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THE
ENCYCLOPEDIC DIGEST
OF
TEXAS REPORTS
(Criminal Cases)

BEING A COMPLETE

Encyclopedia and Digest of all the Texas
Case Law (Criminal) up to and includ-
ing Volume 60 Texas Criminal
Reports and 140 South-
western Reporter.

UNDER THE EDITORIAL SUPERVISION OF

THOMAS JOHNSON MICHIE

o Volume V

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1914

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Encyclopedic Digest of Texas Reports (Criminal Cases.)

JEOPARDY.

BY L. B. WATERS.

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As to review of action of inferior court in striking out a plea of former conviction when same is not embodied in record, see the title APPEAL, ERROR AND CERTIORARI, vol. 1, p. 87.

I. Provisions of Law Relating to Jeopardy.

A. COMMON LAW.

"The ancient common law, as well as Magna Charta itself, provided that one acquittal or conviction should satisfy the law; or, in other words, that the accused should always have the right secured to him of availing himself of the pleas of autrefois acquit and autrefois convict. To perpetuate this wise rule, so favorable and necessary to the liberty of the citizen, in a government like ours so frequently subject to changes in popular feeling and sentiment, was the design of introducing into our constitution a clause to that effect." *Grisham v. State*, 19 Tex. Cr. App. 504, 514.

B. CONSTITUTIONAL PROVISIONS.

Under the constitution, no person

shall be twice put in jeopardy of life for the same offense, nor shall any person be again put on trial for the same offense after a verdict of not guilty. *Hirshfield v. State*, 11 Tex. Cr. App. 207, 214; *Gary v. State*, 11 Tex. Cr. App. 527, 535; *Powell v. State*, 17 Tex. Cr. App. 345, 361; *Rudder v. State*, 29 Tex. Cr. App. 262, 15 S. W. 717; *Quitow v. State*, 1 Tex. Cr. App. 47, 53.

Previous Construction of Jeopardy Adopted by Constitution.—Construction given to the term jeopardy previous to the adoption of the constitution is presumed to have been adopted by the constitution. *Thomas v. State*, 40 Tex. 36; *Powell v. State*, 17 Tex. Cr. App. 345.

Power of Legislature to Change Construction.—High authorities hold that legislatures are not empowered to interpret or declare the construc-

tion of a constitutional provision, nor to abrogate the settled judicial construction of a constitutional provision. "Legislative power" does not comprehend functions which are essentially judicial or executive. Hence it would seem that art. 20 of the Code of Criminal Procedure, which in effect would make jeopardy mean no more than "legal conviction," is without constitutional warrant or validity. *Powell v. State*, 17 Tex. Cr. App. 345.

C. RIGHT TO RESTRICT BY STATUTE.

Jeopardy is a constitutional right and is not to be restricted or abridged by statutory provisions or omissions. *Rudder v. State*, 29 Tex. Cr. App. 262, 15 S. W. 717.

Vagrancy Act.—As the legislature, by passing the vagrancy act (Acts 31st Leg., c. 59), did not intend to repeal Pen. Code 1895, art. 388b, making it a felony for a person to keep a place for the purpose of being used as a place to gamble with cards, the vagrancy act (§ 1, subd. k), if it does not create a new and distinct offense from that denounced in the Penal Code, is unconstitutional, being in violation of Const., art. 1, § 14, prohibiting double jeopardy. *Parshall v. State*, 62 Tex. Cr. App. 177, 138 S. W. 759. See the title VAGRANCY.

Statute Authorizing Injunction against an Offense.—Acts 1905 (29th Leg.), p. 372, c. 153, authorizing an injunction against the use of premises for keeping or exhibiting games prohibited by the laws of the state, was not in violation of the Bill of Rights, declaring that no person for the same offense shall be twice put in jeopardy of life or liberty, though the defendant, if he violated the injunction, might be punished for contempt and again for violating the criminal law; such offenses not being the same. *Ex parte Allison*, 90 S. W. 870, 99 Tex. 455; *Ex parte Roper*, 61 Tex. Cr. App.

68, 134 S. W. 334. See the title INJUNCTION.

Punishing for Burglary and for Any Other Offense Committed After the Entry.—Pen. Code, art. 712, which provides that, "if a house be entered in such manner as that the entry comes within the definition of burglary, and the person guilty of such burglary shall, after so entering, commit larceny or any other offense, he shall be punished for burglary, and also for whatever offense is so committed," is not unconstitutional, as violating the provision against putting a person twice in jeopardy; and a person may, under that section, be convicted of burglary, although he has already been convicted of theft committed in the same transaction. *Howard v. State*, 8 Tex. Cr. App. 447; *Smith v. State*, 22 Tex. Cr. App. 350, 3 S. W. 238; *Rust v. State*, 31 Tex. Cr. App. 75, 19 S. W. 763. See the title BURGGLARY, vol. 1, p. 703.

Increased Punishment for Subsequent Conviction of Same Offense.—Pen. Code 1895, art. 1014, providing for increased punishment in cases of subsequent conviction of the same offense in cases of misdemeanor does not place the defendant twice in jeopardy for the same offense. *Kinney v. State*, 78 S. W. 226, 45 Tex. Cr. App. 500, judgment reversed on another point on rehearing 79 S. W. 572.

II. Offenses or Proceedings as to Which Former Jeopardy Is a Defense.

Cases Affecting Life and Liberty.—Constitutional guaranty against second jeopardy is limited to cases affecting life and liberty. *Vestal v. State*, 3 Tex. Cr. App. 648, 652.

Applies Both to Misdemeanors and Felonies.—The doctrine of "once in jeopardy" applies to misdemeanors as well as felonies. *Brink v. State*, 18 Tex. Cr. App. 344; *Grisham v. State*, 19 Tex. Cr. App. 504, 513.

III. What Constitutes a Jeopardy.

A. IN GENERAL.

That "no person shall be twice put in jeopardy of life or limb" means that no person can be subjected to a second prosecution for the same offense, after having been once prosecuted in a court of competent jurisdiction and duly convicted. *Parchman v. State*, 2 Tex. Cr. App. 228, 238.

B. TIME OR STAGE OF PROSECUTION AT WHICH JEOPARDY ATTACHES.

In General.—A person is in legal jeopardy only when he has been placed upon trial before a court of competent jurisdiction, upon indictment or information which is sufficient in form and substance to sustain a conviction, and when a jury has been charged with his deliverance. *Ex parte Porter*, 16 Tex. Cr. App. 321. See, also, *Pizano v. State*, 20 Tex. Cr. App. 139; *Vestal v. State*, 3 Tex. Cr. App. 648; *Powell v. State*, 17 Tex. Cr. App. 345.

In *Moseley v. State*, 33 Tex. 671, 672, it is said that the constitutional provision that no person can be twice in jeopardy for the same offense applies only where defendant has been tried by a lawful jury upon a good indictment and acquitted or convicted. See, also, *Taylor v. State*, 35 Tex. 97, 109; *Simco v. State*, 9 Tex. Cr. App. 338. But see *Anderson v. State*, 24 Tex. Cr. App., appx. 705, 7 S. W. 40, where the court said: "In some states it is held that jeopardy does not attach until verdict is rendered. In this state it is now held, and was at the time of the making of the constitution, the law of this state that when the accused pleads to a good indictment before a court of competent jurisdiction, and the jury are sworn to try the case, jeopardy attaches."

Pendency of Other Indictments.—Pendency of other indictments for the

same charge is not jeopardy. *Bailey v. State*, 11 Tex. Cr. App. 140.

Preliminary Proceedings.—Doctrines of *res adjudicata* or former jeopardy do not apply to proceedings before examining magistrates. *Ex parte Porter*, 16 Tex. Cr. App. 321, 324.

Defendant was arrested and brought before a justice on an affidavit charging him with a simple assault. He pleaded not guilty, and on examination the justice bound him over to answer to an indictment charging him with an aggravated assault. The justice had jurisdiction of the offense charged by the affidavit. Defendant was subsequently arraigned in the district court on a charge of simple assault. Held, that defendant was not in jeopardy before the justice, so as to preclude his subsequent trial in the district court for a simple assault. *Donaldson v. State* (Cr. App.), 55 S. W. 826.

C. ESSENTIAL ELEMENTS.

1. Competent Jurisdiction of the Trial Court.

In General.—A party may be legally tried on a second indictment, based upon the same facts as the previous one, if the court had no jurisdiction of the cause. *Parchman v. State*, 2 Tex. Cr. App. 228.

Where Judge Disqualified.—A former trial for a crime, wherein the proceedings were void because of the disqualification of the judge, will not support a plea of former jeopardy. *Ex parte Graham*, 43 Tex. Cr. App. 463, 66 S. W. 840.

Concurrent Jurisdiction.—In a case of concurrent jurisdiction in different tribunals, the one first exercising jurisdiction rightfully acquires the control to the exclusion of the other; therefore, where after indictment and before trial, a justice of the peace took jurisdiction of the same offense, before whom the offender was tried and sentenced, such conviction and sentence were no bar to the indictment, because the justice had

no jurisdiction and his action was a nullity. *Burdett v. State*, 9 Tex. 43.

Mayor's Court.—Defendant was tried and convicted before the mayor's court for violation of a city ordinance, the maximum and minimum penalties being considerably less than the maximum and minimum penalties provided by general statute for the same offense. Defendant was thereafter prosecuted in the county court for the same offense, and pleaded former conviction. This plea was struck out in the ground that the mayor's court had no jurisdiction, and defendant convicted. Held that, the city ordinance being in conflict with the general statute, the proceedings in the mayor's court was a nullity. *McClain v. State*, 31 Tex. Cr. App. 558, 21 S. W. 365.

Police Court.—An acquittal by a police court that had no jurisdiction of the crime is not a bar to a subsequent prosecution in the county court. *McNeil v. State*, 29 Tex. Cr. App. 48, 14 S. W. 393.

Justice of the Peace.—Under Acts 1846, p. 300, § 5, providing that any justice shall cause any person charged on oath, or which may come to his knowledge by view or conclusion, of having been guilty of a breach of the peace, etc., to be brought before him for trial, the justice had no jurisdiction to finally try any offense on the voluntary appearance and confession of the offender without complaint; and hence a conviction in such a case was no bar to another prosecution for the same offense. *Wilson v. State*, 16 Tex. 246.

A justice of the peace having no jurisdiction on an "aggravated assault and battery," a plea, in the district court, to an indictment for such offense, of a former conviction for that offense, is bad. *Norton v. State*, 14 Tex. 387; *Flournoy v. State*, 16 Tex. 30.

The fining of one who had stolen a hog by a justice of the peace was no bar to a prosecution for the theft, the

justice being without jurisdiction to try the case. *Gibson v. State*, 47 Tex. Cr. App. 489, 83 S. W. 1119.

2. Necessity for Good and Sufficient Indictment.

If an indictment under which it was sought to sustain a plea of former conviction was so defective that the defendant was entitled to have any judgment entered thereon against him reversed for error, he was not in jeopardy and the plea could not be sustained. *Grisham v. State*, 19 Tex. Cr. App. 504; *Timon v. State*, 34 Tex. Cr. App. 363, 30 S. W. 808.

In a prosecution for playing in a game of cards for money, a plea of former conviction may be stricken out, on motion, where it appears that the indictment in the former conviction did not charge any offense, because it failed to allege with whom such game was played. *McNeill v. State* (Cr. App.), 33 S. W. 977.

On the trial of an indictment containing two counts, one for rape by force and the other rape on a girl under the age of 15, the first count was dismissed for failure of proof. It was then discovered that the indictment was fatally defective because it omitted to state that the prosecutrix was not then and there the wife of accused. The jury were then discharged, the case dismissed and accused was held to wait the action of another grand jury, and was again indicted for rape on a girl under 15 years. Held, under the Bill of Rights (Const. art. 1, § 14), providing that no person shall twice be put in jeopardy, that though the dismissal of the count for rape by force would bar a second prosecution, accused was not put in jeopardy by the discharge of the jury and dismissal of the case as to other count, since jeopardy does not attach to an indictment that is invalid. *Shoemaker v. State*, 58 Tex. Cr. App. 518, 126 S. W. 887.

Where accused was convicted of murder under an indictment found by

a grand jury composed of 13 men, such conviction was not a bar to a subsequent conviction under a valid indictment for the same offense, since, the first indictment being void and insufficient to give the court jurisdiction, there was no double jeopardy, prohibited by Bill of Rights, art. 1, § 14. *Ogle v. State*, 43 Tex. Cr. App. 219, 63 S. W. 1009.

3. Joinder of Issue.

"We understand a trial, in contemplation of the decisions of this court, contemplates an adjudication of the rights of the state and the defendant, and a verdict rendered. In other words, to constitute jeopardy, there must be an issue joined in some way by the organization of the jury or the pleas before the court." *Hall v. State* (Cr. App.), 86 S. W. 765, 767.

Defendant, after the jury was impaneled and sworn, and the indictment read, on being called on to enter his plea, moved to quash the indictment. Thereupon, on motion of the district attorney, the jury was discharged, and the indictment amended as to the formal defect complained of; and on the following day, the cause being again called for trial, and another jury impaneled, defendant filed his plea of jeopardy, setting up the facts above recited. Held, that jeopardy did not attach, as no issue had been formed by entry of plea. *Yerger v. State* (Tex. Cr. App.), 41 S. W. 621.

Code Cr. Proc. 1895, art. 554, provides that if an accused pleads guilty he shall be admonished by the court of the consequences; and by art. 640, in all cases, less than capital, defendant, is required, when his cause is called for trial, to plead whether guilty or not guilty. By the amendment of art. 904, in the absence of an exception in the trial court to the failure to enter the plea, it is presumable that a plea was entered; but a failure to plead in the trial court may be taken advantage of by bill of exception, motion for new

trial, or by motion in arrest of judgment. Held, that where, in a criminal case, it appeared, after the state had introduced one witness, that no plea had been entered, and the court then dismissed the case on motion of the county attorney, accused had not been in jeopardy, so as to preclude another prosecution for the same offense under a new information. *Mays v. State*, 51 Tex. Cr. App. 32, 101 S. W. 233.

4. Jury Legally Constituted, Impaneled and Sworn.

See post, "Discharge of Jury as Affecting Question of Jeopardy," IV.

5. Entry of Judgment on Verdict.

A person can not be deprived of the right to plead a former conviction by the failure to enter the judgment of conviction. *Emmons v. State*, 34 Tex. Cr. App. 118, 29 S. W. 475.

D. WHERE VERDICT SET ASIDE OR JUDGMENT ARRESTED.

See the title NEW TRIAL AND ARREST OF JUDGMENT.

1. In General.

A former verdict or judgment set aside or arrested at the instance of the defendant is no bar to a second trial for the same offense. *Foster v. State*, 25 Tex. Cr. App. 543, 545, 8 S. W. 664; *Robinson v. State*, 23 Tex. Cr. App. 315, 4 S. W. 904; *Parchman v. State*, 2 Tex. Cr. App. 228.

"The rule seems to be well settled that 'if a defendant moves in arrest of judgment, or applies to a court to vacate a judgment already rendered, for any cause, and his motion prevails, he will be presumed to waive any objection to being put a second time in jeopardy, and so may ordinarily be tried anew.' (Code Crim. Proc., arts. 20, 21; 1 Bish. Crim. Law, Fourth Ed., § 844; *Simco v. State*, 9 Tex. Cr. App. 338.)" *Sterling v. State*, 25 Tex. Cr. App. 716, 722, 9 S. W. 45.

If court, of its own motion, after the return of a verdict, sets the verdict aside, and refuses to render judgment,

defendant can not again be tried for the same offense. *Foster v. State*, 25 Tex. Cr. App. 543, 545, 8 S. W. 664.

Illustrations.—Where a party is put on trial for a day-time burglary, and pleads not guilty, and a jury is impaneled, and it appears that the defendant made a motion in arrest of judgment, and the court sustained the same and dismissed the case, such prosecution will not constitute a bar to a future prosecution for such burglary, on the ground of former jeopardy. *Brown v. State*, 43 Tex. Cr. App. 272, 64 S. W. 1056.

Two defendants were tried together, and a joint fine was assessed against them. Judgment was entered for a separate fine against each. Defendants moved to correct the judgment by making it joint according to the verdict. The court overruled the motion, but of its own motion set the judgment aside, and awarded a new trial. Held that, a joint judgment not being valid, the motion to correct was tantamount to a motion to set aside, and the plea former jeopardy was thereby waived. *Sterling v. State*, 25 Tex. Cr. App. 716, 9 S. W. 45.

Where the jury return a verdict which is insufficient because not sufficiently specifying the degree of offense, and it is rejected by the court on that account, it does not operate as an acquittal of the charge. *Alston v. State*, 41 Tex. 39.

While a verdict finding a defendant guilty of murder, and not specifying the degree, is erroneous, and cause for reversal, it is not absolutely void, and defendant is not again put in jeopardy by being subjected to a second trial after the verdict is set aside for such irregularity. *Garza v. State*, 39 Tex. Cr. App. 358, 46 S. W. 242; *Dubose v. State*, 13 Tex. Cr. App. 418.

2. New Trial.

The plea of *autrefois acquit* does not apply to a case where the verdict was set aside and a new trial ordered on de-

fendant's motion. *Dubose v. State*, 13 Tex. Cr. App. 418; *Lewis v. State*, 1 Tex. Cr. App. 323.

A dismissal of a prosecution, after a conviction and the granting of a new trial, can not be pleaded in another prosecution as a former acquittal, since the acquittal must be by the jury, under Pasch. Dig., 2951. *Brill v. State*, 1 Tex. Cr. App. 152.

Where a new trial is granted because a verdict of guilty is defective in not finding the degree of murder, defendant can not set up a plea of former jeopardy, on the ground of acquittal under such verdict of first degree of murder. *Garza v. State*, 39 Tex. Cr. App. 358, 361, 46 S. W. 242.

Where, at the time a plea of former conviction was interposed, a motion was pending in the prior case for new trial—no objection to proceeding to trial in the second prosecution having been made by defendant on that account—the granting of said motion, before the bill of exceptions in the second case was approved, eliminated the question of former jeopardy. *Maines v. State*, 37 Tex. Cr. App. 617, 40 S. W. 490.

E. WHERE JUDGMENT REVERSED.

Where conviction is reversed, it can not be plead as former jeopardy. *Simco v. State*, 9 Tex. Cr. App. 338, 347; *Thompson v. State*, 9 Tex. Cr. App. 649, 665; *Harvey v. State* (Cr. App.), 64 S. W. 1039.

Where appellant was convicted of murder in the second degree, under an indictment charging murder in the first degree, and was granted a new trial, pending which a new indictment was preferred, the acquittal of murder in the first degree did not bar all further prosecution for any character of homicide growing out of the transaction, but a conviction of murder in the second degree, under the second indictment, was proper. *Coleman v. State*, 43 Tex. Cr. App. 280, 65 S. W. 90.

Where accused is convicted of em-

bezzlement on an indictment for theft, which is reversed, it is not available as a plea of autrefois acquit on a subsequent indictment for theft. *Simco v. State*, 9 Tex. Cr. App. 338, 348.

In a prosecution for cattle theft, a general verdict of guilty was returned; and the conviction was reversed for an instruction authorizing a conviction for theft, or for driving the cow from its accustomed range. On retrial, defendant filed a plea of former acquittal of theft. Held, that the plea was demurrable for the reason that the verdict was void for uncertainty, and because whatever punishment was assessed under such verdict was set aside at defendant's instigation. *Chambers v. State*, 44 Tex. Cr. App. 61, 68 S. W. 286.

F. FRAUDULENT OR COLLUSIVE PROSECUTION.

A plea of former conviction in a criminal case was not sustained by evidence that the county judge ex parte entered a plea of not guilty, and a verdict of not guilty on the bare statement of the county attorney that he could not make out a case, and that in his judgment the case ought to be dismissed, there having been no trial, and the court not being authorized to enter the judgment without any evidence. *Hall v. State* (Cr. App.), 86 S. W. 765.

One who had committed an aggravating assault was convicted of simple assault by a justice, who acted without affidavit or warrant of arrest, and examined no witnesses, and whose judgment showed that it was rendered on the submission and demand of the accused. Held, that the conviction did not bar a subsequent prosecution for aggravated assault. *Warriner v. State*, 3 Tex. Cr. App. 104; *Watson v. State*, 5 Tex. Cr. App. 271.

A conviction for affray, prior to the filing of a complaint or warrant of arrest, was not jeopardy, so as to bar a subsequent prosecution for aggravated assault, based on the same transaction.

Decker v. State, 58 Tex. Cr. App. 159, 124 S. W. 912.

G. WAIVER OF OBJECTIONS.

After impanelment of the jury, the reading of the indictment, and plea of "not guilty," defendant called the court's attention to a variance in the name of the person from whom the property was taken and the name of the person to whom it belonged, and on defendant's motion the indictment was quashed. Held that, on a subsequent trial on the indictment as remedied, defendant was estopped from alleging that the former indictment was valid and that jeopardy had attached. *Carroll v. State*, 50 Tex. Cr. App. 485, 98 S. W. 859.

IV. Discharge of Jury as Affecting Question of Jeopardy.

See the title JURY.

A. IN GENERAL.

A party may be legally tried on a second indictment, based upon the same facts as the previous one, if the jury impanelled under it was lawfully discharged before verdict. *Parchman v. State*, 2 Tex. Cr. App. 228.

After jeopardy has once attached, if, without lawful authority, the trial court discharges the jury without his consent and before the verdict, he can not legally be again tried for the same offense. *Pizano v. State*, 20 Tex. Cr. App. 139; *Vestal v. State*, 3 Tex. Cr. App. 648; *Powell v. State*, 17 Tex. Cr. App. 345.

B. PRESUMPTION THAT JURY WAS PROPERLY DISCHARGED.

Until essentials of jeopardy are established affirmatively by defendant, it will be presumed that the court in discharging the jury in a former trial for the same murder before they had reached a verdict, acted upon legal cause and did not abuse its discretion. *O'Connor v. State*, 28 Tex. Cr. App. 288, 291, 13 S. W. 14; *Schindler v. State*, 17 Tex. Cr. App. 408.

C. CAUSES WHICH FURNISH A NECESSITY FOR DISCHARGE.

1. Sickness of Juror or Other Accident.

Article 737, Code Cr. Proc., providing that the jury in a felony case may be discharged where a juror becomes so sick as to prevent a continuance of his duty, or where "any accident or circumstance occurs to prevent their being kept together," is not in conflict with Const. art. 1, § 14, declaring that no person shall be twice put in jeopardy of life or liberty for the same offense. *Woodward v. State*, 42 Tex. Cr. App. 188, 58 S. W. 135.

Illness of Juror's Child.—The serious illness of a child of one of the jurors in a criminal case, and the probability that it would die, created such a necessity as justified a discharge of the jury, under art. 737, Code Cr. Proc., authorizing such discharge whenever "any accident or circumstance occurs to prevent their being kept together." *Woodward v. State*, 42 Tex. Cr. App. 188, 58 S. W. 135.

Court Must Judicially Ascertain the Fact.—Under Code Crim. Proc., art. 737, authorizing the court to discharge a jury on account of sickness of one of the jurors or other circumstances occurring to prevent their being kept together, in exercise of such authority it is necessary that the court judicially ascertain the fact of such sickness or other circumstances before the jury can be legally discharged. *Upchurch v. State*, 36 Tex. Cr. App. 624, 38 S. W. 206.

Where, after a case is submitted to the jury, the court discharges a juror on a statement that his wife is dangerously ill, without any judicial finding to that effect, and without the knowledge of defendant or his counsel, and then discharges the jury, over the protest of defendant, on his objecting to proceed without a full jury, such proceedings sustain a plea of former jeopardy. *Upchurch v. State*, 36 Tex. Cr. App. 624, 38 S. W. 206.

2. Improbability of Jury Agreeing.

a. In General.

Under Const. art. 1, § 14, providing that "no person for the same offense shall be put twice in jeopardy," defendant can not be tried, after the court has discharged the jury in a former trial for the same offense, without his consent, even though the discharge was for failure to agree. *Powell v. State*, 17 Tex. Cr. App. 345, overruling *Moseley v. State*, 33 Tex. 671, and *Taylor v. State*, 35 Tex. 97.

b. Provisions of Code.

(1) In General.

The Code of Criminal Procedure, in art. 701, provides that a trial jury may be discharged "when they can not agree and both parties agree to their discharge, or when they have been kept together for such a time as to render it altogether improbable they can agree; in this latter case the court, in its discretion, may discharge them." *Powell v. State*, 17 Tex. Cr. App. 345.

Discretion of Trial Court.—It is only when the discretion conferred upon the trial court to discharge the jury, when they have been kept together such a length of time as to render it improbable that they will agree on a verdict, has been abused to the prejudice of the accused that the appellate court will interfere on the ground of former jeopardy. *Brady v. State*, 21 Tex. Cr. App. 659, 1 S. W. 462. See, also, *Varnes v. State*, 20 Tex. Cr. App. 107; *Schindler v. State*, 17 Tex. Cr. App. 408.

Reasonable time is not the measure of the court's discretion. The jury must "have been kept together for such a time as to render it altogether improbable that they can agree." Three hours and a half held not to be such a time as would necessarily render it altogether improbable that they could agree. *Powell v. State*, 17 Tex. Cr. App. 345, 353.

Illustrations.—It was no abuse of discretion to discharge the jury because

they could not agree after they were together twenty-one hours, including a night and time for meals, without defendant's consent; and therefore a plea of former jeopardy set up in the second trial was properly stricken out. *Penn v. State*, 36 Tex. Cr. App. 140, 35 S. W. 973.

A special plea of former jeopardy alleged that defendant was on trial at a former term of the court; that, after the evidence, argument, and charge, the jury retired; that they returned next day about 6:30 p. m., and stated that they could not possibly agree on the facts, whereupon they were discharged, over the objection of defendant. It further alleged that during most of the second day a convention was held in the court room, and the jury had to be brought to a room downstairs to be discharged. Held, that the court erred in striking out such plea, and refusing to hear evidence thereon, since there was enough in the plea to authorize proof that the jury had not considered of their verdict while the convention was sitting, nor but for a short time on the day before. *Usher v. State*, 42 Tex. Cr. App. 461, 60 S. W. 555.

A plea of former jeopardy is properly overruled, where it appears on the face thereof that the jury on a former trial were discharged over defendant's objection only after being out two days and failing to agree. *Smith v. State*, 22 Tex. Cr. App. 196, 199, 2 S. W. 542.

(2) Discharge in Defendant's Absence.

Code Cr. Proc., art. 701, which empowers the trial court in a criminal case to discharge the jury after they have been kept together for such a length of time as to render their agreement improbable, does not authorize the court to discharge the jury in defendant's absence; and such a discharge may be pleaded in bar to a further prosecution, though the jury, when discharged, had deliberated for two days, and had reported to the court that they did not

believe they could agree on a verdict. *Rudder v. State*, 29 Tex. Cr. App. 262, 15 S. W. 717. See, also, *Vela v. State*, 49 Tex. Cr. App. 588, 95 S. W. 529; *Upchurch v. State*, 36 Tex. Cr. App. 624, 38 S. W. 206.

Misdemeanor Cases.—"There is a great difference in these questions between the requirements of the Code as to felonies and misdemeanors. Code Cr. Proc., arts. 698, 700. In the *Rudder Case*, 29 Tex. Cr. App. 262, 5 S. W. 77, this court held that in a felony case the defendant should be present in all the proceedings in his case. But such is not the case in misdemeanors. Verdicts can be rendered in defendant's absence (Code Cr. Proc., art. 711), and we can see no reason why he should be present at the discharge of the jury. In felony cases the defendant is held in custody, and can be readily brought before the court; but not so in a misdemeanor case. And defendant may, by absenting himself, keep the jury together after the court concludes, upon unquestionable grounds, that it is altogether improbable they will agree. Such a conclusion can not commend itself to our reason. The court did not err in striking out the plea of former jeopardy." *Selman v. State*, 33 Tex. Cr. App. 631, 28 S. W. 541.

(3) Record Must Show Reason for Discharge.

On a discharge of a jury, under Code Cr. Proc., art. 701, where it has been kept together for such time as to render it altogether improbable that they could agree, there should be a judgment finding that the jury had been kept together such a length of time; and the record showing merely that they were kept together sixteen hours, and that they were discharged on their reporting to the court that there was no possibility of their agreeing, a plea of jeopardy will avail on a subsequent trial. *Wright v. State*, 35 Tex. Cr. App. 158, 32 S. W. 701.

D. DISCHARGE WITH CONSENT OF ACCUSED.

A plea of former jeopardy is not sustained where it appears that the defendant agreed to the discharge of the jury complained of, upon condition that the trial be continued until the next term, which condition was fulfilled. *Arcia v. State*, 28 Tex. Cr. App. 198, 12 S. W. 599.

E. DISCHARGE WHERE NOLLE PROSEQUI IS TAKEN.

See post, "Effect of Dismissal or Nolle Prosequi," V.

V. Effect of Dismissal or Nolle Prosequi.

See the title DISMISSAL AND NONSUIT.

A. BEFORE JEOPARDY ATTACHES.

Dismissal of a prosecution before jeopardy has attached, without a trial on the merits and judgment of acquittal or conviction, is no bar to another prosecution for the same offense. *Ex parte Porter*, 16 Tex. Cr. App. 321, 324.

Defendant was indicted and an application by the state for a continuance was properly refused, whereupon a nol. pros. was entered, and defendant was at once indicted again in order that he might be held until the next term. Held that, although such practice was reprehensible on the part of the state, defendant could not plead it in bar of the second indictment. *Venters v. State*, 18 Tex. Cr. App. 198.

B. AFTER JURY IS IMPANELED AND SWORN.**1. In General.**

After the parties have announced ready for trial upon a good and sufficient indictment, the jury being impaneled and sworn, and the plea entered, the state can not, in misdemeanor on felony cases, nolle prosequi the case, and afterwards prosecute for the offense charged in the indictment,

nolle prosequi. *Brink v. State*, 18 Tex. Cr. App. 344, 347. But see *Swindel v. State*, 32 Tex. 103, the discharge of the jury by a nolle prosequi, after being sworn, and after hearing testimony, but before a finding by them of guilty or not guilty, can not operate as a bar to another prosecution for the same offense.

Defendant was indicted for assault on "John Cunningham," who testified that his true name was "John Kenan," and the state then put in uncontradicted evidence that he was as well known by one of such names as by the other. A motion by the state to enter a nolle prosequi was thereafter sustained over defendant's objection. Held that, on a second prosecution for the same offense, it was error to sustain a demurrer to a plea of former jeopardy. *Elehash v. State*, 35 Tex. Cr. App. 599, 34 S. W. 928.

2. When First Indictment or Information Is Defective.

See ante, "Necessity for Good and Sufficient Indictment," III, C, 2.

Plea of former jeopardy is not maintainable when former case was dismissed upon motion of prosecuting attorney for defective indictment. *Jackson v. State*, 37 Tex. Cr. App. 128, 38 S. W. 1002; *Mays v. State*, 28 Tex. Cr. App. 484, 485, 13 S. W. 787; *Longley v. State*, 43 Tex. 490.

Where a prosecution is dismissed before acquittal because of a defective information, and a correct one is filed, it is proper to instruct the jury to disregard a plea of former jeopardy. *Guinn v. State* (Cr. App.), 65 S. W. 376.

One can not plead former jeopardy who was formerly indicted under a wrong given name, a nol. pros. having been entered on the discovery of the error. *Branch v. State*, 20 Tex. Cr. App. 599.

A deed offered in evidence to sustain an indictment for forging the same was objected to, and ruled out for variance,

whereupon the state was allowed to dismiss the prosecution, and accused was held in custody to enable a new indictment to be filed. Held not to be error and that a plea of once in jeopardy was not well taken. *Ex parte Rogers*, 10 Tex. Cr. App. 655.

VI. Identity of Offenses.

A. NECESSITY FOR IDENTITY.

A plea of former jeopardy is not sustained by proof that accused was convicted of offenses of similar character at about the same time, but he must show that he was formerly convicted for the same identical offense. *Clement v. State* (Cr. App.), 86 S. W. 1016.

B. RULES FOR DETERMINING IDENTITY.

The rules to determine when indictments are not for the same offense, so as not to constitute former jeopardy, are: (1) They are not the same when two indictments are so diverse as to preclude the same evidence from maintaining both; or when (2) the evidence to the first and that to the second relate to different transactions, whatever be the words of the respective allegations; or when (3) each indictment sets out an offense differing in all its elements from that in the other, though both relate to one transaction; or when (4) some technical variance precludes a conviction on the first indictment, but does not appear on the second. *Herera v. State*, 35 Tex. Cr. App. 607, 34 S. W. 943.

The usual test for determining the identity of offenses is that, if the evidence to support a second indictment would have been sufficient to procure a legal conviction upon the first, the plea of former conviction is generally good, but not otherwise. *Thomas v. State*, 40 Tex. 36; *Bogges v. State*, 43 Tex. 347, 348; *Lewis v. State*, 1 Tex. Cr. App. 323, 325; *Vestal v. State*, 3 Tex. Cr. App. 648, 652; *Swancoat v. State*, 4 Tex. Cr. App. 105, 120; *Lowe v. State*, 4 Tex. Cr. App. 34, 38; *Ir-*

vin v. State, 7 Tex. Cr. App. 78, 82; *Allen v. State*, 7 Tex. Cr. App. 298, 300; *Pickens v. State*, 9 Tex. Cr. App. 270; *Ex parte Rogers*, 10 Tex. Cr. App. 655; *Hooper v. State*, 30 Tex. Cr. App. 412, 17 S. W. 1066; *Fenton v. State*, 33 Tex. Cr. App. 633, 28 S. W. 537; *Wright v. State*, 17 Tex. Cr. App. 152; *Grisham v. State*, 17 Tex. Cr. App. 504; *Alexander v. State*, 21 Tex. Cr. App. 406, 17 S. W. 139; *Lewis v. State* (Cr. App.), 24 S. W. 906; *Williams v. State*, 13 Tex. Cr. App. 285; *Simco v. State*, 9 Tex. Cr. App. 338; *Parchman v. State*, 2 Tex. Cr. App. 228, 240; *Potter v. State*, 9 Tex. Cr. App. 55; *Shubert v. State*, 21 Tex. Cr. App. 551, 2 S. W. 883. The indictment may differ in immaterial circumstances. *Thomas v. State*, 40 Tex. 36. And the proof need not be identical. *Williams v. State*, 58 Tex. Cr. App. 193, 125 S. W. 42. But proof of identity in the name of the offense or in elements thereof is not sufficient. Identity of act or omission must be shown. *Kain v. State*, 16 Tex. Cr. App. 282, 307; *Hirshfield v. State*, 11 Tex. Cr. App. 207. And even if the first trial was for misdemeanor and the second for felony the plea is sufficient if the evidence requisite to support the second indictment must necessarily have supported a conviction on the first. *Grisham v. State*, 19 Tex. Cr. App. 504.

C. PERIODS COVERED BY PROSECUTIONS.

1. In General.

A conviction under Pen. Code 1895, art. 334, of going near a private residence of another, and rudely displaying a pistol, was not a bar to a conviction for carrying on and about the person a pistol, where defendant carried the pistol before and after the act for which he was formerly convicted. *Nichols v. State*, 37 Tex. Cr. App. 616, 40 S. W. 502.

An acquittal of a saloon keeper of the charge of permitting his place of business to be open on Sunday, February

24, 1895, was not a bar to a prosecution for keeping his place open on Sunday, August 10, 1895. *Fehr v. State*, 36 Tex. Cr. App. 93, 36 S. W. 381, 650.

A plea of former acquittal by one charged with unlawfully selling liquor on August 25th is not sustained by merely introducing the complaint, and judgment in a former prosecution for a sale alleged to have occurred September 1st, without any proof that the alleged sales were one transaction. *Morton v. State*, 37 Tex. Cr. App. 131, 38 S. W. 1019.

An indictment and acquittal for an offense alleged to have occurred in 1907 would not justify a plea of former jeopardy to bar a prosecution for an offense alleged to have occurred in 1908, since accused could not have been acquitted of the latter offense in the former trial. *Smith v. State*, 55 Tex. Cr. App. 320, 116 S. W. 593, 594.

Where accused and others shot craps for a couple of hours, during which time there were about twenty-five bets made by each of the players, and there was no intermission in the playing, and the parties did not separate, each bet was a separate offense, so that a former conviction for betting during the same game would not preclude a second prosecution for betting thereon. *Parks v. State*, 57 Tex. Cr. App. 569, 123 S. W. 1109.

Defendant played poker in the morning, got broke, and quit the game, but returned later in the day and played again. Held two separate offenses, and hence not the same transaction, within the contemplation of the law of jeopardy. *Miller v. State* (Cr. App.), 72 S. W. 856.

Where one indicted for gaming had, within the year, been twice convicted of the offense, the time of one being laid on the same day as the one charged in the pending indictment, but there was no evidence identifying the offense on trial with the others, and three other offenses at other and different times within the year were

proven, the plea of former conviction was not sustained. *Campbell v. State*, 2 Tex. Cr. App. 187.

Exhibition of keno-table is not a "continuous offense," hence conviction for such offense is no bar to a subsequent prosecution based upon another exhibition. *Kain v. State*, 16 Tex. Cr. App. 282, 310.

2. Rule as to Continuous Offenses.

Where an indictment charges the commission of a continuous offense between specified dates, a plea of former conviction will prevail if any part of the time specified in the indictment has been used on a former conviction under an indictment severing the whole or a part of the time so specified; but the plea will not prevail where no part of the time so specified has been so used. *Fleming v. State*, 28 Tex. Cr. App. 234, 12 S. W. 605.

Keeping a disorderly house is a continuous offense, and a conviction bars further prosecution up to the time of the conviction, unless the indictment or information specifies a time and the proof is confined thereto. *Novy v. State*, 62 Tex. Cr. App. 492, 138 S. W. 139; *Huffman v. State*, 23 Tex. Cr. App. 491, 5 S. W. 134; *Reed v. State* (Cr. App.), 29 S. W. 1085. See the title DISORDERLY HOUSES, vol. 2, p. 236.

Violation of Sunday Law as a Continuous Offense.—One conviction for opening a place of business on Sunday, in violation of Pen. Code 1895, art. 199, bars a prosecution for opening at other times on the same day. *Muckenfuss v. State*, 55 Tex. Cr. App. 229, 116 S. W. 51.

D. CONVICTION OR ACQUITTAL OF ONE OFFENSE AS A BAR TO THE PROSECUTION FOR A DIFFERENT OFFENSE.

See post, "Effect of Identity of Offenses," VI, F.

1. In General.

Crimes against Different Persons.—Where defendant shot and killed one

man, and on the same occasion injured another, a plea of former jeopardy, after acquittal on the trial of murder, will not avail as a defense in a prosecution for assault with intent to murder the other. *Kelly v. State*, 43 Tex. Cr. App. 40, 62 S. W. 915.

In a prosecution for threatening to take the life of R. M. H., defendant pleaded former acquittal of threatening to take the life of Henry H. Held, that the plea was bad on its face because under the latter charge, no conviction could have been had for the former. *Pickens v. State*, 9 Tex. Cr. App. 270.

Where two persons were killed by separate shots from an armed mob of which defendant was a member, an acquittal of defendant of killing one of the deceased does not bar a prosecution for killing the other. *Augustine v. State*, 41 Tex. Cr. App. 59, 52 S. W. 77.

A constitutional inhibition against putting a person twice in jeopardy for the same offense can not be invoked where the first indictment charges murder of N. Evans, and the second, of Morgan Evans. *Taylor v. State*, 35 Tex. 97, 110.

Where defendant was accused of sending a threatening notice in violation of the "white-capping" statute, a former conviction of the offense of sending an exactly similar notice to a different person was not a bar to the prosecution. *Dunn v. State*, 43 Tex. Cr. App. 25, 63 S. W. 571.

An acquittal of a charge of slandering P. in the presence of B. and other persons is not a bar to a charge of slandering M. on the same occasion, in the presence of B. and other persons, where the language set up in the two indictments is entirely different. *Collins v. State*, 39 Tex. Cr. App. 30, 44 S. W. 846.

Bigamy and Adultery.—A former acquittal of bigamy constitutes no defense against a charge of adultery. *Swancoat v. State*, 4 Tex. Cr. App. 105.

Incest with Different Persons.—Pauline Leitz and Pauline Seitz are not idem sonans. An acquittal on a trial for incest with one is not a bar to an indictment for incest with the other. *Nance v. State*, 17 Tex. Cr. App. 385.

False Swearing and Illegal Voting.—A conviction for false swearing is not a bar to a prosecution for illegal voting; the fact that the false swearing and illegal voting occurred contemporaneously not making them the same offense. *Arrington v. State*, 48 Tex. Cr. App. 541, 89 S. W. 643.

Defacing Public Record.—An acquittal, under an indictment charging defendant with defacing a public record by erasing from the record of a doctor's license certificate the name of the person licensed and inserting the name of another man, is not an acquittal under another indictment, charging him with a similar offense, where the certificate in the second indictment was made out to another doctor, and the name inserted by defendant was different from the one inserted in the first certificate. *Ex parte Dreesen*, 54 Tex. Cr. App. 612, 114 S. W. 806.

Under the code, killing swine with intent to injure the owner is a different offense than wantonly killing swine, and hence an acquittal or conviction of one of these offenses does not bar prosecution for the other. *Irvin v. State*, 7 Tex. Cr. App. 78.

Disorderly House and Vagrancy.—The charge of the court properly instructed the jury that a former acquittal upon a charge of vagrancy can not prevail as a plea in bar of a prosecution for keeping a disorderly house. *Wilson v. State*, 16 Tex. Cr. App. 497.

Gaming.—A conviction for betting at a game played with dice, etc., not at a private residence, is not a bar to a prosecution for unlawfully keeping and exhibiting, for the purpose of gaming, a certain gaming table and bank, based on the same facts as such

conviction. *Tutt v. State* (Cr. App.), 29 S. W. 268.

2. Assault and Other Offenses.

Variance in the Name of the Person Assaulted.—Where, in a prosecution for assault, accused had been previously acquitted because of a variance in the name of the person assaulted, such acquittal did not constitute jeopardy, preventing a subsequent conviction for the same offense. *Reynolds v. State*, 58 Tex. Cr. App. 273, 124 S. W. 931.

Different Assaults.—Where defendant assaulted J. with intent to murder, and, when B. came to J.'s assistance, defendant assaulted B. with the same intent, the offenses are distinct, and the trial for the assault on J. does not prevent a trial on a separate indictment for the assault on B. *Ashton v. State*, 31 Tex. Cr. App. 482, 21 S. W. 48.

Assault with Intent to Murder and Threats to Kill.—Assault with intent to murder being an offense of a different nature from threats to kill, a conviction for the one is no bar to prosecution for the other, though both prosecutions were founded on incidents of the same difficulty. *Lewis v. State*, 1 Tex. Cr. App. 323.

Assault with Intent to Rob and Murder.—Defendant's conviction of an assault with intent to rob one person does not prevent his conviction of murder of another at the same time. *Keaton v. State*, 41 Tex. Cr. App. 621, 57 S. W. 1125.

Aggravated Assault and Fighting in Public Place.—On a trial for aggravated assault, defendant pleading former conviction of fighting in a public place, a charge, that, to sustain the plea, the jury must believe the offense charged in this case was the same as that charged in a former one, was erroneous. *Lawson v. State* (Cr. App.), 32 S. W. 895.

Assault with Intent to Murder and Carrying Pistol.—The fact that the de-

fendant had been convicted of an assault with an intent to murder does not constitute a former jeopardy, so as to bar a prosecution for carrying a pistol, though both offenses were committed on the same occasion, and were parts of the same transaction; since the actions are not the same. *Ford v. State* (Cr. App.), 56 S. W. 918; *Thomas v. State*, 40 Tex. 36; *Woodroe v. State*, 50 Tex. Cr. App. 212, 96 S. W. 30.

Affray and Assault.—A conviction of an affray by fighting with one person can not be pleaded in bar of a prosecution for an aggravated assault on another. *Bickham v. State*, 51 Tex. Cr. App. 150, 101 S. W. 210.

3. Larceny and Other Offenses.

a. In General.

Theft and Burglary.—A conviction of a theft alleged to have been committed at the time of a burglary is not a bar to a subsequent prosecution for, Penal Code, arts. 712, 713, expressly authorizing such conviction. *Loakman v. State*, 32 Tex. Cr. App. 563, 25 S. W. 22.

On an indictment for burglary, a conviction for a theft of a saddle taken in the burglary is no bar to the prosecution for the burglary. *Fielder v. State*, 40 Tex. Cr. App. 184, 49 S. W. 376.

Where defendant was indicted for burglary, a plea of former conviction for petty theft, which grew out of a different transaction and was committed at a different time, was properly stricken out. *Hunt v. State* (Cr. App.), 60 S. W. 965.

Theft and Swindling.—An acquittal on a charge of theft, because the owner of the money parted with both the possession and ownership when he handed it to defendant, is no bar to another prosecution for swindling the owner out of such money. *Lewis v. State* (Cr. App.), 24 S. W. 906.

Theft and Passing Pay Check.—Acquittal on a charge of passing a pay check does not bar a prosecution for

theft of the check. *Fulshear v. State*, 59 Tex. Cr. App. 376, 128 S. W. 134.

Theft of Gelding and Theft of Mare.—Under Pen. Code (Pasch. Dig., art. 2409), which punishes the offense of stealing "any horse, gelding, mare," etc., the previous discharge of a person on a trial for the theft of a "gelding" can not be pleaded in bar to an indictment for stealing a "horse." *Swindel v. State*, 32 Tex. 103.

Theft from Different Houses.—A plea of former acquittal of charge of theft from a house is insufficient to bar a prosecution for the theft, from a different house, of an article belonging to a different person. *Bogges v. State*, 43 Tex. 347.

Theft and Obtaining Property under False Pretenses.—A plea of former acquittal to an indictment for obtaining property under false pretenses, by trading cattle to which the accused had no title, for a horse, is not borne out by the fact that the defendant had been tried for stealing the cattle, and acquitted. *Sims v. State*, 21 Tex. Cr. App. 649, 1 S. W. 465.

Theft and Forgery.—Acquittal for theft does not bar a prosecution for forgery of a bill of sale. *Potter v. State*, 9 Tex. Cr. App. 55, 57.

Theft from Different Persons.—Where defendant was indicted by separate indictments for stealing several head of cattle, and the evidence failed to show an actual taking, but only possession by defendant, and it was proven that, before the taking, the several cattle were several miles apart, a conviction on an indictment for taking one of such cattle is not such a part of the same transaction as to bar a prosecution for taking the others. *Willis v. State*, 24 Tex. Cr. App. 586, 6 S. W. 857.

Though for the purpose of settling the question of venue, in cases of larceny, the fiction exists that a thief commits a new and distinct larceny when he carries the stolen property

into or through counties other than that of the original taking, there can be but one conviction for the taking; and where a person steals two head of cattle from different owners, and at different times and places, and drives them together into another county, he has not thereby committed a fresh theft, either in fact or law, and a prosecution and conviction in the county into which the cattle are driven, for the theft of one of the cattle, is therefore no bar to a prosecution for the theft of the other. *Harrington v. State*, 31 Tex. Cr. App. 577, 21 S. W. 356.

Defendant acquitted on indictment for theft of money alleged to belong to, or have been taken from one person, may lawfully be convicted on a different indictment for the theft of the same money as the property or as taken from the possession of a different person. Both indictments are founded on the same physical act, but their legal effect is different, and they charge distinct offenses, and the plea of former acquittal will not avail. *Morgan v. State*, 34 Tex. 677, 683.

An acquittal under an indictment charging the accused with larceny of the property of T. is no bar to his prosecution for larceny of the same property alleged to belong to M. *Sapp v. State* (Cr. App.), 77 S. W. 456.

Where defendant, accused of theft, pleads a former acquittal, the plea is unavailing, where the prosecution on the former indictment charged the theft of the cattle of another as owner, though the transaction be the same and the evidence identical. *Davidson v. State*, 40 Tex. Cr. App. 285, 49 S. W. 372, 50 S. W. 365.

An indictment for a theft of property belonging to H. Franks charges a different offense than an indictment for a theft of property belonging to H. Frank, and jeopardy under the first is no defense against the second. *Parchman v. State*, 2 Tex. Cr. App. 228, 241.

A prosecution for the theft of cattle, the property and in possession of P., is not a bar to a prosecution for the theft of the same cattle from T. *Wheelock v. State* (Cr. App.), 38 S. W. 182.

A prosecution under an indictment charging a theft of property from two persons is not a bar to a subsequent prosecution under another indictment alleging ownership in either one of them. *Lovelace v. State*, 45 Tex. Cr. App. 261, 76 S. W. 756.

An acquittal of a charge of stealing a horse is not a bar to a prosecution for the taking of another horse from the possession of a different person at the same time and place. *Wright v. State*, 37 Tex. Cr. App. 627, 40 S. W. 491.

b. Theft of Several Articles at the Same Time.

The theft of several articles at one and the same time constitutes but one indivisible offense, and a conviction or acquittal of the larceny of one of such articles is a bar to prosecution for the larceny of the others. *Quitow v. State*, 1 Tex. Cr. App. 47.

If a person steals a horse and saddle at the same time, a conviction for one bars a prosecution for the other. *Whitford v. State*, 24 Tex. Cr. App. 489, 493, 6 S. W. 537.

Where Property Belongs to Different Owners.—"It is a well-settled rule that the stealing of different articles of property belonging to different persons, at the same time and place, so that the transaction is the same, is but one offense, and that the accused can not be convicted on separate indictments, charging different parts of one transaction as in each a distinct offense. A conviction on one of the indictments bars a prosecution on the others. *Wilson v. State*, 45 Tex. 76; *Wright v. State*, 17 Tex. Cr. App. 152; *Shubert v. State*, 21 Tex. Cr. App. 551, 2 S. W. 883; *Alexander v. State*, 21 Tex. Cr. App. 406, 17 S. W. 139."

Willis v. State, 24 Tex. Cr. App. 586, 6 S. W. 857, 859; *Adams v. State*, 16 Tex. Cr. App. 162, 171; *Hudson v. State*, 9 Tex. Cr. App. 151.

Qualification of Rule.—When theft of animals of two different owners was perpetrated in a single transaction, a conviction of the theft of the animal of one of the said owners will, upon the doctrine of *autrefois convict* and the doctrine of carving, bar a prosecution for the theft of the animal of the other, but an acquittal upon a separate indictment charging theft of one of the animals is not a bar to a prosecution upon another indictment charging theft of the other animals notwithstanding the transactions be the same and the evidence identical. *Alexander v. State*, 21 Tex. Cr. App. 406, 409, 17 S. W. 139. See, also, *Wright v. State*, 17 Tex. Cr. App. 152.

4. Offenses Connected with the Sale of Intoxicating Liquors.

A conviction for sale of intoxicating liquors to H. is no bar to a prosecution for a sale to C., although they transpired at the same time. *Benson v. State* (Cr. App.), 44 S. W. 168.

Under Acts 29th Leg., p. 91 (Laws 1905, c. 64), prohibiting a person or his employees, engaged in the business of storing intoxicating liquors in a local option territory, from permitting the same to be drunk in the place of business, where two persons were permitted to drink liquor at a place for storing intoxicating liquors at the same time and from the same bottle, the conviction for allowing the drinking by one of the parties was not a bar to the prosecution for allowing the drinking by the other. *Teague v. State*, 51 Tex. Cr. App. 523, 102 S. W. 1142, 1144.

On a trial for violating the local option law by selling liquor to prosecutor, a conviction of accused for selling liquor to a third person within a few minutes after the sale to the prosecutor does not sustain a plea of former jeopardy, though the prosecutor and

the third person were brought into the county for the purpose of working up local option cases; the sales being distinct and constituting different offenses. *Harris v. State*, 50 Tex. Cr. App. 411, 97 S. W. 704.

Where, in order to cover up an illegal sale of liquor, defendant had a purchaser make an order on a wholesale dealer for a gallon, which defendant received and retailed to the purchaser in small quantities, a prosecution for making one sale to the purchaser does not bar a prosecution for another sale. *Armstrong v. State* (Cr. App.), 47 S. W. 1006.

Upon his trial under an indictment charging the keeping of a disorderly house, described as a certain house where liquors were sold without a license, the defendant pleaded that he had been indicted for selling whiskey on the same dates as those alleged in this indictment, and had been tried and convicted therefor. Held, that the prior conviction was for a distinct offense from that charged in the indictment, and could not support a plea of former conviction. *Todd v. State*, 60 Tex. Cr. App. 199, 131 S. W. 606.

5. Robbery and Other Offenses.

See ante, "Larceny and Other Offenses," VI, D, 3.

Evidence that a train robber, who with others stopped a train, and demanded that the express agent open the car, had been tried and convicted for assault and attempt to commit robbery, is not sufficient to support a plea of former jeopardy in a trial for murder of a fireman in the same transaction. *Taylor v. State*, 41 Tex. Cr. App. 564, 55 S. W. 961.

On trial of an indictment for robbing E. A. Peifer of a watch and chain of the value of \$40, a plea of former acquittal under an indictment charging defendant with robbing J. W. Powers of \$140 was properly stricken out, the two offenses charged being so diverse as not to admit of proof that they

were the same. *Epps v. State*, 38 Tex. Cr. App. 284, 42 S. W. 552.

6. Burglary and Other Offenses.

Burglary and Theft.—Doctrine of former jeopardy does not inhibit separate convictions for burglary and theft arising from the same transaction but this is an exception to the general rule. *Herera v. State*, 35 Tex. Cr. App. 607, 610, 34 S. W. 943; *Howard v. State*, 8 Tex. Cr. App. 447; *Clark v. State*, 59 Tex. Cr. App. 246, 128 S. W. 131; *Smith v. State*, 22 Tex. Cr. App. 350, 354, 3 S. W. 238; *Rust v. State*, 31 Tex. Cr. App. 75, 19 S. W. 763.

Penal Code, art. 712, provides that if a house be entered in such a manner that the entry comes within the definition of burglary and the person entering shall commit theft or any other offense he shall be punished for burglary and also for whatever offense is so committed, and art. 713, provides that if burglary is effected for the purpose of committing one felony and the person guilty thereof shall, when in the house, commit another felony, he shall be punished for any felony so committed as well as for burglary. Held, that these statutes are in conflict with the rule as to conviction of one crime barring prosecution for another, and therefore they abrogate all rules of procedure known to the common law that are in conflict with their provisions. *Loakman v. State*, 32 Tex. Cr. App. 563, 25 S. W. 22.

Burglary and Conspiracy.—A conviction of burglary will not bar a prosecution for conspiracy to commit burglary, the latter being a substantive offense, under Pen. Code, arts. 800-804. *Whitford v. State*, 24 Tex. Cr. App. 489, 6 S. W. 537.

Burglary and Assault.—Where the owner of a burglarized house was assaulted immediately before the burglary, a conviction for the burglary does not bar a prosecution for assault with intent to commit burglary, as being a former jeopardy, under Pen.

Code, art. 846, providing that, if a house be entered in such manner as to make the entry burglarious, and the person guilty of burglary, after so entering, commits any offense, he shall be punished for burglary, and also for any other offense committed. *Adams v. State* (Cr. App.), 62 S. W. 1059.

7. Forgery and Other Offenses.

An acquittal of forgery of an instrument can not be pleaded in bar of an indictment for uttering the same instrument. *Hooper v. State*, 30 Tex. Cr. App. 412, 17 S. W. 1066; *Reddick v. State*, 31 Tex. Cr. App. 587, 588, 21 S. W. 684; *Preston v. State*, 40 Tex. Cr. App. 72, 80, 48 S. W. 581; *Green v. State*, 36 Tex. Cr. App. 109, 35 S. W. 971.

Under an indictment for forgery, a plea in bar of a former acquittal for the forgery of a different note from the one set forth in the indictment is bad. *Inman v. State*, 35 Tex. Cr. App. 36, 30 S. W. 219.

An acquittal on a charge of passing a forged note will not bar a subsequent prosecution on a different note, although used in the same transaction with the former note. *Nichols v. State*, 44 S. W. 1091, 39 Tex. Cr. App. 80.

To an indictment for an attempt to pass a forged instrument, defendant pleaded a former conviction, which the evidence showed was for an attempt to pass a forged instrument upon a different person, and at a different time and place. Held, that the transactions were different, and constituted different offenses, even though the forged instrument attempted to be passed was the same in both cases. *Burks v. State*, 24 Tex. Cr. App. 326, 6 S. W. 300.

8. Conspiracy and Other Offenses.

The doctrine of merger will not solve the question whether a conviction for burglary will bar a prosecution for conspiracy to commit burglary, both offenses growing out of the same transaction. *Whitford v. State*, 24 Tex. Cr. App. 489, 492, 6 S. W. 537.

Where defendant, indicted for conspiracy to steal cattle, pleaded former acquittal, in that he had been acquitted of the theft of the cattle, which were the subject of the conspiracy, the plea was properly stricken out, since the offense of conspiracy was complete when entered into, independently of its consummation by theft. *Bailey v. State*, 42 Tex. Cr. App. 289, 59 S. W. 900.

9. Rape and Other Offenses.

Rape and Burglary.—A former acquittal of an attempt to commit rape is not a bar to a prosecution for an attempt to commit burglary for the purpose of committing rape, involving the same offense. *Byas v. State*, 41 Tex. Cr. App. 51, 51 S. W. 923.

Rape and Incest.—An acquittal for rape does not bar a prosecution for incest arising from the same transaction. *Stewart v. State*, 35 Tex. Cr. App. 174, 32 S. W. 766.

Different Acts of Carnal Intercourse.—In a prosecution for rape, the prosecutrix being under the age of fifteen years, it was not error to reject evidence of former jeopardy, based on a conviction for an offense committed on a date other than specified in the indictment, since the statute makes every act of carnal intercourse with a female under such age a distinct offense. *Griffey v. State* (Cr. App.), 56 S. W. 52.

10. Disorderly Conduct and Other Offenses.

Where accused was acquitted on an information charging that on a specified day accused unlawfully and willfully used loud and vociferous language in a manner calculated to disturb the inhabitants of the private house of D., in violation of Pen. Code 1895, art. 334, such acquittal was no bar to a subsequent prosecution on an information alleging that accused on the same day used violent and abusive language concerning D., in his presence, reasonably calculated to provoke a breach of the peace; such offense be-

ing separate and distinct. *Kellett v. State*, 51 Tex. Cr. App. 641, 103 S. W. 882.

A conviction for being drunk is not a bar to a prosecution for disturbing the peace by cursing and swearing at the time of and just before his arrest for drunkenness; the offenses being distinct. *Mitchell v. State*, 48 Tex. Cr. App. 533, 89 S. W. 645.

E. OFFENSES AGAINST DIFFERENT SOVEREIGNTIES IN THE SAME ACT.

In *Bingham v. State*, 2 Tex. Cr. App. 21, 25, the question whether a conviction or acquittal had in the mayor's court, for a violation of a city ordinance, is a bar to a prosecution by the state for the same offense, under the state law was raised but not decided. In the later case of *Hamilton v. State*, 3 Tex. Cr. App. 643, it was held, an act which is violative both of a state law and a police regulation of a town or a city may be punishable under either or both; and a conviction under one is no bar to a prosecution under the other. But since the passage of Code of Crim. Proc. 1895, art. 931, providing that no person shall be punished twice for the same act though it be an offense against both a city ordinance and a state law, it was held that a conviction for gaming on Sunday, in violation of a city ordinance forbidding gaming on any day, is a bar to a prosecution for the same act, as a violation of Pen. Code 1895, art. 193, forbidding gaming on Sunday. *Davis v. State*, 37 Tex. Cr. App. 359, 38 S. W. 616, 39 S. W. 937. This was followed in *Ex parte Freeland*, 38 Tex. Cr. App. 321, 42 S. W. 295, where it was decided that a conviction for violation of the ordinances of a municipality is a bar to a prosecution for the same offense in the state courts, under above provisions of code.

F. EFFECT OF IDENTITY OF OFFENSES.

See ante, "Conviction or Acquittal of

One Offense as a Bar to the Prosecution of a Different Offense," VI, D; "Theft of Several Articles at the Same Time," VI, D, 3, b.

1. In General.

When a party has been convicted or acquitted of an offense it precludes his subsequent prosecution for the same offense. *Burnett v. State*, 53 Tex. Cr. App. 515, 112 S. W. 74.

That defendant on trial for murder had been convicted of manslaughter will prohibit the state from putting him on trial for that offense. *Campbell v. State*, 10 Tex. Cr. App. 560, 566.

Where defendant is on trial for manslaughter, having on a previous trial for murder been acquitted thereof, both prosecutions arising from the same homicide, it is error to charge as to murder. *Parker v. State*, 22 Tex. Cr. App. 105, 107, 3 S. W. 100.

In Const., art. 1, § 14, as to second jeopardy, "same offense" means not the same *eo nomine*, but the same criminal act or omission. A conviction of "swindling" is a good bar to a prosecution for "uttering a forged instrument." *Hirshfield v. State*, 11 Tex. Cr. App. 207.

Where accused was convicted in a former case for displaying a pistol, and firing the same at and near St. Paul Church, it is a defense to a charge for firing his pistol into the St. Paul Church if the matters were one and the same act. *Landrum v. State*, 37 Tex. Cr. App. 666, 40 S. W. 737.

In a prosecution for aggravated assault, it is prejudicial error to strike a plea of former conviction of an affray, based on the facts on which the prosecution for aggravated assault rests, where accused was afterwards convicted of simple assault, since the former conviction would be a bar to a conviction for simple assault. *Reagan v. State* (Cr. App.), 51 S. W. 914.

One convicted of violating the local option liquor law by selling liquor to a minor can not be again put in jeopardy and

tried for selling liquor to the minor; the transactions being identical. *Tompkins v. State*, 49 Tex. Cr. App. 154, 90 S. W. 1019.

A conviction of simple assault of defendant charged with aggravated assault, if never set aside, bars a subsequent trial and conviction for simple assault. *Foster v. State*, 25 Tex. Cr. App. 543, 545, 8 S. W. 664.

Where defendant fired one shot at four fishermen seated around their camp fire, and wounded all of them, a conviction under an indictment charging an assault with intent to murder one of them is a bar to a subsequent prosecution for the same offense against the others. *Sadberry v. State*, 39 Tex. Cr. App. 466, 46 S. W. 639.

Where the facts submitted to the jury on a trial for defacing a brand on an animal are relied on by the state in a prosecution for theft of the same animal, the trial for theft should be postponed until the jury has decided the other case; the conviction of one being a bar to the conviction of the other. *Powell v. State*, 42 Tex. Cr. App. 11, 57 S. W. 94.

An acquittal on a prosecution for willfully and wantonly maiming and injuring a mare, under art. 787, Penal Code, is a bar to a prosecution under art. 799 for willfully maiming and wounding an animal in an inclosure surrounded by an insufficient fence, where both prosecutions arise from the same transaction. *Cryer v. State*, 36 Tex. Cr. App. 621, 623, 38 S. W. 203.

An acquittal of one charged with carrying brass knuckles is a bar to a prosecution for carrying "knuckles made out of metal, same being hard substance." *Morrison v. State*, 38 Tex. Cr. App. 392, 43 S. W. 113.

2. Conviction as a Bar to Further Prosecution.

See post, "Acquittal or Conviction of Any Grade Barring Further Prosecution," VI, F, 4, b.

Offenses Must Be the Same.—A plea

of former conviction is not effective, unless it be proved that the conviction was for the same offense as that for which the defendant is on trial. *Campbell v. State*, 2 Tex. Cr. App. 187, 189; *Parchman v. State*, 2 Tex. Cr. App. 228, 239; *Lowe v. State*, 4 Tex. Cr. App. 34, 38; *Arnold v. State*, 9 Tex. Cr. App. 435, 440; *Byas v. State*, 41 Tex. Cr. App. 51, 51 S. W. 923.

Jurisdiction of Court.—The plea of a former conviction before a justice of the peace is a bar to an indictment for the same offense, in the district court, in cases where a justice has jurisdiction finally to try. *Clepper v. State*, 4 Tex. 242.

In opposition to the plea of former conviction in this case, it is urged by the state that, it being shown that the information in this case was pending in the county court at the time that a similar complaint was filed in the mayor's court (a court clothed with concurrent jurisdiction), even though the proof were sufficient to establish the identity of the offense, the plea could not prevail, inasmuch as, under the circumstances the mayor's court could not have acquired legal jurisdiction. Held, that the position is not tenable, and that, if the proof was sufficient to establish that the offense tried by the mayor's court was identical with the offense being tried by the county court, the plea of former conviction would prevail in bar of a prosecution in the county court. *Kain v. State*, 16 Tex. Cr. App. 282.

Failure of Justice to Certify Judgment to District Court.—The statute requires that, whenever a justice of the peace shall render a judgment for a fine or penalty for any offense, he shall certify the fact to the next term of the district court, "which certificate shall be a bar to any further prosecution for the same offense." Held, that the failure of the justice to certify his judgment would not affect the exemption of defendant from another prosecution

for the same offense, but would merely compel him to resort to other evidence to prove the fact of former conviction. *Dunn v. State*, 6 Tex. 542.

When Complaint Is Defective.—A conviction under an insufficient complaint and satisfaction of the penalty imposed bars a subsequent prosecution for the same act. *Davis v. State*, 37 Tex. Cr. App. 359, 38 S. W. 616, 39 S. W. 937.

3. Acquittal as a Bar to Further Prosecution.

See post, "Acquittal or Conviction of Any Grade Barring Further Prosecution," VI, F, 4, b.

In General.—A verdict of "not guilty" puts a final termination to a criminal prosecution. After that verdict, the constitution and laws forbid that the party shall be again put in jeopardy for the same offense. The state can pursue him no further upon the same charge, either by an application for a new trial or by an appeal. (Const., art. I, § 12; and art. IV, § 3.) *State v. Burris*, 3 Tex. 118.

Under the constitution, an acquittal of defendant exempts him from a second trial or a second prosecution for the same offense. *Hooper v. State*, 30 Tex. Cr. App. 412, 414, 17 S. W. 1066.

Jurisdiction of Court.—It is provided in § 14, art. 1, of the Bill of Rights, that a defendant can not be put upon trial again for the same offense, after a verdict of not guilty, in a court of competent jurisdiction; and it is provided, in Sub. 2, art. 525, Code Crim. Proc., that a defendant can plead that he has been before acquitted by a jury, of the accusation against him in a court of competent jurisdiction, whether acquittal was regular or irregular. Held, where a defendant has once been placed on trial in a court of competent jurisdiction upon an invalid indictment for murder, and convicted of manslaughter, this is a complete acquittal of the charge of murder, and the state can

not again place him on trial for murder under a new and good indictment. *Mixon v. State*, 35 Tex. Cr. App. 458, 34 S. W. 290.

An acquittal by a court of competent jurisdiction, though jurisdiction not actually acquired, owing to complaint not being verified as required by law, is a bar to a second prosecution for the same offense. *Anderson v. State*, 34 Tex. Cr. App., appx., 705, 7 S. W. 40.

Offenses under act April 12, 1871, regulating the keeping and bearing of deadly weapons, are within the jurisdiction of justices of the peace; and hence a plea of acquittal before a justice of the peace is a good plea in bar to a prosecution in the district court for the same offense. *Hilliard v. State*, 37 Tex. 358.

Under Const., art. 1, § 14, providing that a person shall not be again put on trial for the same offense after a verdict of not guilty in a court of competent jurisdiction, and Code Cr. Proc. 1895, art. 561, providing that the only special pleas which can be heard for defendant are that he has previously been convicted legally, and that he has before been acquitted, whether the acquittal was valid or not, an acquittal will bar any subsequent prosecution for the same offense, if the trial occurs in a court having jurisdiction, whether the indictment is a valid one or not. *Shoemaker v. State*, 58 Tex. Cr. App. 518, 126 S. W. 887.

Concurrent Jurisdiction.—Where a mayor's court and the county court have concurrent jurisdiction of the offense of keeping a disorderly house, an acquittal in the mayor's court is a bar to an indictment in the county court. *Handley v. State*, 16 Tex. Cr. App. 444.

Acquittal in One County Bars Prosecution in Another.—Defendant, charged with homicide near the boundary line between C. and N. counties, was put on trial in C. county, and after some objection to the venue he conceded the

jurisdiction of the court and was acquitted. Held, that a subsequent attempt to try him for the same offense as having been committed in the county of N. was a violation of the constitutional provision that a person shall not again be put on trial for the same offense after a verdict of not guilty in a court of competent jurisdiction. *Ex parte Davis*, 48 Tex. Cr. App. 644, 89 S. W. 978.

An acquittal by an unsworn jury would bar another prosecution for the same offense. *Smith v. State*, 31 Tex. Cr. App. 315, 318, 20 S. W. 707.

4. Crime Including Several Offenses.

a. Doctrine of Carving.

The doctrine of carving is applicable to subject of former jeopardy. *Hirshfield v. State*, 11 Tex. Cr. App. 207, 215.

The prosecutor may bar himself by selecting a special grade of the offense. (Whart. Crim. Pl. & Prac., §§ 465, 467.) He may carve as large an offense out of a single transaction as he can, yet he must cut only once. *Quitow v. State*, 1 Tex. Cr. App. 47; *Simco v. State*, 9 Tex. Cr. App. 338; *Grisham v. State*, 19 Tex. Cr. App. 504, 513; *Herera v. State*, 35 Tex. Cr. App. 607, 612, 34 S. W. 943.

b. Acquittal or Conviction of Any Grade Barring Further Prosecution.

See ante, "Conviction as a Bar to Further Prosecution," VI, F, 2; "Acquittal as a Bar to Further Prosecution," VI, F, 3.

(1) In General.

Where an offense consists of different degrees and defendant, upon indictment or information is convicted or acquitted of any grade of such offense, such conviction or acquittal bars a further prosecution of the offense. *Johnson v. State*, 19 Tex. Cr. App. 453, 461.

If indictment is sufficient to authorize conviction for any degree of culpable homicide, accused can not le-

gally be tried again for the same offense. *Presley v. State*, 30 Tex. 160, 162.

Exception to Rule.—The rule that the conviction or acquittal of any grade of an offense bars a further prosecution for such offense does not apply where a higher grade of the offense has not been completed at the time of conviction or acquittal of a lesser grade; e. g., where the assaulted party dies after the conviction of his assailant for the assault. *Johnson v. State*, 19 Tex. Cr. App. 453, 461.

A conviction for aggravated assault and battery under an indictment for assault with intent to murder will not bar a prosecution for murder, after the death of the assaulted party, although the death result from the same transaction. *Curtis v. State*, 22 Tex. Cr. App. 227, 3 S. W. 86.

(2) Acquittal or Conviction of Higher Offense.

(a) In General.

After an acquittal or conviction of a higher offense it may be pleaded in bar to a prosecution for the lesser offenses. *Givens v. State*, 6 Tex. 344, 345.

Where defendant has been acquitted of murder in the first degree, he can not thereafter be convicted of the offense requiring arraignment. *Nolen v. State*, 8 Tex. Cr. App. 585, 596.

A person acquitted of an aggravated assault on an alleged officer can not be convicted of a simple assault in resisting arrest by such officer. *Brown v. State*, 43 Tex. Cr. App. 411, 66 S. W. 547.

Jury Must Have Been Able to Convict of Lesser Offense.—Where the jury could lawfully have found defendant guilty of a lesser offense, acquittal of a higher bars an indictment for a lower. *Irvin v. State*, 7 Tex. Cr. App. 78, 82; *Thomas v. State*, 40 Tex. 36; *Vestal v. State*, 3 Tex. Cr. App. 648.

Where New Trial Is Granted.—In cases admitting of degrees where a

party having been convicted of a lesser degree is accorded a new trial, the rule is that the case stands for trial upon the degree for which the conviction was had and the degrees as inferior thereto; and that with respect to such degrees the case stands as if no previous trial had been had. *Robinson v. State*, 21 Tex. Cr. App. 160, 17 S. W. 632; *Campbell v. State*, 10 Tex. Cr. App. 560, 566; *Burnett v. State*, 53 Tex. Cr. App. 515, 112 S. W. 74.

(b) Conviction of Lower Offense upon Evidence of Higher Offense.

Where defendant who has been acquitted of murder in the first degree is on trial for murder in the second degree, a charge is proper which permits conviction of second degree upon proof of express malice. It does not violate the rule against putting a person twice in jeopardy for the same offense. *Conde v. State*, 35 Tex. Cr. App. 98, 104, 34 S. W. 286.

Where defendant was acquitted of murder, and convicted of manslaughter, and on appeal the judgment was reversed, he was not entitled in the succeeding trial to an instruction to acquit him of the charge of manslaughter, if the evidence showed him to be guilty of murder. *Pickett v. State*, 43 Tex. Cr. App. 1, 63 S. W. 325; *Black v. State* (Cr. App.), 68 S. W. 683. *Contra*, *Turner v. State*, 41 Tex. Cr. App. 329, 54 S. W. 579.

Where accused was acquitted of murder and convicted of manslaughter, and on appeal the judgment was reversed, he was not entitled in the succeeding trial to an instruction to acquit him of manslaughter, if the evidence showed him to be guilty of murder; the evidence of guilt of a higher grade of the offense under such circumstances being sufficient to sustain a conviction for manslaughter. *Burnett v. State*, 53 Tex. Cr. App. 515, 112 S. W. 74.

That defendant was convicted of murder in the second degree does not,

on a second trial, entitle him to an absolute acquittal if the evidence shows the murder was in fact murder in the first degree. *Harvey v. State*, 35 Tex. Cr. App. 545, 34 S. W. 623.

Where defendant in trial for murder had been convicted of murder in second degree and a new trial had been granted, it is not error on the second trial to refuse to charge that defendant should be acquitted, if the evidence showed him to be guilty of murder in the first degree. *Fuller v. State*, 30 Tex. Cr. App. 559, 563, 17 S. W. 1108.

Where defendant had been acquitted of murder in the first degree, a charge on murder in the first degree and express malice in the second trial is not error where the court instructed the jury on such acquittal, and applied the law solely to murder in the second degree. *Muely v. State*, 31 Tex. Cr. App. 155, 166, 18 S. W. 411, 19 S. W. 915.

Where, on a prosecution for murder, accused was convicted of manslaughter, on a new trial he was not entitled to an instruction that if he should be found guilty of murder, either in the first or second degree, he should be acquitted. *Black v. State* (Cr. App.), 68 S. W. 683; *Pickett v. State*, 43 Tex. Cr. App. 1, 63 S. W. 325.

(3) Acquittal or Conviction of Lower Offense.

(a) Statement of Rule.

It has been held by this court repeatedly that where an indictment includes different degrees, and a defendant is tried and convicted of a lesser degree, he stands acquitted of all higher degrees of said offense; and in such case it is not necessary that the verdict formally acquit him of such higher grades. The effect of a conviction of a minor grade is tantamount to an acquittal of all grades of the offense above that. See Code Crim. Proc., arts. 713, 724. *Mixon v. State*, 35 Tex. Cr. App. 458, 34 S. W. 290. See *Jones v. State*, 13 Tex. 168; *Presley v. State*,

30 Tex. 160; *Thomas v. State*, 40 Tex. 36; *Pickett v. State*, 43 Tex. Cr. App. 1, 63 S. W. 325; *Black v. State* (Cr. App.), 68 S. W. 683; *Lopez v. State*, 2 Tex. Cr. App. 204; *Vestal v. State*, 3 Tex. Cr. App. 648; *Cheek v. State*, 4 Tex. Cr. App. 444; *Warnock v. State*, 6 Tex. Cr. App. 450; *Johnson v. State*, 19 Tex. Cr. App. 453; *Robinson v. State*, 21 Tex. Cr. App. 160, 17 S. W. 632; *Parker v. State*, 22 Tex. Cr. App. 105, 3 S. W. 100; *Foster v. State*, 25 Tex. Cr. App. 543, 8 S. W. 664; *Conde v. State*, 35 Tex. Cr. App. 98, 34 S. W. 286; *Burnett v. State*, 53 Tex. Cr. App. 515, 112 S. W. 74.

First Conviction Must Be for Lower Grade.—Pen. Code, art. 749, in defining the offense of unlawfully driving stock from its accustomed range, enacts another character of cattle theft than that of simply "stealing cattle," denounced in Pen. Code, art. 747; but, besides providing for it the same terms of confinement in the penitentiary as punishment, it authorizes alternative penalties by fine, or by both imprisonment and fine. Held, that the driving of stock from its accustomed range, etc., is but a species of cattle theft; and cattle theft is per se a felony, notwithstanding the alternative punishment provided by Pen. Code, art. 749. The position, therefore, that, a former trial of the appellant having resulted in his conviction of the theft defined in art. 749, and his punishment at a fine, he can not be again found guilty of theft, and awarded a term in the penitentiary as punishment, is untenable. *Campbell v. State*, 22 Tex. Cr. App. 262, 2 S. W. 825, overruling *Sisk v. State*, 9 Tex. Cr. App. 90.

(b) Qualification of Rule.

The statute (Code Crim. Proc., art. 553) upon former acquittals and convictions declares that "a former judgment of acquittal or conviction in a court of competent jurisdiction shall be a bar to any further prosecution for the same offense, but shall not bar a

prosecution for any higher grade of offense over which said court had not jurisdiction, unless such trial and judgment were had upon indictment or information, in which case the prosecution shall be barred for all grades of the offense." But if the trial in the first instance, though for a minor grade and in a court having no jurisdiction of the major or higher offense, is for the same transaction, and had by virtue of an information or indictment, the judgment will be a bar to the higher grade though the latter be pending in another and different tribunal having jurisdiction of it. *Grisham v. State*, 19 Tex. Cr. App. 504, 512. See *Allen v. State*, 7 Tex. Cr. App. 298; *Achterberg v. State*, 8 Tex. Cr. App. 463; *White v. State*, 9 Tex. Cr. App. 390; *Funderburk v. State* (Cr. App.), 64 S. W. 1059, 1060.

Where Trial Was upon Indictment.

—Where a defendant has once been placed on trial in a court of competent jurisdiction upon an invalid indictment for murder, and convicted of manslaughter this is a complete acquittal of the charge of murder, and the state can not again place him on trial for murder under a new and good indictment. *Mixon v. State*, 35 Tex. Cr. App. 458, 34 S. W. 290.

Code Cr. Proc. 1895, art. 20, provides that an acquittal of the defendant exempts him from a second trial for the same offense, without regard to the irregularity of the previous proceeding, except that where he has been acquitted on a trial in a court having no jurisdiction of the offense he may be prosecuted in a court having jurisdiction; and art. 561 provides that, where a party has once been convicted legally in a court of competent jurisdiction for the same accusation after trial on the merits for the same offense, he may interpose such conviction by a special plea, whether the acquittal be regular or irregular. Held, that where a defendant indicted for

murder in the first degree was acquitted of that crime, but convicted of murder in the second degree in a court having jurisdiction of the offense, but having no jurisdiction of defendant's person by reason of an erroneous change of venue, duly objected to, such error was an irregularity only, and did not preclude defendant from pleading such conviction as a bar to a subsequent trial for murder in the first degree. *Ex parte Moore*, 46 Tex. Cr. App. 417, 80 S. W. 620.

Where Trial Was upon Complaint.

—A conviction of an affray, upon a complaint filed before a justice, bars a subsequent prosecution on the same facts for a simple assault. *Dumas v. State*, 48 Tex. Cr. App. 27, 85 S. W. 1058.

That defendant was tried in a justice's court on complaint charging him with assault and was convicted will not bar a subsequent prosecution for the same assault upon the same person charging aggravated assault. *Henkel v. State*, 27 Tex. Cr. App. 510, 511, 11 S. W. 671; *Funderburk v. State* (Cr. App.), 64 S. W. 1059; *Dumas v. State*, 48 Tex. Cr. App. 27, 85 S. W. 1058; *Stepp v. State* (Cr. App.), 77 S. W. 787; *White v. State*, 9 Tex. Cr. App. 390.

It is no defense to a prosecution for aggravated assault that accused had been prosecuted for simple assault in the mayor's court. *Caudle v. State*, 57 Tex. Cr. App. 363, 123 S. W. 413.

In a prosecution for assault with intent to murder, where the evidence shows that, if defendant committed any offense, it was of a higher grade than a simple assault, he can not plead a former conviction before a justice based on a complaint for a simple assault, since Code Cr. Proc. 1895, art. 590, provides that a former judgment of acquittal or conviction in a court of competent jurisdiction shall not bar a prosecution for any higher grade of offense over which said court had no

jurisdiction, unless the trial and judgment were on indictment or information. *Davis v. State*, 40 Tex. Cr. App. 225, 47 S. W. 978.

Before the adoption of the Revised Code, conviction for simple assault before a justice court was no bar to a subsequent prosecution for aggravated assault, but, under the revised statutes, such conviction bars a prosecution for the same offense but not for a higher grade of the offense, unless conviction was had on indictment or information. *Allen v. State*, 7 Tex. Cr. App. 298, 301.

(c) Cases Illustrating the Rule.

Homicide in Different Degrees.—

Where, on a former trial for murder, defendant had been convicted of murder in the second degree, a new trial having been granted, defendant could not be convicted of a higher crime than murder in the second degree. *Hampton v. State*, 1 Tex. Cr. App. 652; *Jones v. State*, 13 Tex. 168; *Sutton v. State*, 2 Tex. Cr. App. 342; *Baker v. State*, 4 Tex. Cr. App. 223; *Cheek v. State*, 4 Tex. Cr. App. 444, 448; *Smith v. State*, 22 Tex. Cr. App. 316, 3 S. W. 684; *Jackson v. State*, 55 Tex. Cr. App. 79, 115 S. W. 262.

Where defendant charged with homicide has, on a former trial, been acquitted of murder in the first degree, it is error to charge as to murder in the first degree, or as to express malice. *Smith v. State*, 22 Tex. Cr. App. 316, 322, 3 S. W. 684.

Where, on former trial for murder, defendant had been convicted of manslaughter, new trial being granted, defendant could not be convicted of a higher crime than manslaughter. *Mixon v. State*, 35 Tex. Cr. App. 458, 34 S. W. 290; *Parker v. State*, 22 Tex. Cr. App. 105, 3 S. W. 100; *Carter v. State* (Cr. App.), 40 S. W. 498.

Where defendant was convicted of negligent homicide, and the conviction was set aside, it was an acquittal of all degrees of culpable homicide above that of negligent homicide. *Flynn v.*

State, 43 Tex. Cr. App. 407, 66 S. W. 551.

A conviction of simple abduction, under an indictment charging kidnapping and abduction in separate counts, bars further prosecution upon the charge of kidnapping or felonious abduction. *Mason v. State*, 29 Tex. Cr. App. 24, 31, 14 S. W. 71.

Robbery.—A conviction of robbery under an indictment alleging it to have been committed by assault, violence, and putting in fear of life or bodily injury, bars a prosecution for assault with intent to murder, in which the same violence and assault are relied on to sustain a conviction. *Moore v. State*, 33 Tex. Cr. App. 166, 25 S. W. 1120.

Aggravated Assault.—A conviction for an aggravated assault is an acquittal of a charge of assault with intent to murder. *Warnock v. State*, 6 Tex. Cr. App. 450, 452; *De Leon v. State*, 55 Tex. Cr. App. 39, 114 S. W. 828.

A conviction of an aggravated assault, consisting of accused having assaulted a person by throwing an orange at her, choking her, cutting off portions of her clothing, and drawing a stick which appeared to have been a deadly weapon, all the acts being parts of a continuous transaction, was a bar to a subsequent prosecution for an assault with intent to murder, based on the same acts. *Paschal v. State*, 90 S. W. 878, 49 Tex. Cr. App. 111.

Defendant cut prosecutor in an altercation, and was charged with aggravated assault. By arrangement with the county attorney, accused pleaded guilty, and a fine was assessed and paid and the judgment satisfied. He was thereafter indicted for assault to commit murder, and in support of a plea of former jeopardy it was shown that the acts complained of constituted the identical assault for which he had previously pleaded guilty. Held, that the plea was sustained, and that ac-

cused was entitled to a discharge. *Corbett v. State* (Cr. App.), 140 S. W. 342.

A conviction of an assault with intent to murder bars a prosecution for robbery committed at the time of such assault. *Herera v. State*, 35 Tex. Cr. App. 607, 34 S. W. 943.

Simple Assault.—Where a defendant is indicted for aggravated assault and is convicted of simple assault, the fact that conviction is set aside on defendant's motion for new trial does not render him triable upon such new trial for aggravated assault, the conviction of the lesser degree of assault operating as an acquittal of all higher degrees. *Robinson v. State*, 21 Tex. Cr. App. 160, 17 S. W. 632; *Tribble v. State*, 2 Tex. Cr. App. 424; *Huff v. State* (Cr. App.), 24 S. W. 903. But see *Heinen v. State* (Cr. App.), 74 S. W. 776, where an aggravated assault was proven a plea of former conviction of a simple assault was no bar.

Affray.—Prosecution for assault is barred by a former conviction of an affray on a prosecution on the same facts. *Thompson v. State*, 48 Tex. Cr. App. 16, 85 S. W. 1059.

G. OFFENSES OF WHICH ACCUSED COULD HAVE BEEN CONVICTED IN FORMER PROSECUTION.

Burglary and Theft.—If burglary and theft are charged in the same count of an indictment, and the defendant is convicted, the theft will be included in the burglary and no judgment can be rendered for the theft, in which case the conviction for burglary will bar a subsequent prosecution for theft. *Williams v. State*, 24 Tex. Cr. App. 69, 5 S. W. 838.

Upon an indictment which charged burglary and theft in the same count, the court submitted the question of burglary only, and the jury found a general verdict of guilty, upon which the court adjudged defendant guilty of burglary. Held, that the conviction

was for burglary alone, and operated to bar any further prosecution for the theft charged in the indictment. *Turner v. State*, 22 Tex. Cr. App. 42, 2 S. W. 619.

Theft and Driving Stock from Range.

—A conviction for willfully driving stock from its accustomed range can be had under an indictment charging the theft of the stock, and it is no objection to the sufficiency of a plea of former jeopardy, interposed upon the trial for the willful driving of the stock, that the indictment under which the former trial was had charged the theft of the stock. *McElmurray v. State*, 21 Tex. Cr. App. 691, 2 S. W. 892.

If burglary and theft after burglarious entry are charged in one indictment, theft would be merged in burglary and no conviction could be had for burglary, and conviction of burglary would bar a prosecution for theft. *Howard v. State*, 8 Tex. Cr. App. 447.

Theft and Swindling.—Where an indictment alleges facts constituting either swindling or theft, and the state elects to prosecute for either one, a conviction thereof bars a prosecution for the other. *Sims v. State*, 21 Tex. Cr. App. 649, 658, 1 S. W. 465.

Where Indictment Alleges Owner Unknown.—An acquittal under an indictment for theft, which alleges the owner as unknown, is a bar to a prosecution for the theft of the same article under an indictment alleging the true owner, provided the grand jury in the first case used due diligence to ascertain the name of the owner, for, in that case, a conviction could have been maintained upon it. *Fenton v. State*, 33 Tex. Cr. App. 633, 28 S. W. 537.

A conviction for a particular act of intercourse upon a charge of rape bars a prosecution for other acts admitted in evidence under the indictment. *Hamilton v. State*, 36 Tex. Cr. App. 372, 375, 37 S. W. 431.

Violating Liquor Laws.—Two in-

dictments were found against accused, each for selling a pint of whiskey. One of the sales was alleged to have taken place just prior to the noon hour and the other just after that hour on the same day, and the sales were between the same parties, the same price paid, and the same testimony was introduced in both cases; both transactions being before the jury in each case without limitation. Held, that a plea of former conviction, after a conviction in the first case, should have been sustained on the second trial, since, where two transactions are placed in evidence under an indictment the allegations of which could be sustained by the same facts, and the evidence as introduced is submitted to the jury without confinement to either, a plea of former jeopardy is well taken on the second case. *Piper v. State*, 53 Tex. Cr. App. 550, 110 S. W. 899.

Where two prosecutions are filed for the same character of offense (sale of intoxicating liquors), occurring at different hours on the same day, on informations and affidavits that are copies of each other, and where one of the cases is called, and the witnesses testify to both transactions, and a conviction is had, with nothing to indicate for which offense accused is convicted, another conviction can not be had on the same evidence since, under Code Cr. Proc., art. 561, declaring that accused may plead that he has been convicted of the same accusation, accused, by showing the facts, sufficiently identifies the transaction forming the basis of the former conviction with the one on trial. *Alexander v. State*, 53 Tex. Cr. App. 553, 110 S. W. 918.

H. JEOPARDY OF CODEFENDANTS.

The acquittal of one defendant, jointly indicted and tried with another for fornication, will not constitute an acquittal of the other. *Ledbetter v. State*, 21 Tex. Cr. App. 344, 17 S. W. 427.

The conviction or acquittal of one of the parties to adultery will not bar the prosecution and conviction of the other. *Alonzo v. State*, 15 Tex. Cr. App. 378; *Solomon v. State*, 39 Tex. Cr. App. 140, 141, 45 S. W. 706.

The fact that another had been convicted of keeping a place open on Sunday, in violation of the Sunday law, was no bar to the prosecution of defendant for the same offense, since, if the facts show that he participated in the crime, he would also be guilty. *Craig v. State*, 49 Tex. Cr. App. 295, 92 S. W. 416.

Former acquittal of a codefendant, jointly indicted with the present defendant for exhibiting a game table the two being indicted as individuals, can not operate as a bar to the subsequent prosecution of defendant for the same offense, even though it were true that both parties indicted were partners. *Goforth v. State*, 22 Tex. Cr. App. 405, 3 S. W. 332.

VII. Pleading and Practice.

A. NATURE OF PLEAS OF AUTREFOIS, ACQUIT AND CONVICT.

Constitutional Right.—The pleas of former jeopardy are special pleas available to accused as a constitutional and not a statutory right, and are fundamental; and beyond the power of the legislature to deny. *Holmes v. State*, 20 Tex. Cr. App. 509.

Nature of Pleas.—Pleas of autrefois, acquit, and convict are special pleas allowed and in most instances required, in subsequent prosecutions for an offense which has before been tried in some other tribunal, or in the same court under another and distinct proceeding from the case in which the pleas are interposed, and where they are essential in order to present before the court matters *dehors* and record then before the court. *Robinson v. State*, 21 Tex. Cr. App. 160, 17 S. W. 632.

The pleas of former acquittal and conviction, as provided for by Code Proc. (Pas. Dig. art. 2951), include every right secured at common law by such pleas. *Thomas v. State*, 40 Tex. 36.

The distinction between autrefois acquit and autrefois convict is thus stated in *Wright v. State*, 17 Tex. Cr. App. 152: "Autrefois acquit is only available in cases where the transaction is the same, and the two indictments are susceptible of and must be sustained by the same proof. Autrefois convict only requires that the transaction, or the facts constituting it, be the same." *Shubert v. State*, 21 Tex. Cr. App. 551, 2 S. W. 883; *Simco v. State*, 9 Tex. Cr. App. 338; *Kellett v. State*, 51 Tex. Cr. App. 641, 103 S. W. 882.

The difference between jeopardy and the pleas of autrefois acquit and autrefois convict is the important distinction that the latter presupposes and are predicated upon verdicts rendered; the former for valid causes which have operated in cases where no verdict has been reached. *Grisham v. State*, 19 Tex. Cr. App. 504, 514.

B. NECESSITY FOR SPECIAL PLEA.

1. In General.

The Code provides for the special pleas of former acquittal and former conviction (Code Crim. Proc., Arts. 524-553), and these are the only pleas of *res adjudicata* recognized in our criminal procedure, except in the case of a judgment upon habeas corpus. *Ex parte Porter*, 16 Tex. Cr. App. 321, 324; *Dodd v. State*, 10 Tex. Cr. App. 370, 373; *Holmes v. State*, 20 Tex. Cr. App. 509.

Former conviction is a defense which must be specially pleaded. *Samuels v. State*, 25 Tex. Cr. App. 537, 8 S. W. 656; *Clement v. State* (Cr. App.), 86 S. W. 1017; *Lindley v. State*, 57 Tex. Cr. App. 346, 123 S. W. 141.

That the state proves the former con-

viction of accused for the same offense does not alter the rule that defendant must specially plead former conviction. *Samuels v. State*, 25 Tex. Cr. App. 537, 538, 8 S. W. 656.

The defense of former acquittal is not available under the plea of not guilty, but must be pleaded specially, alleging an acquittal by a jury in a court of competent jurisdiction. *Swancoat v. State*, 4 Tex. Cr. App. 105.

A judgment quashing a previous indictment because barred by limitations is not pleadable as a former acquittal. *Swancoat v. State*, 4 Tex. Cr. App. 105.

The writ of habeas corpus is not the proper remedy to try the issue of autrefois acquit; the appropriate remedy is by special plea, entered in the court in which the indictment is pending under which the party is held. *Brill v. State*, 1 Tex. Cr. App. 152, 154.

A plea in abatement on prosecution for theft, setting up that accused had been previously indicted in another county, and tried therein, which had resulted in a mistrial, was properly overruled. *Homer v. State* (Cr. App.), 65 S. W. 371.

Pleas of former conviction and former acquittal are the only special pleas available under Code of Crim. Proc., art. 525, and hence the trial court did not err in striking out defendant's plea in abatement alleging an agreement by defendant to aid the state officers in detecting criminals, etc. *Holmes v. State*, 20 Tex. Cr. App. 509.

To an indictment for theft in F. county, the defendant pleaded specially the pendency of a prior indictment for the same offense in G. county. To this special plea the state demurred, and the demurrer was sustained. Held, correct; the only two special pleas known to the Texas criminal practice being former acquittal and former conviction, except where constitutional rights are involved. The opinion in *Burdett v. State*, 9 Tex. 43, was delivered before the adoption of the present Code

of Texas. *Schindler v. State*, 15 Tex. Cr. App. 394.

2. Qualification of Rule.

The only exception to this rule is that if the accused has been convicted of an offense inferior in degree to that charged, and the judgment has been reversed or a new trial awarded, he is not required, when placed on trial again in the same case and the same court, to plead former acquittal of the greater offense. *Samuels v. State*, 25 Tex. Cr. App. 537, 8 S. W. 656; *Robinson v. State*, 21 Tex. Cr. App. 160, 17 S. W. 632; *Riggs v. State* (Cr. App.), 96 S. W. 25; *De Leon v. State*, 55 Tex. Cr. App. 39, 114 S. W. 828; *Mixon v. State*, 35 Tex. Cr. App. 458, 461, 34 S. W. 290.

C. TIME AND ORDER OF PLEADING.

In General.—A plea of former acquittal should be interposed in bar together with the plea of not guilty, or it may be relied on alone. *Barton v. State* (Cr. App.), 43 S. W. 987.

After Impanelment of Jury.—A plea of former jeopardy may be interposed after impanelment of the jury and entry of a plea of not guilty. *Pizano v. State*, 20 Tex. Cr. App. 139, 142.

When Portion of Evidence Is in.—Where such plea was filed as soon as it was prepared, it was error to exclude it from the jury, and order it stricken out, though a portion of the state's evidence was already in. *Coon v. State*, 21 Tex. Cr. App. 332, 17 S. W. 351.

Where Other Indictment Was Pending.—If defendant has been convicted or acquitted, or if jeopardy has attached, this could be pleaded to a prosecution, whether another indictment was then pending or was subsequently presented. *Bailey v. State*, 11 Tex. Cr. App. 140.

After Verdict.—A plea of former acquittal cannot be considered when interposed after verdict. *Barton v. State* (Cr. App.), 43 S. W. 987.

On Motion in Arrest of Judgment.—

A plea of former jeopardy comes too late on motion in arrest of judgment. *Pickett v. State*, 43 Tex. Cr. App. 1, 63 S. W. 325.

Time Allowed Counsel to File Plea.

—Where, on the call of an indictment for keeping and exhibiting a gaming bank for the purpose of gaming, defendant's counsel requested time in which to file a plea of former conviction, it was error to allow him only fifteen minutes. *Coon v. State*, 21 Tex. Cr. App. 332, 17 S. W. 351.

D. REQUISITES AND SUFFICIENCY.**1. In General.**

"As a general rule, the plea of jeopardy should contain the pleadings and judgment, and should state with sufficient fullness those matters in order to identify the case on trial with that previously tried as being the same transaction or the identical offense. However, that is usually the case only where the case in hand is not under the identical indictment or information as that previously tried. In other words, the plea of jeopardy, to be sufficient, must set out the indictment or information, unless it is the identical one on which the second trial is had, and also the judgment of the former case, and must allege, and the proof show, the identity of the party and the identity of the offense; and this predicate, upon the dismissal of the first to transaction, to be sufficient, the plea must contain the motion to dismiss and the judgment predicated on the motion. But that rule does not obtain where the prosecution is under the identical indictment on which the former trial was had. Where this is the case, the matters are all part and parcel of the record, and are before the court. This question is sometimes found in case where a party has been acquitted of the higher grade of the offense, and convicted of the lesser."

Vela v. State, 49 Tex. Cr. App. 588, 95 S. W. 529, 530.

Autrefois convict, to be considered as a plea, must allege the proceedings which resulted in such former conviction, i. e., matter of record, to wit, the former indictment and conviction; and matters of fact, to wit, the identity of the person convicted, and of the offense of which he was convicted. *Hefner v. State*, 16 Tex. Cr. App. 573.

A plea of former jeopardy must be complete in itself and show the final disposition of the case relied on to support the plea. *Brown v. State*, 43 Tex. Cr. App. 272, 64 S. W. 1056.

The requisites of a plea of former conviction, under the statute, are that it shall appear from the plea that the defendant has been before convicted, in a court of competent jurisdiction, upon the same accusation, after a trial, upon the merits, for the same offense. *Quitow v. State*, 1 Tex. Cr. App. 47; *Brill v. State*, 1 Tex. Cr. App. 152.

Date of Former Trial.—A plea of former acquittal is not bad because it fails to state the day, or month, or year when the former trial was had, and a ruling excluding evidence in support of the plea, upon that ground, is erroneous. *Deaton v. State*, 44 Tex. 446.

Improper Discharge of Jury.—A plea of former jeopardy merely showing that the jury were discharged on the same day that the cause was submitted to them, without the consent of the defendant, is insufficient; such plea should show that they were improperly discharged. *Schindler v. State*, 17 Tex. Cr. App. 408, 412.

A plea stating that a former trial has been had, at which the jury considering of their verdict for more than three hours, were discharged, without the statement in the record of any reason for such discharge, is a sufficient plea of former jeopardy. *Hooper v. State*, (Cr. App.), 42 S. W. 398.

Joinder of Issue.—A plea of former

jeopardy is insufficient, if it fails to allege a joinder of issue on the former indictment. *Sedgwick v. State*, 57 Tex. Cr. App. 420, 123 S. W. 702.

Former Indictment or Information Defective.—A plea of former jeopardy setting forth an indictment for false pretenses, which fails to allege ownership of the property, is insufficient. *Mays v. State*, 28 Tex. Cr. App. 484, 13 S. W. 787.

Where a plea of former jeopardy shows on its face that the former information was so defective that it could not form the basis of a prosecution, and a judgment entered thereon would have been a nullity, it is properly stricken out. *Williams v. State*, 34 Tex. Cr. App. 433, 30 S. W. 1063.

Necessity for Bill of Exceptions.—It is not essential to the sufficiency of a plea of former jeopardy that a record of the proceedings on the former trial shall be perpetuated by bill of exceptions. *Pizano v. State*, 20 Tex. Cr. App. 139. See, generally, the title EXCEPTIONS, BILL OF, AND STATEMENT OF FACTS ON APPEAL, ante, p. 1.

Where a plea of former conviction upon its face is sufficient, the court should not sustain exceptions thereto. *Emmons v. State*, 34 Tex. Cr. App. 118, 29 S. W. 475.

Where Former Trial Was in Same Court.—Where a former acquittal relied upon in the plea was had in the court in which the plea is made, it is immaterial whether the plea is in the proper form or not, as the court can take cognizance of the matter under a plea of not guilty. *Mixon v. State*, 35 Tex. Cr. App. 458, 461, 34 S. W. 290.

2. Averments.

a. Identity of Offenses.

Plea of autrefois acquit, to be good, must show that former trial was for same offense. *King v. State*, 43 Tex. 351; *Bogges v. State*, 43 Tex. 347, 348; *Ex parte Rogers*, 10 Tex. Cr. App. 655; *Adams v. State*, 16 Tex. Cr. App. 162;

Hefner v. State, 16 Tex. Cr. App. 573; *Vela v. State*, 49 Tex. Cr. App. 588, 95 S. W. 529, 530; *Williams v. State*, 13 Tex. Cr. App. 285; *Byas v. State*, 41 Tex. Cr. App. 51, 51 S. W. 923; *Brothers v. State*, 22 Tex. Cr. App. 447, 3 S. W. 737; *Taylor v. State*, 4 Tex. Cr. App. 29.

A plea that defendant had, on a previous named day, been tried and acquitted of the identical offense charged in the pending prosecution is, on its face, sufficient, where the attached pleadings show the offense charged to be the same as to dates, parties, and character, and the judgment set up in the plea recites defendant's acquittal in the former case. *McCullough v. State* (Cr. App.), 34 S. W. 743.

A plea of former acquittal in a prosecution for selling intoxicating liquor, alleging that the offense for which accused was being prosecuted was the same offense as that for which he had been acquitted, but positively averring only that the affidavits and informations in the two causes were identical in every particular, and averring the conclusion that by the former verdict accused had been acquitted of the same charge, is insufficient, since the state, having authority to prosecute for any period of time within the statute of limitations, there could have been many complaints filed against accused for sale to the same man, representing different transactions, and all averring the same date. *Jerue v. State*, 57 Tex. Cr. App. 213, 123 S. W. 414.

In a prosecution for keeping a disorderly house in P. County, on April 20, 1877, accused pleaded former acquittal, and as part of her plea exhibited a judgment acquitting her of an information filed against her March 30, 1877, which charged her with keeping a disorderly house, in the same county, on March 24, 1877. Held, that the plea itself shows that the former offense was not the same as the one on trial, and the court below did not err in over-

ruling the plea, or in excluding evidence under it, or in declining to submit it as an issue for the jury. *Lowe v. State*, 4 Tex. Cr. App. 34.

b. Identity of Person.

A plea of former acquittal or former conviction should allege the identity of the person acquitted or convicted. *Williams v. State*, 13 Tex. Cr. App. 285; *Adams v. State*, 16 Tex. Cr. App. 162; *Hefner v. State*, 16 Tex. Cr. App. 573; *Vela v. State*, 49 Tex. Cr. App. 588, 95 S. W. 529, 530.

On trial for assault and battery, a plea of former jeopardy is good which sets up that at a former term defendant was brought to trial under information alleging the injured party's name as in that in the case at bar, and that the prosecution was dismissed during the trial because of variance as to the name of the injured party which the state was allowed to explain. *Elehash v. State*, 35 Tex. Cr. App. 599, 602, 34 S. W. 928.

c. Setting Out Record.

A plea of former conviction or acquittal, to be sufficient, should set forth in *hæc verba*, or at least by exhibit, both the complaint and information, or the indictment (as the case may be) of the former trial, and also the judgment of conviction. (See *Wilson's Crim. Forms*, 615, p. 277; 1 *Bish. Crim. Proc.* (3d ed.), § 814; *Williams v. State*, 13 Tex. Cr. App. 285; *Adams v. State*, 16 Tex. Cr. App. 162; *Hefner v. State*, 16 Tex. Cr. App. 573; *Code Crim. Proc.*, art. 325.) *Grisham v. State*, 19 Tex. Cr. App. 504, 510; *Munch v. State*, 25 Tex. Cr. App. 30, 7 S. W. 341; *Foster v. State*, 25 Tex. Cr. App. 543, 545, 8 S. W. 664; *Washington v. State*, 35 Tex. Cr. App. 156, 32 S. W. 694; *Zinn v. State* (Cr. App.), 117 S. W. 136; *Wheelock v. State* (Cr. App.), 38 S. W. 182.

A plea to a charge of carrying a pistol, which set up the fact that on a sufficient indictment he had been convicted of an assault with an intent to murder, and that the carrying of the pistol was

a part of the same transaction, was insufficient on its face; since it failed to set up the indictment, verdict, and judgment at the former trial. *Ford v. State* (Cr. App.), 56 S. W. 918.

In a prosecution for violating the local option law, a plea of former conviction in another case was properly stricken, where neither the complaint nor the information on the former trial was set out as an exhibit or made a part of the plea. *Benson v. State*, 53 Tex. Cr. App. 254, 109 S. W. 166.

Qualification of Rule—Where Both Trials Are in Same Court.—Although a plea of former jeopardy and former conviction omits to set out the indictment and judgment referred to, and would therefore be fatally defective if the trials had been in different courts, such defect will not bar the defense when both were in the same court, since the court, takes judicial cognizance of previous proceedings in the case. *Foster v. State*, 25 Tex. Cr. App. 543, 8 S. W. 664.

Where defendant pleaded former jeopardy, based on a mistrial in the same court, such plea was not defective, in that it did not set out the indictment, verdict, and judgment in full, since the court must take judicial notice thereof. *Woodward v. State*, 42 Tex. Cr. App. 188, 58 S. W. 135.

A plea of former jeopardy in prosecution for assault to murder, setting up that at a former trial for the same offense the jury reported and were discharged, in the absence of defendant and his counsel, may be entered at a subsequent trial on the same indictment after change of venue to a different county and at a subsequent term of court, without making a copy of the judgment discharging the jury an exhibit; such a plea not being a collateral attack on an existing judgment not appealed from. *Vela v. State*, 49 Tex. Cr. App. 588, 95 S. W. 529.

d. Jeopardy and Jurisdiction.

The plea of former acquittal must

show that the accused has been before acquitted by a jury, of the accusation against him, in a court of competent jurisdiction. *Swancoat v. State*, 4 Tex. Cr. App. 103, 119.

3. Verification.

Special pleas of former acquittal or conviction must be sworn to or the court will disregard them. *Field v. State*, 34 Tex. 39, 43; *Dodd v. State*, 10 Tex. Cr. App. 370, 373; *Samuels v. State*, 25 Tex. Cr. App. 537, 8 S. W. 656.

E. DEMURRER TO PLEA.

That a plea of former acquittal is not true, is no ground for demurrer. *McCullough v. State* (Cr. App.), 34 S. W. 753, 754.

Where a plea of former conviction in a criminal case is pronounced bad on demurrer defendant may plead over. *Clepper v. State*, 4 Tex. 242.

A plea of former conviction or former jeopardy is a written pleading in a criminal case, and judgment of the court sustaining a demurrer thereto is final, and eliminates a plea from the cause, unless amended. *Rust v. State*, 31 Tex. Cr. App. 75, 19 S. W. 763.

F. REPLICATION.

To an indictment for aiding an escape the accused pleaded former acquittal, setting out a former indictment and judgment whereby it appeared that, despite his objection, the state, after submitting the case to a jury, was allowed to dismiss it before verdict. To this plea of former acquittal the attorney for the state filed a replication, alleging, in effect, that the former indictment was in fact quashed, though not so shown by the record. Held, error to entertain the replication and allow the record to be contradicted by parol evidence. *Vestal v. State*, 3 Tex. Cr. App. 648.

G. EVIDENCE.

1. Presumptions and Burden of Proof.

Where an accused interposes a plea of former jeopardy, the burden is on him to establish its truth. *Clements v.*

State (Cr. App.), 86 S. W. 1016; *Hozier v. State*, 6 Tex. Cr. App. 501; S. C., 6 Tex. Cr. App. 542, 545; *Kain v. State*, 16 Tex. Cr. App. 282, 310; *Willis v. State*, 24 Tex. Cr. App. 586, 6 S. W. 857; *Fehr v. State*, 36 Tex. Cr. App. 93, 95, 35 S. W. 381, 650; *O'Connor v. State*, 28 Tex. Cr. App. 288, 13 S. W. 14; *Kilcoyne v. State* (Cr. App.), 92 S. W. 36.

The burden of proof is on defendant to establish his plea of former conviction by a preponderance of evidence. *Willis v. State*, 24 Tex. Cr. App. 586, 6 S. W. 857; *Benton v. State*, 52 Tex. Cr. App. 422, 107 S. W. 837; *Davidson v. State*, 40 Tex. Cr. App. 285, 49 S. W. 372, 50 S. W. 365.

One on trial for the theft of an animal, who pleads a formal acquittal based on his previous trial and acquittal of the theft of a different animal from a different owner alleged to have been stolen at or near the same place and time as the theft charged, must, to sustain the plea, show that the animal for the theft of which he was acquitted and the one mentioned in the indictment were taken at one and the same time and place, so as to make the stealing of both one act. *Hozier v. State*, 6 Tex. Cr. App. 542; *Stevens v. State* (Cr. App.), 58 S. W. 96.

Where defendant, charged with keeping a disorderly house, pleads a former acquittal, he must show that the offense of which he was acquitted was committed on the same day as that for which he was being prosecuted. *Reed v. State* (Cr. App.), 29 S. W. 1085.

The information in this case charges the appellant with keeping the gaming table as well as exhibiting the gaming table. The verdict and judgment fail to show for which (the keeping or the exhibiting of the same) the appellant was convicted, and it is therefore urged by appellant that he is relieved from the burden of proving the identity of the offense. Held, that the proposition is untenable; that, though it be conceded that the keeping of a gaming

table is an offense continuous in its nature, the exhibition of a gaming table is not; and, to be available, the evidence in support of the plea of former acquittal or conviction must meet the whole case, and is not sufficient if it leaves it in doubt whether the former conviction was had for the keeping or the exhibition of the table. *Kain v. State*, 16 Tex. Cr. App. 282.

Presumption is that city ordinance was published for requisite time before taking effect, hence defendant pleading former acquittal by mayor's court under such ordinance need not show proper publication thereof. *Wilson v. State*, 16 Tex. Cr. App. 497, 502. See, generally, the title MUNICIPAL CORPORATIONS.

Qualification of Rule.—It has been stated as a rule that "the burden of proving a prior conviction of the offense charged against a defendant being upon him, it is not shifted by prima facie evidence of the identity of the offense of which he has been previously convicted with that charged upon him." This rule, without modification, does not hold good in this state; for if the evidence makes a prima facie case in support of the plea, it must preponderate in its favor, and a preponderance of proof will suffice to support the plea. *Kain v. State*, 16 Tex. Cr. App. 282.

2. Admissibility.

When plea of former conviction alleges in due form facts which if proved would constitute a bar to the prosecution, defendant should be allowed to introduce evidence in support thereof. *Shubert v. State*, 21 Tex. Cr. App. 551, 554, 2 S. W. 883.

Failure of a defendant to set out in his plea of former conviction the information on which the trial and conviction were had rendered the plea demurrable but not void and the state having failed to except to the plea the trial court properly permitted defendant to introduce proof to support it.

Grishman v. State, 19 Tex. Cr. App. 504.

On a prosecution for keeping and exhibiting a gaming table, in which defendant was convicted for the alleged betting of a box of cigars on a game of pool played by him with C., and in which he pleaded a former conviction, it was error to refuse to permit him to give evidence that under a former indictment for betting at a gaming table he was convicted, on the theory that the table fees due on the game were wagered, and that the game was the same as that on which the box of cigars was bet. *Taylor v. State*, 50 Tex. Cr. App. 288, 98 S. W. 839.

Ex Parte Affidavits to Show Previous Conviction.—The fact that accused, on trial for assault with intent to murder, had previously been convicted of aggravated assault under the same indictment, on which judgment had not been entered, can not be shown by ex parte affidavits; but the proper practice requires accused to file a motion in the case asking that the record be perpetuated and a judgment of conviction thereon entered. *De Leon v. State*, 55 Tex. Cr. App. 39, 114 S. W. 828.

3. Weight and Sufficiency.

See ante, "Presumptions and Burden of Proof," VII, G, 1.

"To sustain the plea of autrefois convict or acquit, it is not sufficient simply to put in the former record; some evidence must be given that the offenses charged in the former and present indictments are the same. This may be done by showing, by some person present at the former trial, what was the offense actually investigated there; and, if that is consistent with the charge in the second indictment, a presumptive case will thus be made out, which must be met by proof on the other side of the diversity of the two offenses." *Wilson v. State*, 45 Tex. 76, 80.

On trial for theft of cattle, defendant pleaded a former conviction, and testified that certain cattle for the theft of which he had been formerly convicted, were all in one bunch, and were taken at the same time, and included the cattle for the theft of which he was now on trial. All the evidence, except that of the accused, showed clearly that the cattle were not taken at the same time. Held insufficient to sustain the burden of proving the fact that they were stolen at one and the same time. *Davidson v. State*, 40 Tex. Cr. App. 285, 49 S. W. 372, 50 S. W. 365.

Defendant pleaded former jeopardy to an indictment for the murder of John Dee, and alleged that on the former trial the jury was discharged by the court without his consent, and over his protest, and without legal cause. It was proved that he was put on trial, but the witnesses testified that it was for the murder of John Dees. There was no proof that he was tried on a valid indictment. The testimony as to the length of time the jury was out varied from two to twenty-four hours. There was no evidence that the jury was discharged over the protest or against the consent of the defendant. Held, that jeopardy being a special defense, and the burden of proof being on defendant, the jury were properly instructed to find the plea untrue. *O'Connor v. State*, 28 Tex. Cr. App. 288, 13 S. W. 14.

Evidence held to show that the information in two prosecutions for selling intoxicating liquor, in violation of the local option law were for different and distinct offenses, not growing out of the same transaction. *Jerue v. State*, 57 Tex. Cr. App. 213, 123 S. W. 414.

H. TRIAL OF ISSUE.

1. By the Court.

Where the offenses charged in different indictments are so diverse as not to admit of proof that they are the

same, the court may decide the issue without submitting it to a jury. *Wilson v. State*, 45 Tex. 76, 79; *Epps v. State*, 38 Tex. Cr. App. 284, 285, 42 S. W. 552; *Preston v. State*, 41 Tex. Cr. App. 300, 53 S. W. 127, 881; *Wright v. State*, 37 Tex. Cr. App. 627, 40 S. W. 491.

On a plea of former conviction, issue should not be submitted to the jury, if there was no evidence thereon. *Johnson v. State* (Cr. App.), 29 S. W. 474.

2. By the Jury.

If a special plea of former acquittal or conviction is sufficient to admit of evidence, and is supported by any evidence at the trial, it is the bounden duty of the court to submit whether it is "true or untrue" as an issue to be tried and found by the jury, and it is error to neglect, fail or refuse to do so. (Code Crim. Proc. art. 525, subdivis. 1, 526, 527, 712.) *Davis v. State*, 42 Tex. 494; *Deaton v. State*, 44 Tex. 446; *Quit-zow v. State*, 1 Tex. Cr. App. 47; *Brown v. State*, 7 Tex. Cr. App. 619; *McCampbell v. State*, 9 Tex. Cr. App. 124; *Simco v. State*, 9 Tex. Cr. App. 338; *Smith v. State*, 18 Tex. Cr. App. 329; *Pickens v. State*, 9 Tex. Cr. App. 270; *White v. State*, 9 Tex. Cr. App. 390; *Grisham v. State*, 19 Tex. Cr. App. 504, 512; *Shubert v. State*, 21 Tex. Cr. App. 551, 2 S. W. 883; *McCullough v. State* (Cr. App.), 34 S. W. 753; *Woodward v. State*, 42 Tex. Cr. App. 188, 58 S. W. 135; *Scott v. State* (Cr. App.), 68 S. W. 680; *Prine v. State*, 41 Tex. 300; *Troy v. State*, 10 Tex. Cr. App. 319; *Taylor v. State*, 4 Tex. Cr. App. 29; *Bland v. State*, 42 Tex. Cr. App. 286, 59 S. W. 1119; *Funderburk v. State* (Cr. App.), 64 S. W. 1059; *Pritchford v. State*, 2 Tex. Cr. App. 69; *Cook v. State*, 43 Tex. Cr. App. 182, 63 S. W. 872; *Wright v. State*, 37 Tex. Cr. App. 627, 40 S. W. 491.

In a prosecution for aggravated assault, on a plea of former conviction of simple assault, founded on a trial before

a justice, it was error to strike the plea on motion alleging fraud in obtaining jurisdiction in the justice court; but that question, if of any importance, should have been submitted to the jury. *Funderburk v. State* (Cr. App.), 64 S. W. 1059.

On a trial, before a county court, for an aggravated assault by two defendants, it is proper practice to submit to the jury, along with the general issue, one's plea of *autrefois acquit* and the other's plea of *autrefois convict*, by a justice's court, of a charge based on the same breach of the peace. *Pritchford v. State*, 2 Tex. Cr. App. 69, 72.

Where defendant interposes a plea of former record and judgment, which was subject to objection, on which, although raised, the court did not act, and evidence was introduced under the plea as though no objection had been made, it is error not to submit the question raised by the plea to the jury under proper instructions. *Munch v. State*, 25 Tex. Cr. App. 30, 7 S. W. 341.

I. INSTRUCTIONS.

Instructions to Find Specially.—

Where a plea of former conviction is interposed the court must instruct the jury to find specially on such plea, and, on failure so to instruct and find, a verdict of guilty will be reversed. *Wright v. State*, 27 Tex. Cr. App. 447, 11 S. W. 458.

Where Plea Is Defective.—Though, in a prosecution for assault, defendant's plea of former conviction in the corporation court was not in proper form, where the state failed to object to it, he had a right to instructions covering the defense. *Walker v. State* (Cr. App.), 97 S. W. 1043.

Erroneous Instructions.—Where one charged with aggravated assault pleaded a former conviction in the corporation court it was error to instruct that evidence of his plea of guilty of simple assault in that court might be considered to mitigate the punishment, since he was entitled to acquittal if the jury be-

lieved he was not guilty of anything but simple assault, or if they had reasonable doubt as to such guilt. *Walker v. State* (Cr. App.), 97 S. W. 1043.

Where defendant, on prosecution for aggravated assault, pleads a former conviction of fighting in a public place, an instruction that, unless the jury believe that the offense charged in the case before them is the same offense charged in the former case, the plea of former conviction can not avail is misleading. *Lawson v. State* (Cr. App.), 32 S. W. 895.

J. VERDICT.

See the title VERDICT.

Where defendant pleaded a former conviction or acquittal, as well as not guilty, the verdict must expressly find whether the special plea is true or not. *Brown v. State*, 7 Tex. Cr. App. 619; *McCampbell v. State*, 9 Tex. Cr. App. 124; *Smith v. State*, 18 Tex. Cr. App. 329; *Wright v. State*, 27 Tex. Cr. App. 447, 11 S. W. 458; *Davis v. State*, 42 Tex. 494; *Pickens v. State*, 9 Tex. Cr. App. 270; *White v. State*, 9 Tex. Cr. App. 390.

The failure of a verdict to find specially as to the plea of former conviction is reversible error, though the jury was properly instructed on the issue, and the evidence fails to sustain the plea. *Burks v. State*, 24 Tex. Cr. App. 326, 6 S. W. 300.

K. APPEAL AND ERROR.

See the title APPEAL, ERROR AND CERTIORARI, vol. 1, p. 87.

To a prosecution for illegal branding of cattle, the defendant, in addition to his plea of not guilty, interposed a special plea of a former conviction for the same offense in the same court. This special plea was defective, in that it failed to set out the record of conviction, and did not specifically allege the identity of the person convicted and the offense of which he was convicted. These defects, however, were not excepted to at the trial, and the defend-

<p>ant was permitted, without objection, to introduce testimony in support of the plea. In support of the plea, the defendant proved that at the time and place that he marked and branded the animal involved in this prosecution, he also marked and branded another yearling, whose owner was unknown, for which last act he had been indicted,</p>	<p>tried and convicted. This proof was made by oral testimony, and the record of conviction was not, as it should have been, read in evidence. To this, however, the state made no objection. Held, that, under the circumstances, the evidence must be considered, as it is brought up in the record. <i>Adams v. State</i>, 16 Tex. Cr. App. 162.</p>
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Joinder of Offenses.

See the titles BURGLARY, vol. 1, p. 726; INDICTMENT AND INFORMATION, vol. 4, p. 239.

Joinder of Parties.

See the title INDICTMENT AND INFORMATION, vol. 4, p. 239.

Joint and Several.

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Joint Indictment.

See the title INDICTMENT AND INFORMATION, vol. 4, p. 239.

Joint Offenders.

See the titles GAMING, vol. 3, p. 353; HUSBAND AND WIFE, vol. 4, p. 222; INCEST, vol. 4, p. 227; INDICTMENT AND INFORMATION, vol. 4, p. 239; JURY; LARCENY; NUISANCE.

Joint Owner.

See the title LARCENY.

Joint Tenants.

See the title LARCENY.

JUDGES.

BY LEONARD F. PIERSON.

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CROSS REFERENCES.

See the titles APPEAL, ERROR AND CERTIORARI, vol. 1, p. 87; JURISDICTION AND VENUE; JURY; JUSTICES OF THE PEACE; TRIAL; WITNESSES.

As to authority to take affidavits, see the title AFFIDAVITS, vol. 1, p. 48. As to jurisdiction of courts, see the title JURISDICTION AND VENUE. As to matters relating to justice of the peace, see the title JUSTICES OF THE PEACE. As to presence of judge, see the title TRIAL. As to remarks and conduct of judges, see the title TRIAL. As to right of a judge to be a witness in a cause, see the title WITNESSES.

I. Appointment, Qualification and Tenure.

A. REGULAR JUDGES.

Statutes Construed — Elective and Appointive Judges.—Section 28 of art. 5 of the Texas constitution provides "that vacancies in the office of district judge shall be filled by the governor until the next succeeding general election." Section 17 of art. 16

provides that "all officers within this state, shall continue to perform the duties of their office until their successors shall be duly qualified." The Texas statutes on this subject are as follows: Article 1065, Rev. St., provides, "The judge of the district court shall hold his office for the term of four years, and until his successor shall have duly qualified." This article of the Texas Civil Statutes con-

strues § 23 of art. 5 of the constitution in accordance with the last cited provision of the constitution so far as tenure of elective judges is concerned, and it would seem to follow that the same rule would apply to appointive judges. Certainly an appointive judge is an officer within this state, and, without any enabling statute, § 17 of art. 16, would embrace such an officer, and authorize him to hold until his successor should be duly qualified. *Hamilton v. State*, 40 Tex. Cr. App. 464, 51 S. W. 217.

Effect of Failure to Fill at Expiration of Term—Vacancy.—"Under provisions permitting an officer to hold his office for the prescribed term and until his successor shall have been elected and qualified therefor, a failure to fill the position at the expiration of the term does not create a vacancy which can be filled by appointment; and the failure, through death or otherwise, of a duly elected or appointed officer to qualify, does not create a vacancy—the old incumbent holding not merely as a de facto officer but as an officer de jure until the power upon which the duty of election or appointment is devolved can regularly act and the successor is duly elected and appointed and qualified." *Hamilton v. State*, 40 Tex. Cr. App. 464, 51 S. W. 217.

Statute Construed—Judge of 33rd District.—Section 39 of Act of April 9, 1883, providing that there was to be no district judge elected in thirty-third district at election in 1884, is not intended to apply to terms of district courts in that district, but applied only to districts in which judges were to be elected. *Goosby v. State*, 17 Tex. Cr. App. 167.

B. SPECIAL OR SUBSTITUTE JUDGES.

1. Constitutional and Statutory Provisions.

Constitutionality of Provisions Avoiding Change of Venue.—Code, Cr.

Proc., art. 570, providing that when a district judge is disqualified to try a criminal case, no change of venue for that reason shall be necessary, but the parties or their attorneys shall be entitled to select an attorney of the court to preside at the trial, was not in violation of Const., art. 5, § 11, providing that when a judge is disqualified the "parties to the cause" may, by consent, appoint a special judge to preside. *Early v. State*, 9 Tex. Cr. App. 476.

Repeal—Governor's Authority—Exchange.—Act June 19, 1897 (Acts 25th Leg., Sp. Sess. p. 39, c. 12), repealing Rev. St. 1895, arts. 1069, 1070, which gave the governor authority to appoint a judge pro tem. from among the bar of the district on disqualification of the resident judge, and denying authority to the governor, but providing that the resident judge of another district if possible, did not violate Const., art. 5, § 11, guaranteeing to litigants, in case a judge is disqualified, right by consent to appoint a proper person. *Oates v. State*, 56 Tex. Cr. App. 571, 121 S. W. 370.

Legislative Restriction of Right of Selection.—Const. art. 5, § 11, declares that, when a judge of the district court is disqualified, the parties may by consent appoint a proper person to try the cause, or, on their failing to, a competent person may be appointed to try the same in the county where it is pending in such manner as may be prescribed by law, and the district judges may exchange districts, or hold court for each other when they deem it expedient and shall do so when required by law, and that disqualification of judges of inferior tribunals shall be remedied and vacancies filled as may be prescribed by law. Held, that the right given to agree on a special judge was the only part of such provision that was absolute and self-executing and hence the provision did not deprive the legislature of power to restrict such right to

selection of a judge pro tem. by agreement to instances where, by reason of sickness or other exigency, it was impossible for judges to exchange districts on disqualification of the resident judge. *Oates v. State*, 56 Tex. Cr. App. 571, 121 S. W. 370.

Power of Legislature to Provide Election by Attorneys.—Const., art. 5, § 16, providing that, when the judge of the county court is disqualified, the parties interested may by consent appoint a proper person to try the case, or a competent person may be appointed as prescribed by law, together with the provision of the constitution that, where a judge fails to attend at the term, the bar can select a special judge, does not preclude the legislature from providing, as is done by Sayles' Ann. Civ. St. 1897, art. 1132b, that if, at the time appointed to hold a county court, the judge shall not appear, members of the bar may elect a special judge to hold the terms of court. *Porter v. State*, 48 Tex. Cr. App. 125, 86 S. W. 767.

Repeal by Implication—Selection Authorized.—Sayles' Ann. Civ. St., art. 1069, provides that no change of venue shall be necessary for the disqualification of the judge, but the governor shall designate some other judge to try the case, and, if that is impossible, the parties may select an attorney to try the same; and art. 1070 requires the clerk to make certain entries when a special judge is agreed on. Article 1071 prescribes that whenever the judge of the district court shall be unable to hold court the attorneys may elect a special judge. Held that, art. 1071 being authorized by Const., art. 5, § 7, empowering the legislature to provide for the holding of district court when the judge is absent or disqualified from acting, and not relating to, or conflicting with, art. 1069 and 1070, an amendment (Act 25th Leg.) to such sections did not repeal art. 1071 by implication, and a special

judge selected by the attorneys in the absence of the judge was authorized to conduct a murder prosecution. *Greer v. State* (Cr. App.), 65 S. W. 1075.

Statutory Modes for Appointment—Necessity for Oath.—Three modes only are prescribed by statute for the election, selection or appointment of a special judge. 1. If the regular judge fails to appear at the appointed time and place for holding his court, an election of a special judge for the term shall be held in accordance with the provisions of arts. 1094-1100, Rev. Stat. 2. If the regular judge is, from any cause, disqualified to try a case, the parties thereto may select a special judge to try the case by agreement. 3. If the parties fail to agree, the district judge shall certify the fact to the governor, who shall appoint a special judge to try the case. In either event, it is required that the person elected, selected or appointed to serve as special judge shall, before entering upon his duties, take the oath of office required by the constitution; and the manner of his selection or appointment as special judge, together with the reason therefor, and the fact that the oath of office was administered to him, "shall be entered upon the minutes of the court as part of the record in the cause;" and the same must appear in the transcript on appeal. *Smith v. State*, 24 Tex. Cr. App. 290, 6 S. W. 40.

The election of a special judge to hold a term of the county court is expressly authorized by article 1132b, added to Rev. St. 1895 by Acts 25th Leg., c. 8, so that a trial before such special judge is before a competent tribunal. *Hooper v. State*, 62 Tex. Cr. App. 105, 136 S. W. 790.

2. Appointment by Governor.

See ante, "Constitutional and Statutory Provisions," I, B, 1.

If the regular judge is not disqualified to try the accused by reason of interest or relationship, as provided by

Code of Crim. Proc., art. 596, he can not recuse himself and thereby authorize the governor to appoint a special judge to try the cause. *Reed v. State*, 11 Tex. Cr. App. 587.

Appointment Where Counsel Had Made Previous Agreement.—Prior to making application to the executive for the appointment of a special judge to try this cause, an agreement was entered into by the state and defendant to try before B., an attorney, or other special judge. The bill of exceptions recites, however, that the county attorney, unwilling to risk the agreement, had this case certified to the governor, who appointed the special judge. The objection urged by the defendant is that he should not be forced into trial before the judge so appointed, and that the state was bound by the agreement of counsel to select a special judge. From what appears in the record, the agreement between counsel for the state and defendant was a verbal agreement. Held, that the state was not bound by such agreement, and the court did not err in requiring defendant to proceed to trial before the judge as appointed. *Thompson v. State*, 9 Tex. Cr. App. 649.

Without Authority.—Where, on the disqualification of the resident judge, the governor without authority appointed a member of the bar to try the cause, he was not a judge de facto. *Oates v. State*, 56 Tex. Cr. App. 571, 121 S. W. 370.

3. Appointment by Counsel.

See ante, "Constitutional and Statutory Provisions," I, B, 1.

Counsel for State.—The state's attorney is authorized to consent, on behalf of the state, to the selection of a special judge to try a criminal case wherein the regular judge is disqualified. *Early v. State*, 9 Tex. Cr. App. 476.

Members of Bar.—Under the express provisions of Rev. St., art. 1094, where the regular judge of the district

court is unwilling to preside, the members of the bar may elect a special judge. *Brazell v. State*, 33 Tex. Cr. App. 333, 26 S. W. 723; *Thompson v. State*, 9 Tex. Cr. App. 649, 664.

Election by Majority.—The election of a special judge by a majority of the attorneys voting is valid, though other attorneys who do not vote are present in sufficient number to have changed the result. *Merrell v. State* (Cr. App.), 70 S. W. 979.

When Election May Take Place.—Under Rev. St. 1895, art. 1071, providing that whenever, on the day appointed for a term of the district court, the judge thereof shall be absent, there shall thereby be no failure of the term, but the practicing lawyers of such court present thereat may proceed to elect from their number a special judge, etc., the judge is allowed the whole of the first day of the term in which to put in an appearance, and, if he fails to do so, the lawyers may meet on the second day, and elect a special judge, and thereby prevent a lapse of the term; or if, before such meeting on the second day, the regular judge puts in an appearance, and opens court, the term will not lapse. *Scott v. State*, 43 Tex. Cr. App. 591, 68 S. W. 177.

When defendant's case, the first on the docket, was called, the judge recused himself, and subsequently a special judge was appointed, and the case was then recalled, it being the first on call. Held no error. *Clark v. State* (Cr. App.), 36 S. W. 273.

Effect of Motives Inducing Absence of Regular Judge.—Const., art. 5, § 11, provides that no judge shall sit in a case in which he is interested, has been counsel, etc., and that, where one of these causes arises, a special judge shall be selected by consent of the parties. Section 7 empowers the legislature to provide for the holding of district court when the judge thereof is absent, etc. Held, that a special judge, selected in the absence of the

regular judge by a bar election, pursuant to statute, was qualified to sit in the trial of a particular criminal case, without reference to the motives inducing the regular judge's absence. *Merrell v. State* (Cr. App.), 70 S. W. 979.

4. Record of Appointment.

Necessity to Show Appointment and Qualification.—Where the regular judge is disqualified to try a particular case, and a special judge is selected by the parties, or appointed by the governor, the record should show how he became a special judge, and his qualification. *Schwartz v. State*, 38 Tex. Cr. App. 26, 40 S. W. 982. See, also, *Perry v. State*, 14 Tex. Cr. App. 166; *Wilson v. State*, 14 Tex. Cr. App. 205; *Harris v. State*, 14 Tex. Cr. App. 676; *Bailey v. State* (Cr. App.), 15 S. W. 117; *Weatherford v. State* (Cr. App.), 28 S. W. 814.

Necessity That Selection Be in Writing and Part of Record.—Where, in pursuance of Cr. Code, arts. 571, 572, a special judge has been appointed to try a cause, the agreement of counsel to such appointment should be perpetuated in writing, filed among the papers, and made part of the record. A mere verbal agreement would not preclude the county attorney from certifying the case to the governor for appointment of a special judge. *Thompson v. State*, 9 Tex. Cr. App. 649.

Sufficiency of Record Entry.—Rev. St., arts. 1094-1100, and Code Cr. Proc., arts. 570-572, provide for the selection or appointment of a special judge in certain cases, who, before entering upon his office, shall take the oath of office required by the constitution, and the fact that the oath was administered shall be entered upon the minutes of the court as a part of the record, and the record on appeal must show the reasons for his selection, and the manner in which he became special judge. The only record as to such an appointment was that the judge was

selected by the state and defendant, and was sworn to try the case of the state against the defendant. The clerk certified this to be found in his minutes, but it was entirely detached from any other proceedings in the case. Held, that the entry was too uncertain to show even a substantial compliance with the law. *Smith v. State*, 24 Tex. Cr. App. 290, 6 S. W. 40.

Presumptions from.—Where a record entry recited the appearance of the state and accused by their attorneys and that the parties by attorney, agreed that A., an attorney of the court, should preside as special judge for the trial of the case, whereupon A. was duly sworn according to law as special judge to try the case, it would be presumed in the absence of anything appearing to the contrary that the regular judge was disqualified by some statutory cause and that the special judge was selected for that reason and that the proper oath was administered to him as such. *Early v. State*, 9 Tex. Cr. App. 476. See the title APPEAL, ERROR AND CERTIORARI, vol. 1, p. 155.

5. Qualification.

Necessity to Give Bond.—The fact that Sayles' Ann. Civ. St. 1897, art. 1132b, providing that if, at the time appointed to hold a county court, the judge does not appear, members of the bar may elect a special judge to hold the term, does not require the special judge to give a bond, whereas the regular county judge is required to give bond, is immaterial. *Porter v. State*, 48 Tex. Cr. App. 125, 86 S. W. 767.

II. Rights, Powers, Duties and Liabilities.

A. REGULAR JUDGES.

1. In General.

The judge in criminal cases is an officer of state charged with the duty of seeing that the law is faithfully ad-

ministered. *Cox v. State*, 8 Tex. Cr. App. 254.

A county judge is a magistrate, authorized by law to hold an examining court, and to exercise all judicial functions incident to such courts. *Sullivan v. State*, 6 Tex. Cr. App. 319.

A warrant issued by the county judge and signed officially by him need not recite that such judge is a "committing magistrate" since such judge is declared to be a magistrate by Code Crim. Proc., arts. 42 and 234. *Graham v. State*, 29 Tex. Cr. App. 31, 13 S. W. 1013.

The judge of district court can entertain complaint against a citizen, can have trial upon it, can admit to bail, discharge or commit the offender to jail, but in performing these duties he acts not as judge of the district court, but as a magistrate. *Childers v. State*, 30 Tex. Cr. App. 160, 196, 16 S. W. 903.

Power of Successor on Proceedings before Former Judge.—A district court has authority, at a term subsequent to the trial of a felony case, but before sentence passed or appeal taken, to cause its clerk to put his file mark nunc pro tunc upon the charge given to the jury at the trial; and it is immaterial that such order is made by the successor in office of the judge before whom the trial was had. *Nettles v. State*, 4 Tex. Cr. App. 337.

Title to and Possession of Office.—Where a statute created a judicial district, giving it a number, and provided that it should consist of certain counties which had formerly been part of another judicial district, and provided that the judge of the old district should be the judge of the new, his title was not affected, and he was the lawful judge of such district. *Maroney v. State*, 45 Tex. Cr. App. 524, 78 S. W. 696.

2. Right to Compensation.

Fees for Actions Dismissed without Trial.—Under Code Cr. Proc., art. 1075, authorizing the county judge to

receive "the sum of \$3 for each criminal action tried and finally disposed of before him," he is not entitled to such fee for actions dismissed without trial. *Brackenridge v. State*, 27 Tex. Cr. App. 513, 11 S. W. 630.

3. Criminal Liability.

Extortion—Indictment Charging Official Capacity.—An indictment charged that defendant, a duly-qualified and acting county judge, and authorized as such to demand and receive fees of said office, did unlawfully, extorsively, and willfully, as such officer, demand fees not allowed by law, that is, did make an account in writing against the county and certify that it was correct, and present the same to the commissioners' court, and demand that it be approved for the full amount, and that a draft issue therefor; that a part of said account was the sum of \$18, made up of a fee of \$3 in six criminal cases, which fees were not allowed by law, as said cases were not in fact tried and finally disposed of before defendant as county judge, but were dismissed without any trial whatever. Held, that the indictment charged defendant in his official capacity, and not as a private individual. *Brackenridge v. State*, 27 Tex. Cr. App. 513, 11 S. W. 630. See the title EXTORTION, vol. 3, p. 218.

4. Objection to Authority.

A verified plea in limine alleging that a judge of a different district is threatening to try the case, though the regular judge is not disqualified, and though the judge from the other district has not been appointed by the governor to hold court, and though the lawyers practicing at the bar have not elected him to hold court, and though accused has not agreed to try the case before him, does not prove itself; but there must be evidence to sustain it, especially where the record contradicts the plea. *Hart v. State* (Cr. App.), 134 S. W. 1178.

Defendant in a criminal case could not object that the case was tried by

a judge appointed to fill an unexpired term, because no successor was elected at the next general election. *Hamilton v. State*, 40 Tex. Cr. App. 464, 51 S. W. 217.

5. Exercise of Powers in Different Courts.

District Courts—Sufficiency of a Request to Exchange Where Judge Is Not Disqualified.—Under Const., art. 5, § 11, providing that district judges may exchange or hold court for each other when they deem it expedient, and shall do so when required by law, the judge of another district may sit at the request of the regular judge, though the latter is not disqualified or at the time holding court for the former or another judge. *Johnson v. State*, 61 Tex. Cr. App. 104, 134 S. W. 225.

Transfer of Duties.—Under Const., art. 5, § 11, providing that district judges may exchange districts when expedient, and shall do so when required by law, where judges exchange districts, each can perform all the duties imposed on a district judge in the district over which he has been requested to preside. *Miller v. State* (Cr. App.), 91 S. W. 582.

Authority to Try Case Not Designated.—Under Const., art. 5, § 11, providing that the district judges may exchange districts when expedient, and shall do so when required by law, and Act June 19, 1897 (Acts 25th Leg. (Sp. Sess.), p. 39; Wilson's Supp. Code Cr. Proc. 1897-1900, p. 105, art. 610c), providing that, whenever any cases are pending in which the district judge is disqualified, no change of venue shall be made necessary thereby, but the judge presiding shall notify the governor, who shall thereupon designate some district judge in an adjoining district to exchange and try such cases, etc., a district judge, assigned to try cases in another district, the judge whereof is disqualified, had authority to try a case, the indictment in which was returned while he was holding court,

though the governor, in appointing him, had not designated such case as one of those to be tried. *Miller v. State* (Cr. App.), 91 S. W. 582.

Right of District Judge to Sit in Criminal Court for Galveston and Harris Counties.—Const., art. 5, § 1 provides that the criminal district court of Galveston and Harris counties shall continue, with the district, jurisdiction, and organization now existing by law until otherwise provided, etc. Act July 23, 1870 (6 Laws Tex. p. 211; Rev. St. 1895, art. 1519), gives the criminal district court original and exclusive jurisdiction of all cases of felony and misdemeanor in Galveston and Harris counties of which the district and county courts have original and exclusive jurisdiction under the law. Const., art. 5, § 8, gives the district court original jurisdiction in all cases of the grade of felony, as well as such civil jurisdiction as is conferred on the district court. Section 16 authorizes the jurisdiction of misdemeanors in the county court, and that these can be transferred by legislative act to the district court; also providing that the county court shall not have criminal jurisdiction in any county where there is a criminal district court, unless expressly conferred by law. Section 11 provides that the district judges may exchange districts, or hold courts for each other, when they may deem it expedient or when required by law. Held that, though a judge of the criminal district court of Galveston and Harris counties can not try civil cases, a district judge, authorized under the general terms of the constitution and provisions of law to try both civil and criminal cases, may hold court for the judge of such criminal district court and try criminal cases. *Hull v. State*, 50 Tex. Cr. App. 607, 100 S. W. 403.

To Hear Habeas Corpus Case.—Rev. St., art. 1124, providing that any judge of the district court may hold court for any other district judge, gives a

district judge authority to hear a habeas corpus case for, and at the request of, the judge of another district, who has absented himself from the district after issuing the writ. *In re Angus*, 28 Tex. Cr. App. 293, 12 S. W. 1099.

Transcript—Sufficiency of Authority.

—A transcript showing, in the caption of the case, that the judge who tried the case presided by exchange with the regular judge of the district, sufficiently shows the lawful authority of the judge who presided to hear and determine the cause. Entry of a formal order declaring the exchange of districts was not necessary. *Wyers v. State*, 21 Tex. Cr. App. 448, 2 S. W. 816.

B. SPECIAL OR SUBSTITUTE JUDGES.

Under Code of Criminal Procedure, a special judge appointed on disqualification of the district judge, to try a criminal case, has all the power and authority of the district judge necessary for the trial and final disposal of the case. *Pennington v. State*, 13 Tex. Cr. App. 44, 47.

At Subsequent Term.—A special judge appointed to try a criminal case has the authority at a subsequent term to cause judgment upon the conviction to be entered nunc pro tunc. *Pennington v. State*, 13 Tex. Cr. App. 44, 47.

Power to Suspend Trial.—Under the statutes conferring upon a special judge "all the power and authority of the judge of said court, during such continued absence or inability [of the regular judge], and until the completion of any business begun before such special judge," a special judge has power, pending the examination of the witnesses in the cause, to suspend the trial until the night of the succeeding day, and leave the county and district until that time. *Powers v. State*, 23 Tex. Cr. App. 42, 5 S. W. 153.

When Liable to Be Ousted.—Under *Sayles' Ann. Civ. St.* 1897, art. 1132b,

providing for the election by the members of the bar of a special county judge, if, at the time appointed to hold court, the judge does not appear, the special judge may be elected on the first day of the term, but may be ousted by the subsequent appearance of the regular judge. *Porter v. State*, 48 Tex. Cr. App. 125, 86 S. W. 767.

Authority to Transfer Cause.—After a cause has been transferred to the district court, whose judge is also disqualified, the special district judge has no authority to transfer it back to the county court, even though a new county judge, not disqualified, has succeeded to the bench thereof. *Snow v. State*, 11 Tex. Cr. App. 99.

Effect of Hearing Portion of Trial.

On a prosecution for homicide where the district judge presiding during a portion of the trial and then having been taken sick, a special judge was elected who presided until the trial was concluded, but defendant's motion for a new trial was heard and determined by the district judge, there was no error in the proceeding. *Gill v. State*, 36 Tex. Cr. App. 589, 38 S. W. 190.

III. Disqualification to Act.

A. ACTING AS COUNSEL OR OTHER PARTICIPATION.

1. Regular Judge.

The Constitutional Prohibition Applies to Criminal Cases.—A constitutional provision prohibiting a district judge from presiding on a trial of a case wherein he has been of counsel and requiring that where the district judge has been disqualified by reason of any of the causes enumerated, the parties, may, by consent, appoint a proper person to try the cause, applies to criminal as well as civil cases. *Thompson v. State*, 9 Tex. Cr. App. 649. See, also, *Wilks v. State*, 27 Tex. Cr. App. 381, 11 S. W. 415; *Graham v. State*, 43 Tex. Cr. App. 110, 63 S. W. 558.

Effect of Provision.—The constitu-

tional inhibition, that "no judge shall sit in any case" wherein he has been of counsel, does not disable a district judge from receiving an indictment from a grand jury, nor from making orders preliminary to the trial of such a case. *Cock v. State*, 8 Tex. Cr. App. 659.

That the same question of law arises, or the same character of facts are involved, in two prosecutions, does not disqualify a judge from sitting in one by reason of his having been county attorney in the other. *Koenig v. State*, 33 Tex. Cr. App. 367, 26 S. W. 835.

That the judge was a district attorney while the case was being prosecuted by the county attorney in the county court will not disqualify him to try the case as judge of the district court. *Wilks v. State*, 27 Tex. Cr. App. 381, 386, 11 S. W. 415.

District Attorney When Crime Committed.—It is not ground of disqualification of the district judge that he was the district attorney when a homicide was committed, it appearing that he had nothing to do with the prosecution of the case, and resigned his position before the indictment was presented. *Utzman v. State*, 32 Tex. Cr. App. 426, 430, 24 S. W. 412.

At Time Accused Was Tried before Examining Court.—Under the statutes disqualifying a judge in a criminal case if he has been counsel for the state or the accused, a judge is not disqualified from the mere fact that he was district attorney at the time when the accused was tried before an examining court in his district, where it is shown that the judge had not appeared at the examination, or even heard of the case, and that it was the duty of the county attorney, and not of the district attorney, to appear for the state in the examining court. *Wilks v. State*, 27 Tex. Cr. App. 381, 11 S. W. 415.

Acts Constituting Acting as Counsel.—A judge who, while holding the office of district attorney, heard the complaint of the prosecuting witness, re-

duced it to writing, caused it to be signed and sworn to by him, and attested the same, has acted as counsel for the state, and is therefore disqualified from presiding at the trial of defendant for the offense charged in the complaint, under Code Cr. Proc., art. 569, which provides that "no judge shall sit in any cause where he has been of counsel for the state or the accused." *Terry v. State* (Cr. App.), 24 S. W. 510.

Affidavits, on motion for a new trial in a murder case, showed that the judge who tried the case had been counsel for defendant. The judge's affidavit denied this fact, but it appeared therefrom that he visited defendant while in jail, to secure a fee to represent him, and defendant then voluntarily told him some of the facts in the case. He admitted in the affidavit that he talked with relatives, representing defendant, prior to the examining trial, and prior to the death of the murdered man, but stated that they knew his fee had not been paid. He admitted that he was present at a conference of defendant's attorneys, but not in a professional capacity. Held, that the judge was disqualified to act as judge in defendant's trial for murder. *Graham v. State*, 43 Tex. Cr. App. 110, 63 S. W. 558.

A county judge, before his election, was counsel for defendant in a controversy in reference to defendant's fence encroaching on the highway, and after a survey advised defendant to move his fence back, which the latter did. Held, that the judge was disqualified from presiding at a prosecution of defendant for obstructing the same highway by afterwards placing a gate thereon, and whether or not he received a counsel fee was immaterial. *Woody v. State* (Cr. App.), 69 S. W. 155.

Private Attorney in Previous Case of Same Facts.—Under Code Cr. Proc., art. 569, providing that no judge shall sit in any case "where he has been of counsel for the state or the accused,"

it is error, in a prosecution for an aggravated assault, to strike out a plea that the judge is disqualified because he was a private prosecuting attorney in a case in which the accused was convicted of a simple assault arising out of the same transaction, and based on the same state of facts. *Johnson v. State*, 29 Tex. Cr. App. 526, 16 S. W. 418.

Assistant District Attorney—Presenting Case to Grand Jury.—The fact that a judge trying a murder case was once appointed, though without authority of law, assistant district attorney, and as such aided in presenting to the grand jury the case against an accomplice, does not disqualify him; accused's relation to the crime not being then known or referred to, and on his trial the corpus delicti not being seriously contested. *Locklin v. State* (Cr. App.), 75 S. W. 305.

Acting as Counsel for Defendant's Wife in Civil Suit.—Under Const., art. 5, § 11, providing that no judge shall sit in any case wherein he may be interested, or in which he shall have been counsel, a county judge was disqualified to sit on the trial of a prosecution for aggravated assault, committed by defendant upon his wife, where such judge was, at the time of the trial, acting as counsel for defendant's wife in divorce proceedings brought by her, and based on the identical assault which was on trial. *Barnes v. State*, 47 Tex. Cr. App. 461, 83 S. W. 1124.

Effect of Taking Affidavit.—The fact that a judicial officer takes the affidavit of a party charging another with the commission of an offense does not constitute him counsel in the case, so as to disqualify him for trying it. *Stepp v. State*, 53 Tex. Cr. App. 158, 109 S. W. 1093.

Effect of Proposed Fee.—A judge is not disqualified because he had proposed to assist the prosecution, as counsel, for a certain fee, which was never arranged or agreed to be paid.

Baines v. State, 43 Tex. Cr. App. 490, 66 S. W. 847.

Statements and Expressions of Opinion.—When a criminal case was called, the district attorney suggested that he would file a motion to dismiss on the ground that the offense was not sufficient to authorize a conviction, whereupon the trial judge, not in the presence of the jury, but in private conversation with the district attorney, the clerk, and counsel for accused, stated that he thought he was disqualified to enter any order, because he knew that the defendant was a liar and a perjurer. Held, that such remark did not disqualify the judge from trying the cause, although it was improper, and would cause a more rigid scrutiny of alleged errors. *Bismarck v. State*, 45 Tex. Cr. App. 54, 73 S. W. 965.

Answering Hypothetical Question.—Where an accused complained of the disqualification of a judge the grounds that the sheriff had told accused's counsel that the judge had told him that the facts and details in the case would make the defendant guilty, but the judge stated that the case was never mentioned to him, but the sheriff put a hypothetical case to him and asked whether that would be a violation of the law, the judge was not disqualified. *Owens v. State*, 52 Tex. Cr. App. 362, 107 S. W. 548.

Prejudice.—In the absence of statutory provisions, prejudice not based on property interest is not a legal disqualification of a trial judge. *Johnson v. State*, 31 Tex. Cr. App. 456, 461, 20 S. W. 985.

In Setting Aside Verdict as Inadequate.—In a prosecution of defendant for criminal libel, the court set aside the verdict of the jury because the punishment was inadequate, and, on application of defendant, granted a new trial, but on different grounds than those set out in defendant's motion. Held, that there was nothing in the action of the court to show that it was

prejudiced against defendant. *Johnson v. State*, 31 Tex. Cr. App. 456, 20 S. W. 985.

By Reason of Attending a Meeting of Judges to Suppress Gambling.—A judge is not disqualified to preside at the trial of one indicted for keeping a disorderly house by reason of having attended a meeting of judges of the state, called for the purpose of devising ways and means for suppressing gaming and disorderly houses, and this though accused was brought under discussion at the meeting. *Dailey v. State* (Cr. App.), 55 S. W. 821.

Party to Application to Test Validity of Local Option Election.—The fact that the judge who presided at defendant's trial for violating the local option law was a formal party to an application to contest the validity of the election on the question of local option, under which the prosecution was maintained, did not disqualify the judge from sitting in the case. *Truesdell v. State*, 42 Tex. Cr. App. 544, 61 S. W. 935.

As Codefendant and Counsel.—The fact that the county judge who presided at defendant's trial for violating the local option law was a formal party as a codefendant to a contest on the validity of the law, and had made an argument in the district court thereon, did not disqualify him from sitting in the case. *Burrell v. State* (Cr. App.), 65 S. W. 914.

Advocation and Statements of Enforcing Law.—On a prosecution for violating the local option law, the judge is not disqualified by reason of having advocated such law, and having stated that he would see it enforced, while a candidate for election, and having advised with the friends of local option how best to enforce its provision. *Bateman v. State* (Cr. App.), 44 S. W. 290.

The fact that one, while canvassing for the office of county judge, said that he would see that the local option law

was enforced, did not disqualify him, after his election, from trying one indicted for violating such law. *Benson v. State*, 39 Tex. Cr. App. 56, 44 S. W. 167, 1091.

Expression of Belief of Violation of Law.—The fact that a judge has expressed the belief that a certain person has been violating the local option law in the district does not disqualify him to try such person when charged with such offense. *Drechsel v. State* (Cr. App.), 39 S. W. 678.

Acting as Counsel in Other Prosecutions.—That the trial judge had theretofore been of counsel in other prosecutions against accused for violating the local option law would not disqualify him from sitting as special judge in a prosecution for violating the local option law. *Trinkle v. State*, 59 Tex. Cr. App. 257, 127 S. W. 1060.

Previous Complaint in a Prosecution for Playing Cards in Saloon.—On indictment for playing cards in a house for retailing liquors, the question being as to the character of the house, as a club, the fact that the judge, while prosecuting attorney, had made complaint against the proprietor society for pursuing the occupation of selling liquor without a license does not disqualify him from sitting as judge on the same facts. *Koenig v. State*, 33 Tex. Cr. App. 367, 26 S. W. 835; *Reifert v. State* (Cr. App.), 26 S. W. 839.

2. Special Judge.

Giving Advice as Friend.—When accused consulted an attorney and detailed to him his defenses, he was advised by him to plead guilty and pay the fine. The attorney admitted giving the advice, but claimed that it was not given as an attorney, but as a friend. Held, that such attorney was disqualified from sitting as special judge in accused's trial. *Durham v. State*, 58 Tex. Cr. App. 270, 124 S. W. 932.

B. BY BEING INJURED PARTY.
Under art. 569 of the Code of Crimi-

nal Procedure, a judge can not try a case or make any order in such case where he is the party injured. *Reed v. State*, 11 Tex. Cr. App. 587, 606.

"Injured party" within meaning of art. 606 of the Code of Criminal Procedure relative to disqualification of judges, means person injured either in person or property. *January v. State*, 36 Tex. Cr. App. 488, 492, 38 S. W. 179.

For Assault Made upon Himself.—Under Code Crim. Proc., art. 569, a justice has no right to sit in a prosecution for assault made upon himself. *Ex parte Ambross*, 32 Tex. Cr. App. 468, 24 S. W. 291.

C. BY RELATIONSHIP.

Under art. 569 of Code of Criminal Procedure, a judge can not try any case or make any order in such case where he is related to the party injured or to the accused within the third degree of consanguinity. *Reed v. State*, 11 Tex. Cr. App. 587, 606.

To One Jointly Indicted but Not Arrested.—Relationship between the regular judge and one jointly indicted with defendant, but not arrested, is not a disqualification authorizing the appointment of a special judge to try the defendant. *Reed v. State*, 11 Tex. Cr. App. 587.

Second Cousin to Plaintiff's Wife.—A district judge who was a second cousin of plaintiff's wife was disqualified to try the case, so that orders made therein were coram non judge. *Ex parte West*, 60 Tex. Cr. App. 485, 132 S. W. 339.

Grandfather Being Brother to Defendant's Grandmother.—Under Code Cr. Proc., art. 606, which is a copy of Const., art. 5, § 11, providing that "no judge * * * shall sit in any case * * * where the accused * * * may be connected with him by consanguinity or affinity within the third degree," a judge is disqualified to sit in a criminal case where his grandfather was brother to defendant's grandmother. *Gresham v. State*, 43 Tex. Cr. App. 466, 66 S. W. 845.

As Brother of Owner of Animal Maliciously Killed.—Under Code Cr. Proc. 1895, art. 606, providing that no judge shall sit in any case where the party injured is connected with him by consanguinity or affinity within the third degree, on trial of an indictment for the malicious killing of a hog with intent to injure the owner, the brother of the owner is disqualified to act as judge. *January v. State*, 36 Tex. Cr. App. 488, 38 S. W. 179.

Effect of Consent of Parties.—Where a judge is disqualified to sit in a criminal case because of consanguinity to defendant, the consent of the parties can not remove the incapacity of the judge, or restore his competency, against the express provisions of Const., art. 5, § 11, and Code Cr. Proc., art. 606. *Gresham v. State*, 43 Tex. Cr. App. 466, 66 S. W. 845.

Effect of Relationship on Transfer of Cause.—Article 471, Code Criminal Procedure, makes the transfer of cases over which the district court has no jurisdiction a matter of course, and the acts of the judge in that behalf are merely ministerial. Though disqualified to try the case, he is authorized to receive an indictment in such case, and to make necessary preliminary orders. Hence the district judge, notwithstanding his relationship to a defendant, is authorized to transfer a case to a court having jurisdiction thereof. *Oxford v. State*, 49 Tex. Cr. App. 321, 94 S. W. 463, citing *Cook v. State*, 8 Tex. Cr. App. 671.

D. PECUNIARY INTEREST.

Statutory Compensation for Conviction.—The fact that the statutory compensation of a county judge is a fee to be paid by the defendant, if convicted, does not disqualify him as being "interested," within the meaning of the constitutional inhibition in that regard. *Bennett v. State*, 4 Tex. Cr. App. 72.

Holding Title to Injured Property.—On an indictment for defacing a public school building, the fact that the title to the school house was vested in the

county judge in his official capacity could not disqualify him to preside over the trial of the accused; and the motion to transfer the case to the district court was properly refused. *Clark v. State*, 23 Tex. Cr. App. 260, 5 S. W. 115.

E. EFFECT OF DISQUALIFICATION.

In General.—Where a judge was disqualified to try a criminal case, the whole proceedings in the case are an absolute nullity, and a judgment rendered thereon is void. *Graham v. State*, 43 Tex. Cr. App. 110, 63 S. W. 558; *Gresham v. State*, 43 Tex. Cr. App. 466, 66 S. W. 845; *Woody v. State* (Cr. App.), 69 S. W. 155; *Abrams v. State*, 31 Tex. Cr. App. 449, 452, 20 S. W. 987.

Cr. Code, art. 569, that an interested judge shall not "sit" in the case, disables him from making any order therein. *Reed v. State*, 11 Tex. Cr. App. 587.

Where Objections Are Waived.—Where a judge is disqualified from sitting in a case, the judgment rendered by him is a nullity, though the parties agree to waive objections to the jurisdiction. *January v. State*, 36 Tex. Cr. App. 488, 38 S. W. 179.

Indictment and Information.—Under Code Cr. Proc., art. 467, providing

that an information may be sworn to before any officer authorized to administer oaths, and Sayles' Ann. Civ. St. 1897, art. 4, providing that all oaths, affidavits, etc., required by law may be administered by any judge or clerk of a court of record, justice of the peace, or notary public within the state, a county judge is authorized to take a complaint charging another with an offense. *Stepp v. State*, 53 Tex. Cr. App. 158, 109 S. W. 1093.

The fact that a judicial officer takes the affidavit of a party charging another with the commission of an offense does not constitute him counsel in the case, so as to disqualify him for trying it. *Stepp v. State*, 53 Tex. Cr. App. 158, 109 S. W. 1093.

Where the judge of the criminal district court of the counties of Galveston and Harris, is engaged in his judicial duties in Harris county, his proper official designation is, judge of the criminal court of Harris county, but his official signature to an order as "judge of the criminal district court Galveston and Harris counties," does not impair the competency of the order as evidence in support of an allegation which describes him as judge of the criminal district court of Harris county. *Watson v. State*, 5 Tex. Cr. App. 11.

Judgment.

See the titles NEW TRIAL AND ARREST OF JUDGMENT; SENTENCE, JUDGMENT, COMMITMENT AND PUNISHMENT.

Judgment Nisi.

See the titles BAIL AND RECOGNIZANCE, vol. 1, p. 644; JUDGES, ante, p. 40.

Judicial Confessions.

See the title CONFESSIONS, vol. 1, p. 783.

Judicial Construction.

See the title INTERPRETATION AND CONSTRUCTION, vol. 4, p. 632.

Judicial Districts.

See the titles COURTS, vol. 2, p. 150; STATUTES.

JUDICIAL NOTICE.

BY LEONARD F. PIERSON.

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CROSS REFERENCES.

See the titles EVIDENCE, vol. 2, p. 324; JURISDICTION AND VENUE; PRESUMPTIONS AND BURDEN OF PROOF, or other specific heads.

I. Of Facts in General.

Courts Are Bound to Recognize Existence of State.—*Shrader v. State*, 30 Tex. 386.

Physical Condition.—A trial court is not authorized to take judicial notice of the physical condition of a person, such as a juror, as to disease or health, but he may temporarily retire the juror in charge of some officer and have a

physician called to attend him, and if the juror continues sick, have a further investigation, and if necessary discharge the juror. *Bland v. State*, 42 Tex. Cr. App. 286.

Time and Divisions of a Year.—Courts take judicial notice of times, dates, and subdivisions of a year into months, weeks, and days. *McAllister v. State*, 55 Tex. Cr. App. 270, 116 S. W. 582.

Ax as Deadly Weapon.—The court of criminal appeals will not take judicial notice that an ax is a deadly weapon. *Bush v. State*, 52 Tex. Cr. App. 398, 107 S. W. 348.

Brass Knuckles.—Where the information charged defendant with carrying "brass knuckles," held, the allegation does not limit the proof to knuckles made of "brass," and the appellate court judicially knows that brass knuckles may be composed of metal other than brass. Such knuckles may be made of any metal or hard substance, and it was not error to so instruct the jury. *Louis v. State*, 36 Tex. Cr. App. 52, 35 S. W. 377. See the title WEAPONS.

Age of Minor.—Although the court may take judicial knowledge of natural laws, such cognizance can not be extended so as to permit it to assume the age or nonage of a minor, for the selling of liquor to whom the accused is prosecuted. *Hunter v. State*, 18 Tex. Cr. App. 444.

II. Historical Facts.

Judicial knowledge is taken of such essential historic facts as have exercised controlled influence on the commonwealth. *Lasher v. State*, 30 Tex. Cr. App. 387, 17 S. W. 1064.

That "Muscogee Nation" is synonymous with "Creek Nation" is a matter of public history whereof the court will take judicial notice. *Cowell v. State*, 16 Tex. Cr. App. 57.

Courts judicially know that Ft. McIntosh has been ceded to the United States. *Lasher v. State*, 30 Tex. Cr. App. 387, 17 S. W. 1064.

Termination of War.—The court judicially knows when war ceased in Texas. *Clark v. State*, 31 Tex. 575.

The courts will take judicial notice as a matter of history that, when the people of Texas surrendered the "war," in the sense in which that term was used in Act Feb. 25, and Act Dec. 7, 1863, suspending the stray laws, had ended. *The Estray Cases*, 30 Tex. 515.

III. Physiological Facts.

Average Size of Woman.—The court judicially knows that average size of woman is more than five feet. *Wilson v. State*, 41 Tex. 320.

IV. Spelling and Abbreviations.

Orthography.—Law takes no notice of orthography. *Foster v. State*, 1 Tex. Cr. App. 531.

The appellate court will take judicial knowledge of the contraction, derivation and corruption of names. *Alsup v. State*, 36 Tex. Cr. App. 535, 38 S. W. 174; *Patterson v. State* (Cr. App.), 140 S. W. 1128.

Contra.—The court held in this case that the name Edie could not be held a contraction and derivation of Edith. *Waters v. State* (Cr. App.), 31 S. W. 642.

Alex for Alexander.—The court of criminal appeals judicially knows that "Alex." is a contraction of the name "Alexander." *Patterson v. State* (Cr. App.), 140 S. W. 1128.

V. Geographical Facts.

See post, "Territorial Jurisdiction," XIII.

Boundaries and limits of counties, as a municipal subdivision of a state, are matters of judicial knowledge. *State v. Jordan*, 12 Tex. 205; *McGill v. State*, 25 Tex. Cr. App. 499, 8 S. W. 661.

Location of Panola County.—The court of criminal appeals judicially knows the geography of the country, and that Panola county lies north of and adjoining Shelby county. *Bussey v. State* (Cr. App.), 127 S. W. 1035.

Grier County.—The court will take judicial notice that Grier county in Texas is a part of the state, especially where it has been recognized as an integral part of the state by general legislation. *Adams v. State*, 35 Tex. Cr. App. 285, 33 S. W. 354.

Judicial notice of towns is limited to those recognized by general statutes and in the absence of the statute and

of evidence, the court will not know that place is in particular county. *Fields v. State* (Cr. App.), 24 S. W. 407, 408.

The court can not take judicial notice that the town named in the indictment as the place of the commission of the offense is within the county of the forum unless its location is recognized by statute. *Hoffman v. State*, 12 Tex. Cr. App. 406.

Of Greenville or Stringtown.—A coat was taken from a wagon yard in the town of Greenville, and accused was seen in possession of it at Stringtown. Held that, as the court of appeals does not judicially know that Greenville or Stringtown are in the county where the indictment was laid, the venue of the offense was not sufficiently established. *Latham v. State*, 19 Tex. Cr. App. 305.

City of Houston.—The court judicially knows that the city of Houston is in Harris county, as it was the state capital for two years, and hence proof that a murder was committed in such city is sufficient proof of venue. *Lewis v. State* (Cr. App.), 24 S. W. 903.

Location of Galveston.—The court of criminal appeals will take judicial notice that the city of Galveston is in Galveston county, Tex., so that the venue of a crime was sufficiently established in that county, where it was shown to have been committed in the city of Galveston. *Gossett v. State*, 57 Tex. Cr. App. 43, 123 S. W. 428.

On a trial for the sale of liquor without occupation license, proof that defendant was engaged in the business in Galveston City is sufficient proof of venue, as the court judicially knows that Galveston City is in Galveston county. *Monford v. State*, 35 Tex. Cr. App. 237, 33 S. W. 351.

Location of Waco.—The court of appeals will take judicial notice of the fact that the city of Waco is within the county of McLennan. *Long v. State*, 1 Tex. Cr. App. 709.

Childress in Childress County.—The court of criminal appeals does not ju-

dicially know that Childress is in Childress county, Tex., and evidence showing an act to have been committed in Childress does not show it was committed in such county. *Cain v. State* (Cr. App.), 25 S. W. 1119.

Of County Seat and Residence There.

—Where the only evidence of venue was that the fight occurred in the store of one M., and that the injured party was living in Longview, held, that the proof of venue was not sufficient. Though the appellate court might judicially know that Longview is the county seat of Cregg county, it could not judicially know that M.'s store was in Longview, nor draw such an influence from the fact that the injured party was living in Longview at the time. *Stewart v. State*, 31 Tex. Cr. App. 153, 19 S. W. 908.

Locality of Brazos River.—In the absence of direct proof of the venue of the crime, where the evidence shows the defendant and deceased were traveling westward on a straight railroad track, and had crossed the Brazos river, and were seen together, near where the body was found, at least a mile and a half from the river, the court will take judicial notice that the Brazos river is the eastern boundary of Milam county, and not disturb a conviction in that county, as *he locus in quo* could not have been elsewhere. *McGill v. State*, 25 Tex. Cr. App. 499, 8 S. W. 661.

Of Metes and Bounds of United States Military Station.—The court will take judicial notice that land is held by the United States as a military post by private purchase, but can not take judicial notice of the precise metes and bounds of the property by its field notes as run out on the ground. *Baker v. State*, 83 S. W. 1122, 47 Tex. Cr. App. 482.

Private Residences.—A court can not take judicial cognizance of the locality of "the Gilbeau House, in the city and county occupied by Gen. C. C. Anger" or of the name or locality of such city or county. *Bell v. State*, 1 Tex. Cr.

App. 81. See, also, the titles EVIDENCE, vol. 2, p. 324; JURISDICTION AND VENUE.

VI. Incorporation of Municipality.

See the title MUNICIPAL CORPORATIONS.

The court does not take judicial notice that a city named is necessarily an incorporated city. *Koenig v. State*, 33 Tex. Cr. App. 367, 26 S. W. 835; *Patterson v. State*, 12 Tex. Cr. App. 222; *Temple v. State*, 15 Tex. Cr. App. 304.

Code Crim. Proc. art. 436, provides that if it appears to the judge of the district court that the offense has been committed in any incorporated town or city, the cause shall be transferred to a justice in the town or city if there be one therein. Held that, where the fact that the offense was committed in an incorporated town or city was not alleged in the indictment, the district judge was not charged with judicial knowledge that the offense was committed in such a place nor that a city named was incorporated nor that a justice resided in the city. *Koenig v. State*, 33 Tex. Cr. App. 367, 26 S. W. 835.

When County Seat.—Courts can not judicially know that towns, even where they are county seats, are incorporated towns. *Bluitt v. State*, 56 Tex. Cr. App. 525, 121 S. W. 168.

Reason for Failure to Notice.—Judicial knowledge of municipal corporations is not legally chargeable to the courts of this state, inasmuch as the general laws enable every city and any town of two hundred inhabitants to incorporate itself by complying with prescribed conditions, of which it would be unreasonable to charge the courts with judicial notice. *Temple v. State*, 15 Tex. Cr. App. 304.

VII. Public and Private Acts.

Public Acts.—A joint resolution, imposing a particular duty upon any

officer of the state, is a public statute, of which the courts are bound to take judicial notice. *State v. Delesdenier*, 7 Tex. 76.

An act prohibiting the sale of liquors within a given distance of a specified town is a public act, of which courts take judicial notice. *Ryan v. State*, 32 Tex. 280.

Of Marriage Act.—The court knows judicially that a girl just over twelve years of age could not marry in Texas; fourteen years being the youngest age at which a marriage could occur. *Munger v. State*, 57 Tex. Cr. App. 384, 122 S. W. 874.

The court knows judicially that in Texas a marriage between a white man and negro woman could not be had. *Munger v. State*, 57 Tex. Cr. App. 384, 122 S. W. 874.

Of Matter Construing Statute.—It is a matter of notoriety that when this law was enacted an illustrated publication known as the *Police News*, and another known as the *Police Gazette*, were offered for sale, and were sold in all the cities of the state; and upon the passenger trains of all the railroads in the state; and, further, that these publications were of an indecent, immoral and pernicious character, and that many of the citizens of the state demanded some legislation that would prevent, restrict or regulate this class of publications. These are facts of such notoriety that the courts will take judicial notice of them in arriving at the meaning, scope and purpose of the act in question. *Thompson v. State*, 17 Tex. Cr. App. 253, 257.

Special Acts.—Courts do not take judicial notice of special acts of the legislature. *Hailes v. State*, 9 Tex. Cr. App. 170.

Local option laws are special laws and must be put into operation in the manner specified by the statute, and the courts do not judicially know when they are put in operation, but this is a matter of fact to be proved, and where

the record fails to show such proof, but simply showed loose expressions of witnesses as to the question whether local option was in force at the time of the alleged violation, the conviction can not be sustained. *Craddick v. State*, 48 Tex. Cr. App. 385, 88 S. W. 347.

Adoption of Local Option.—Judicial notice of the adoption of the county option law in a county where a prosecution is pending will not be taken. *Pointer v. State*, 60 Tex. Cr. App. 355, 132 S. W. 136; *Bills v. State*, 55 Tex. Cr. App. 541, 117 S. W. 835.

On appeal from a conviction for a violation of the local option law, the court can not take judicial notice of the existence of local option in the county. *Allen v. State* (Cr. App.) 98 S. W. 869.

City ordinances being special laws the courts will not take judicial notice of them. *Lawrence v. State*, 2 Tex. Cr. App. 479.

Courts do not take judicial notice of special acts or laws, hence a charge, assuming existence of city ordinance requiring all penal ordinances to be published ten days prior to taking effect is error. *Wilson v. State*, 16 Tex. Cr. App. 497, 502.

VIII. Judicial Proceedings and Records.

See the title APPEAL, ERROR AND CERTIORARI, vol. 1, p. 87.

Record and Proceedings.—The court will take judicial notice of record before it on trial and of all the proceedings and pleadings in such case. *Harris v. State*, 21 Tex. Cr. App. 478, 2 S. W. 830.

Previous Proceedings.—A court will take judicial cognizance of all previous proceedings taken in the case, e. g., indictment and judgment on a former trial. *Foster v. State*, 25 Tex. Cr. App. 543, 8 S. W. 664.

Of Former Trial.—A court takes judicial knowledge of matters which oc-

curred therein at a former trial of the same case. *Richardson v. State*, 85 S. W. 282, 47 Tex. Cr. App. 592.

Conviction.—The trial court will take judicial notice of a conviction there, available as a former conviction, and that an appeal therefrom is pending. *Dupree v. State*, 56 Tex. Cr. App. 875, 120 S. W. 875.

The court of criminal appeals can not take judicial notice that local option is in effect in a particular county; the state being required to prove that fact in a prosecution for violating the local option law. *Woodward v. State*, 58 Tex. Cr. App. 411, 126 S. W. 270.

IX. Federal Laws and Treaties.

Our courts are bound to take notice of the federal constitution and statutes. *Blandford v. State*, 10 Tex. Cr. App. 627.

Treaties between foreign nations, being recognized and provided for in the federal constitution, must have the same judicial notice taken of them as of all federal laws. *Blandford v. State*, 10 Tex. Cr. App. 627. See the title EXTRADITION, vol. 3, p. 221.

Arkansas Laws Operative in Indian Territory.—The court of criminal appeals will take judicial knowledge that the United States has passed a statute making the laws of Arkansas operative in the Indian Territory. *Bink v. State*, 48 Tex. Cr. App. 598, 89 S. W. 1075; *S. C.*, 89 S. W. 1077; *Davenport v. State*, 49 Tex. Cr. App. 11, 89 S. W. 1078.

X. Laws of Foreign States.

In criminal as well as civil cases, laws of other states must be proven before they can be taken notice of. *Ex parte Pearce*, 32 Tex. Cr. App. 301, 22 S. W. 15.

XI. Ordinances.

See ante, "Public and Private Acts," VII. See the title MUNICIPAL CORPORATIONS.

XII. Organization and Terms of Court.

Court for Galveston and Harris Counties.—The court of appeals judicially knows that there is a criminal district court for the counties of Galveston and Harris, and that Hon. Gustave Cook is the judge thereof. *Watson v. State*, 5 Tex. Cr. App. 11.

Two Courts in County.—Judicial notice will be taken of the fact of there being two district courts in a county. *Thomas v. State*, 59 Tex. Cr. App. 159, 127 S. W. 1030.

Time of Holding Court.—Judicial notice will be taken of the time for holding district courts. *Hudson v. State*, 40 Tex. 12.

The court of appeals takes judicial notice of the times at which the courts convene in the several counties of the state. *Conner v. State*, 6 Tex. Cr. App. 455; *Swofford v. State*, 3 Tex. Cr. App. 76.

Change of Time.—The appellate court takes cognizance of the terms of the county courts provided for by the statute; but if a county court has, in accordance with the statute, changed the time of holding its criminal terms, and the change affects the validity of a judgment appealed to the appellate court, the transcript should show the change so made. *Wills v. State*, 4 Tex. Cr. App. 613.

XIII. Territorial Jurisdiction.

See ante, "Geographical Facts," V.

Courts take judicial cognizance of the territorial extent of the sovereignty and jurisdiction exercised by their own government, and the political subdivisions of their own country and their relative positions, though not of their precise boundaries otherwise than as described by public statutes. *Boston v. State*, 5 Tex. Cr. App. 383.

Indian Territory.—The appellate court has judicial knowledge of the fact that the Indian Territory is beyond the jurisdiction of this state. *Conner v. State*, 23 Tex. Cr. App. 378, 5

S. W. 189. See, also, *Hutto v. State* (Cr. App.), 33 S. W. 223.

Of Ft. McIntosh.—The courts of Texas will take judicial notice of the fact that Ft. McIntosh is a military post, ceded to the United States government, and, as such, that crimes committed within such fort are beyond the jurisdiction of the state courts. *Lasher v. State*, 30 Tex. Cr. App. 387, 17 S. W. 1064.

XIV. Public Officers, Acts and Signatures.

See post, "Elections," XV. See the title OFFICERS.

Judicial Appointments of Governor.—The court of criminal appeals will judicially notice the judicial appointments of the governor. *De la Rosa v. State* (Cr. App.), 21 S. W. 192.

Names and Signatures.—The court takes judicial notice of the names and signatures of its own officers, and where the officer's signature is followed by the word "Clerk" it will be presumed on appeal that he was clerk of the court in which the case was tried. *Cardenas v. State*, 58 Tex. Cr. App. 109, 124 S. W. 953.

Acts of County Board Varying Tax.—In order to a conviction, under Pen. Code, art. 110, for pursuing a taxable occupation without license, the amount of the tax due at the date of the prosecution must be alleged and proved. The amount, being variable at the will of the county board, is not a matter of judicial knowledge. *Archer v. State*, 9 Tex. Cr. App. 78.

XV. Elections.

See the titles ELECTIONS, vol. 2, p. 270; INTOXICATING LIQUORS, vol. 4, p. 633.

General Election.—A court may take judicial notice of a general election, in a trial for giving away liquor on an election day. *Borches v. State*, 33 Tex. Cr. App. 96, 25 S. W. 423.

Election of Officers.—The courts take judicial notice as to what officers are elected at a general election. *Stein-*

berger v. State, 35 Tex. Cr. App. 492, 34 S. W. 617.

The trial court may take judicial notice of the fact that at a general election county and precinct officers can be elected. *Borches v. State*, 33 Tex. Cr. App. 96, 25 S. W. 423.

By Municipal Corporations.—That municipal corporations are authorized by law to hold elections for attorney and other officers is a fact within the judicial knowledge of courts. *Gallagher v. State*, 10 Tex. Cr. App. 469.

XVI. Existence and Value of Money.

Value of Ten Dollar Bill.—Judicial notice will be taken that a 10-dollar currency bill of the United States of America is not and can not be worth \$20. *Jones v. State*, 39 Tex. Cr. App. 387, 46 S. W. 250.

Of a Dime.—Ten cents in silver is a dime, which is a legal tender coin of the United States, and its value is ten cents, and courts must judicially know that a dime or ten cent piece in silver is a coin of the United States and legal tender, because its value and legal quality is fixed by act of congress. *Menear v. State*, 30 Tex. Cr. App. 475, 17 S. W. 1082.

Foreign Money.—On a trial for robbery, where the indictment described the money taken as "one dollar in Mexican money of the value of fifty cents." Held, that there being no statute upon the subject of foreign money, the Texas courts take no judicial cognizance of the same; and hence, in describing the same in an indictment, it must be treated as property within the purview of art. 427, Code Crim. Proc., and should be described by name, kind, quantity and ownership; and that the indictment having failed to so describe the money, is fatally defective. *Wade v. State*, 35 Tex. Cr. App. 170, 32 S. W. 772, overruling *Bravo v. State*, 20 Tex. Cr. App. 177.

XVII. Intoxicating Properties of Beverages.

See the title INTOXICATING LIQUORS, vol. 4, p. 633.

Whiskey.—The court takes judicial notice of the fact that whisky is intoxicating liquor. *Wilcoxson v. State* (Cr. App.), 91 S. W. 581; *Aston v. State* (Cr. App.), 49 S. W. 385; *Loveless v. State* (Cr. App.), 49 S. W. 602; *Smith v. State*, 56 Tex. Cr. App. 501, 120 S. W. 881.

Beer.—The court will take judicial notice that the word "beer," as used in a petition and by a witness in an action on a liquor dealer's bond, means of malt and intoxicating liquor. *Maier v. State*, 2 Tex. Civ. App. 296, 21 S. W. 974.

Hop Ale.—The court does not judicially know that hop ale is intoxicating; and on a prosecution for selling intoxicating liquors, where the only witness for the state testifies that he does not know whether or not the hop ale sold him was intoxicating, the evidence is insufficient to support a conviction. *Barnes v. State* (Cr. App.), 44 S. W. 491.

XVIII. Games and Gambling Houses.

See the title GAMING, vol. 3, p. 353.

Faro Bank.—The supreme court will take judicial cognizance of a faro bank as a bank kept for the purpose of gaming, the statute having specified faro as a game, etc. *State v. Burton*, 25 Tex. 420.

Character of House.—Courts will not take judicial cognizance of the public or private character of houses other than those declared by the statute on gaming to be public houses. *State v. Alvey*, 26 Tex. 155; *Grant v. State*, 33 Tex. Cr. App. 527, 27 S. W. 127; *Shepard v. State*, 1 Tex. Cr. App. 304.

Jurat.

See the titles AFFIDAVITS, vol. 1, p. 48; OATH. As to jurat to complaint, see the title CRIMINAL LAW, vol. 2, p. 190.

JURISDICTION AND VENUE.

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As to jurisdiction and authority to commit to bail, see the title BAIL AND RECOGNIZANCE, vol. 1, p. 572. As to the power of the sheriff of the county from which a change of venue is made to take a bail bond from a defendant who is in custody, see the title BAIL AND RECOGNIZANCE, vol. 1, p. 572. As to jurisdiction of a court as affected by the place of sitting, see the title COURTS, vol. 2, p. 150. As to proof of venue, see the title EVIDENCE, vol. 2, p. 324. As to jurisdiction in habeas corpus proceedings, see the title HABEAS CORPUS, vol. 3, p. 430. As to allegations of venue, see the title INDICTMENT AND INFORMATION, vol. 4, p. 239. As to the jurisdiction prerequisite to former jeopardy, see the title JEOPARDY, ante, p. 1.

I. Jurisdiction.

A. NATURE AND SCOPE OF CRIMINAL JURISDICTION.

"Now, it is a familiar principle that

courts established by the written law are dependent for their jurisdiction and extent of power upon the law of their creation, and they can not transcend its

authority. Their powers can not be enlarged by intendment, so as to embrace objects not expressed in the law. *Ex parte Bollman*, and *Ex parte Swartwout*, 4 Cranch 75; *Thatcher v. Powell*, 6 Wheat. 119; *Baker v. Chisholm*, 3 Tex. 157; *Cowan v. Nixon*, 28 Tex. 231." *Solon v. State*, 5 Tex. Cr. App. 301, 305. See also, *Jennings v. State*, 5 Tex. Cr. App. 298.

"There are three facts that seem to be absolutely necessary to the jurisdiction of the court or as jurisdictional questions: First, the court must have jurisdiction of the person; second, of the subject matter; and, third, to render the particular judgment rendered. Otherwise, the prosecution will be void, as also the judgment. *Ex parte Degener*, 30 Tex. Cr. App. 566, 17 S. W. 1111, where a great number of cases are collated; *Ex parte Taylor*, 34 Tex. Cr. App. 591, 31 S. W. 641; *Ex parte Kearby*, 35 Tex. Cr. App. 531, 34 S. W. 635; *S. C.*, 35 Tex. Cr. App. 634, 34 S. W. 962; *Ex parte Duncan*, 42 Tex. Cr. App. 661, 62 S. W. 758; *Ex parte Tinsley*, 37 Tex. Cr. App. 517, 40 S. W. 306; *Ex parte Lake*, 37 Tex. Cr. App. 656, 40 S. W. 727; *Ex parte Parker*, 35 Tex. Cr. App. 12, 29 S. W. 480, 790; *Ex parte Juneman*, 28 Tex. Cr. App. 486, 13 S. W. 783; *Ex parte Snodgrass*, 43 Tex. Cr. App. 359, 65 S. W. 1061." *Emery v. State*, 57 Tex. Cr. App. 423, 123 S. W. 133, 134.

B. CONSTITUTIONAL AND STATUTORY PROVISIONS.

1. In General.

The word "offense" as used in the fourth exception in Act 1836, § 5 "establishing the jurisdiction and powers of the district courts," is synonymous with that of "crime" as used in the same exception, and hence where the acts complained of do not amount to a crime or indictable offense the case is not within the exception. *Illies v. Knight*, 3 Tex. 312.

2. Right to Confer and Limit Jurisdiction.

See post, "Impairing or Enlarging

Jurisdiction Conferred by Constitution," I, B, 5; "Municipal and Other Local Courts," I, C, 2; "Jurisdiction of Justices of the Peace, Police Justices and Other Officers," I, D.

"Where not restricted by the constitution, questions of venue and jurisdiction are subjects of legislative control." *Ham v. State*, 4 Tex. Cr. App. 645, 671. See, also, *Rainey v. State*, 19 Tex. Cr. App. 479, 487; *Hatch v. State*, 10 Tex. Cr. App. 515; *Robles v. State*, 38 Tex. Cr. App. 81, 41 S. W. 620.

"In framing the provisions of art. 5, 'it was the object of the framers of the constitution to mark out a complete judicial system, defining generally the province of each of the courts by reference to the objects confided to the action of each, and the relation of each to the others. Such a system can not be changed by action of the legislative department except when the power to make the change is conferred by the constitution itself.' *Ex parte Towles*, 48 Tex. 413; *Ex parte Ginnochio*, 30 Tex. Cr. App. 584, 18 S. W. 82; *Gibson v. Templeton*, 62 Tex. 555." *Leach v. State*, 36 Tex. Cr. App. 248, 36 S. W. 471, 472. See, also, *Johnson v. State*, 26 Tex. Cr. App. 399, 9 S. W. 762.

3. Conferring Extraterritorial Jurisdiction.

See post, "Offenses Outside of State," I, E, 6, a.

4. Creating Local and Special Courts.

See post, "Municipal and Other Local Courts," I, C, 2. See, generally, the title COURTS, vol. 2, p. 150.

5. Impairing or Enlarging Jurisdiction Conferred by Constitution.

See ante, "Right to Confer and Limit Jurisdiction," I, B, 2; post, "Municipal and Other Local Courts," I, C, 2; "Criminal Jurisdiction in General," I, D, 1.

Under Const., art. 5, § 22, declaring that the legislature shall have power, by local or general law, to increase, diminish, or change the civil and criminal jurisdiction of the county courts,

and, in cases of any such change of jurisdiction, the legislature shall also conform the jurisdiction of the other courts to such change, it is competent for the legislature to divest the civil and criminal jurisdiction of the county courts, and transfer the same to the district courts. *Mora v. State*, 9 Tex. Cr. App. 406.

The constitution confers on the county and justices' courts of Atascosa county jurisdiction over misdemeanors; and Laws 18th Leg., p. 24, divests the county court of such county of jurisdiction over criminal cases, and vests exclusive jurisdiction over cases then pending therein in the district court. Held, that such district court was constitutionally invested with jurisdiction over misdemeanor cases. *Chapman v. State*, 16 Tex. Cr. App. 76.

Section 26 of the amended charter of the city of Ft Worth (Act April 3, 1891), which provides that the city court shall have exclusive jurisdiction over violations of the Sunday laws between the hours of 12 o'clock Saturday night and 9 o'clock Sunday morning, and between the hours of 4 p. m. Sunday and 12 o'clock Sunday night, in so far as it is intended to give the city court exclusive jurisdiction over such offenses, the penalty of which, fixed by the state law, is not more than \$200, is in conflict with Const., art. 5, § 19, which gives to justices of the peace jurisdiction in all criminal cases where the penalty is not more than \$200. *Ex parte Ginnochio*, 30 Tex. Cr. App. 584, 18 S. W. 82. See, also, *Davis v. State*, 32 Tex. Cr. App. 382, 23 S. W. 892.

6. Effect of Statute Conferring Jurisdiction on Another Court.

Jurisdiction Conferred on Municipal Court—Effect on County Court.—The new city charter of Dallas (Act March 13, 1889, § 25), as amended by Act March 27, 1889, creates the city court of Dallas, and provides that it shall "have exclusive jurisdiction over disorderly houses and female vagrants." Const., art. 5, § 22, provides that "the

legislature shall have power by local or general law to increase, diminish, or change the civil and criminal jurisdiction of county courts; and in cases of any such changes of jurisdiction the legislature shall also conform the jurisdiction of the other courts to such change." Held, that the provision conferring exclusive jurisdiction on the city court deprived the county court of any jurisdiction over such offenses, though no express words were inserted to that effect. *Corey v. State*, 28 Tex. Cr. App. 490, 13 S. W. 778.

Jurisdiction Conferred on Justice Court—Effect on District Court.—Hart. Dig., art. 553, giving original jurisdiction of assaults to justices, does not take away the jurisdiction of the district court to convict of simple assault under an indictment for assault with intent to murder. *Johnson v. State*, 17 Tex. 515.

Laws 1881, p. 13, takes away the jurisdiction of the county court of Frio county with reference to criminal matters. Section 2 conferred such jurisdiction on the district court as was given by the general laws to the county court, except as to probate of wills, etc., and except cases, civil and criminal, over which, by the general laws of the state, the justice courts would have jurisdiction. Section 3 conferred on the justice court of precinct No. 1 jurisdiction, in all cases, civil and criminal over which, by the general laws of the state, the county court of said county would have jurisdiction. Held, that the act did not oust the district court of jurisdiction to try a misdemeanor case wherein a fine not exceeding \$200 was the punishment, since the constitution conferred jurisdiction in such cases on county courts, among which was included the county court of Frio county. *Brady v. State*, 63 S. W. 327, 43 Tex. Cr. App. 76.

Jurisdiction Conferred on Criminal District Court—Effect on District Court.—"These criminal courts are not inferior courts. They are in one as-

pect limited in jurisdiction. They are limited in that they take cognizance of terminal matters alone. They are, however, district courts, qualified by the adjective 'criminal,' of equal dignity within their sphere with the district courts. They derive their being from the same high source, the constitution. Nor can it be said, because the act of the legislature creating this court has declared that it should have exclusive jurisdiction in all felony cases, that this would divest it of all jurisdiction." *March v. State*, 44 Tex. 64, 80. See, also, *Stubbs v. State*, 39 Tex. 564.

The jurisdiction conferred by the act of March 16, 1883 (Laws of Eighteenth Legislature, page 24), upon the district court of Atascosa county, is the same divested out of the county court, as to all cases not then pending in said county court; that is, the jurisdiction as to cases not pending is not exclusive, but only concurrent with the justices' courts in cases over which the justices' courts have heretofore had jurisdiction. Succinctly stated, the act referred to does not, in any way, affect the jurisdiction of the justices of the peace of Atascosa county. *Chapman v. State*, 16 Tex. Cr. App. 76.

C. COURTS INVESTED WITH CRIMINAL JURISDICTION.

See, generally, the title **COURTS**, vol. 2, p. 150. See post, "Jurisdiction of Justices of the Peace, Police Justices, and Other Officers," I, D; "Jurisdiction of Offense," I, E; "County or District to Which Change May Be Made," II, B, 10.

1. In General.

The county court of Burnet county was one of the county courts which, by Gen. Laws 1881, c. 19, pp. 13, 14, was deprived of jurisdiction of all causes, civil and criminal, over which it theretofore had jurisdiction, except as to matters of probate, etc. Gen. Laws 1885, c. 49, § 5, enacts that "said county courts (including county court

of Burnet county) shall have exclusive original jurisdiction of all misdemeanors except misdemeanors involving official misconduct, and except cases in which the highest penalty of fine that may be imposed under the law may not exceed two hundred dollars; and said court shall also have appellate jurisdiction in criminal cases in which justices of the peace and other inferior tribunals in said county have original jurisdiction." Held, that the effect of the act of 1885 was to reinvest the county court of Burnet county with the criminal jurisdiction of which it was deprived by the act of 1881. *Galloway v. State*, 23 Tex. Cr. App. 398, 5 S. W. 246.

2. Municipal and Other Local Courts.

See, generally, the title **MUNICIPAL CORPORATIONS**.

a. In General.

The provision in the charter of the city of Waco that the police court shall have jurisdiction of the offense of carrying weapons or other misdemeanors, when there is a city ordinance in force punishing the offense with as great a penalty as the same is punished by the state statute, confers jurisdiction of misdemeanors on the police court only when the city ordinance inflicting the same penalty as the statute does was in force when the charter was adopted. *McNeil v. State*, 29 Tex. Cr. App. 48, 51, 14 S. W. 393.

"In regard to the corporation court in which relator was convicted, while I regard the effort in the charter to constitute that a state court as futile and without effect (*Ex parte Fagg*, 38 Tex. Cr. App. 573, 44 S. W. 294; *Ex parte Sibley* (Cr. App.), 65 S. W. 372; *Ex parte Wilbarger*, 41 Tex. Cr. App. 514, 55 S. W. 968), still this was a case exclusively cognizable by a municipal court as such, and it had jurisdiction to try and punish relator upon conviction of a municipal offense provided for by city ordinance. *Blessing v. Galveston*, 42 Tex. 641." *Ex parte*

Levine, 46 Tex. Cr. App. 364, 81 S. W. 1206, 1208. See, also, *Hamilton v. State*, 3 Tex. Cr. App. 643.

b. Jurisdiction Over State Offenses.

Rule in Criminal Court of Appeals.—

"Applicant was convicted in the city court of the city of Corsicana for violating the state statute prohibiting sales on Sunday. Refusing to pay his fine, he was arrested by the chief of police, and resorted to the writ of habeas corpus to secure his discharge, assigning therefor various reasons. He urges want of jurisdiction in the city court to try him, as was done, for alleged violation of a state law. This contention is well taken. *Ex parte Sibley* (Cr. App.), 65 S. W. 372, is exactly in point. See, also, *Holmes v. State*, 44 Tex. 631; *Ex parte Coombs*, 38 Tex. Cr. App. 648, 44 S. W. 854; *Ex parte Knox* (Cr. App.), 39 S. W. 670; *Leach v. State*, 36 Tex. Cr. App. 248, 36 S. W. 471; *Ex parte Fagg*, 38 Tex. Cr. App. 573, 44 S. W. 294; *Ex parte Wickson* (Cr. App.), 47 S. W. 643; *Ballard v. Dallas* (Cr. App.), 44 S. W. 864; *Holland v. State* (Cr. App.), 39 S. W. 675; *Bigby v. Tyler*, 44 Tex. 351; *Ex parte Towles*, 48 Tex. 413; *Williamson v. Lane*, 52 Tex. 335; *Ex parte Whitlow*, 59 Tex. 273; *Gibson v. Templeton*, 62 Tex. 555; *State v. DeGress*, 72 Tex. 242, 11 S. W. 1029; *Crowley v. Dallas* (Cr. App.), 44 S. W. 865; *Titus v. Latimer*, 5 Tex. 433. This case does not come within the rule laid down in *Ex parte Wilbarger*, 41 Tex. Cr. App. 514, 55 S. W. 968, and *Ex parte Hart*, 41 Tex. Cr. App. 581, 56 S. W. 341." *Ex parte Anderson*, 46 Tex. Cr. App. 372, 81 S. W. 973. See, also, *Hamilton v. State*, 3 Tex. Cr. App. 643; *Corey v. State*, 28 Tex. Cr. App. 490, 13 S. W. 778, 779; *Ex parte Hinson*, 46 Tex. Cr. App. 587, 81 S. W. 987; *Ex parte Levine*, 46 Tex. Cr. App. 364, 81 S. W. 1206. But see *Bautsch v. Galveston*, 27 Tex. Cr. App. 342, 11 S. W. 414; *McLain v. State*, 31

Tex. Cr. App. 558, 562, 21 S. W. 365. For a case in accord with *Ex parte Wilbarger*, distinguished in *Ex parte Anderson*, *supra*, see *Ex parte Freedman*, 47 Tex. Cr. App. 487, 83 S. W. 1125.

Rule in Supreme Court.—

"There is a regrettable conflict between the decisions of the court of criminal appeals and those of this court upon the question of the validity of the legislation which undertakes to invest the mayors or recorders of incorporated cities in this state with the authority of justices of the peace within the city. The court of criminal appeals, in cases properly arising before them, have held such legislation in conflict with the constitution. *Leach v. State*, 36 Tex. Cr. App. 248, 36 S. W. 471; *Ex parte Knox* (Cr. App.), 39 S. W. 670. The same question came before us in a civil proceeding, and, while we felt the importance of maintaining uniformity of decision between our two courts of last resort, and recognized well the learning and ability of that court as the force of the argument by which they supported their conclusion, we were constrained to differ from them, and to hold the legislation constitutional. *Harris County v. Stewart*, 91 Tex. 133, 41 S. W. 650. We patiently investigated and carefully considered the question before announcing our conclusions in the case cited, and now see no good reason for changing our opinion." *May v. Finley*, 91 Tex. 352, 43 S. W. 257, 258. See, also, *March v. State*, 44 Tex. 64. But see the cases from the supreme court cited in *Ex parte Anderson*, 46 Tex. Cr. App. 372, 81 S. W. 973.

Rule in Civil Court of Appeals.—

Code, art. 78, conferring criminal jurisdiction on mayors of cities, is not repugnant to Const., art. 5, §§ 16, 19, conferring criminal jurisdiction on county and justices' courts. *Gibbons v. Braden*, 1 White & W. Civ. Cas. Ct. App., § 309.

D. JURISDICTION OF JUSTICES OF THE PEACE, POLICE JUSTICES, AND OTHER OFFICERS.

See ante, "Effect of Statute Conferring Jurisdiction on Another Court," I, B, 6; post, "Jurisdiction of Offense," I, E;" "Mode of Acquiring Jurisdiction," I, G. See, generally, the title JUSTICES OF THE PEACE.

1. Criminal Jurisdiction in General.

"In *Cowan v. Nixon*, 28 Tex. 231, this court said: 'The provision of the constitution of 1845, under which the legislature established justices' courts, is found in the 17th section of the 4th article, and is in these words: "Justices of the peace shall have such civil and criminal jurisdiction as shall be provided by law." Thus the constitution itself does not undertake to provide what jurisdiction such courts shall have, but confers that power on the legislature. Hence, whatever jurisdiction these courts possess they derive exclusively from legislative grant; and hence, also, they must exercise it in the manner and within the limits prescribed by the power creating them.'" Ex parte McGrew, 40 Tex. 472, 474. See, also, *Brown v. State*, 55 Tex. Cr. App. 572, 118 S. W. 139.

The act to organize justices' courts (section 5), providing that justices of the peace shall have jurisdiction of prosecutions for breaches of the peace, assault and battery, riots and affrays, is not repugnant to Const., art. 10, providing that the district court shall have original jurisdiction in criminal cases; such provision not requiring the jurisdiction of the district court to be exclusive. *Clepper v. State*, 4 Tex. 242.

A justice of the peace has authority to sit as a magistrate under the express provisions of Code Cr. Proc. 1895, art. 41; but, in view of article 62, providing that, when a magistrate sits to inquire into a criminal accusation, his court is called an examining court, his authority as a magistrate is entirely

distinct from his other jurisdiction. *Brown v. State*, 55 Tex. Cr. App. 572, 118 S. W. 139.

2. Jurisdiction as Examining Court.

See post, "Territorial Extent," I, D, 5. Under Pen. Code 1895, art. 25, providing that the words "accused" and "defendant" therein refer to one who in a legal manner is held to answer for an offense at any stage of the proceedings, or against whom complaint in a lawful manner is made, charging an offense including all proceedings from the order of arrest to final execution, a defendant is not "accused" until charged with an offense, and hence a justice of the peace as a magistrate can not sit as an examining court until a criminal action has been commenced against a person, and he has been arrested and brought before the justice, and therefore a justice does not act as a magistrate at a court of inquiry called to summon and examine witnesses as to a supposed crime, under the express provisions of Code Cr. Proc. 1895, art. 941; nobody being present and called upon to answer any accusation. *Brown v. State*, 55 Tex. Cr. App. 572, 118 S. W. 139.

The defendant was arrested under a warrant issued by a justice of the peace of De Witt county, founded upon a complaint charging him with a felony in Gonzales county, and the warrant was made returnable before the county judge of the latter county, but the examination of the case was had before a justice of the peace of Gonzales county. Held, that the justice of the peace of Gonzales county had jurisdiction of the case as an examining court. *Arrington v. State*, 13 Tex. Cr. App. 551.

3. Jurisdiction of Offense.

See post, "Jurisdiction of Offense," I, E.

4. Extent of Penalty.

See post, "Extent of Penalty," I, E.

3. See, generally, the titles FINES, vol. 3, p. 288; PENALTIES.

5. Territorial Extent.

One justice of the peace as such can not sit in the precinct of another justice, even when the other justice is absent, under Rev. St. 1895, art. 1566, providing that, if a vacancy exists in the office of justice of the peace of a precinct, or the justice shall be absent or unwilling to perform the duties of his office, the nearest justice in the county may perform the duty of the office, in view of article 1564, providing that each justice of the peace shall be commissioned as justice of the peace of his precinct, but, if he performs such duties, they must be performed in his own precinct; and hence, under Code Cr. Proc. 1895, art. 941, providing that a justice of the peace, having good cause to believe that an offense against the state laws has been committed, may summon and examine witnesses in relation thereto, a neighboring justice, as a justice of the peace, can not go into another justice precinct where there is a resident justice, and hold a court of inquiry. *Brown v. State*, 55 Tex. Cr. App. 572, 118 S. W. 139.

Ordinarily, one justice of the peace has no authority to take cognizance of proceedings within the limits of the jurisdiction of another justice, and statutes permitting it under prescribed conditions are to be strictly construed; and, where by statute certain proceedings must be had before a proper justice, no other can take jurisdiction. *Brown v. State*, 55 Tex. Cr. App. 572, 118 S. W. 139.

"In *Toliver v. State*, 32 Tex. Cr. App. 444, 24 S. W. 286, we held that a justice of the peace had no power to issue a warrant to a county without naming it, but that, if he put the name of the county, he must put the name of the county where he resides, having jurisdiction to issue warrants coextensive with the limits of the county. We think it clearly follows that, in misdemeanors over which he has concur-

rent jurisdiction, he has ample and full constitutional power to try the same, whether said offense occurred in his precinct, or in some other precinct in said county." Ex parte *Brown*, 43 Tex. Cr. App. 45, 64 S. W. 249, 250. But see *Hart v. State*, 15 Tex. Cr. App. 202, where it is held that it is only when a justice of the peace holds an examining court to inquire into the commission of an offense that his judicial authority is coextensive with his county.

6. Concurrent Jurisdiction.

See post, "Jurisdiction of Offense," I, E.

E. JURISDICTION OF OFFENSE.

As to jurisdiction of particular offenses, see the particular titles which treat thereof.

1. In General.

"Nor is it necessary to state in terms in the indictment that the offense was committed within the jurisdiction of the district court. The jurisdiction of that court is general, and if the offense is charged to have been committed in the proper county, that is a sufficient averment that it is within the jurisdiction of the court." *Drummond v. Republic*, 2 Tex. 156, 157.

Where the judge of another judicial district resided nearer the county seat of a county in which a crime was committed than did the judge of the district of which the county was a part, a court of a county in the former district had jurisdiction of the offense. *Cooksey v. State* (Cr. App.), 58 S. W. 103.

2. Nature or Grade of Offense.

See post, "Extent of Penalty," I, E, 3.

Felonies—In General.—A justice of the peace has no jurisdiction to try a person charged with a felony, as his jurisdiction is limited to misdemeanors. *Langbein v. State*, 37 Tex. 162.

County courts have no jurisdiction to try felonies, except when sitting as

examining courts. *Kinley v. State*, 29 Tex. Cr. App. 532, 16 S. W. 339; *Davis v. State*, 2 Tex. Cr. App. 184. See, also, *Martin v. State* (Cr. App.), 16 S. W. 749.

"In our opinion the language of the constitution, as follows: 'The district court shall have original jurisdiction in criminal cases of the grade of felony; of all suits in behalf of the state to recover penalties, forfeitures and escheats; of all cases of divorce; in cases of misdemeanors involving official misconduct,' as well as suits for slander and suits for the trial of title to land and the other matters of jurisdiction mentioned in § 8 of the judiciary article of the constitution (art. 5), is too plain to admit of or require construction or interpretation. By this section suits for the trial of title to land, suits for divorce, and criminal cases of the grade of felony are all placed in the same category as cases of misdemeanors involving official misconduct. The jurisdiction as to one is the same as the others, and is as exclusive in the one as the others." *Hatch v. State*, 10 Tex. Cr. App. 515, 517. See, also, *Fossett v. State*, 11 Tex. Cr. App. 40; *Lott v. State*, 18 Tex. Cr. App. 627.

Misdemeanors — In General.—The county courts and the district courts have concurrent jurisdiction of all offenses under the grade of felony. *Williams v. State*, 30 Tex. 404.

"Jurisdiction, in all cases of misdemeanor, is given by the constitution to the county court, to justices' courts, and to criminal district courts. Const., art. 5, § 16." *Hamilton v. State*, 3 Tex. Cr. App. 643, 645.

"Under the changes which have taken place in our law, the district courts have no jurisdiction in indictments which are for misdemeanors per se, except those involving official misconduct. Const., § 8, art. 5." *Cassaday v. State*, 4 Tex. Cr. App. 96, 98. See, also, *Hatch v. State*, 10 Tex. Cr. App.

515; *Craig v. State*, 31 Tex. Cr. App. 29, 19 S. W. 504.

"We have never held that, where an indictment charges nothing but a misdemeanor by its terms, the district court had jurisdiction to try the accused, except in those counties where the legislature has deprived the county court of such jurisdiction, and conferred it upon the district court. Where that has been done, of course, the district court would have jurisdiction, because the legislature has authority, by constitutional provision, to change the jurisdiction of the county court, and confer it upon the district court." *Robles v. State*, 38 Tex. Cr. App. 81, 41 S. W. 620.

Const. 1869, art. 5, § 17, providing that all offenses less than felony may be tried before any justice of the peace, does not affirmatively confer jurisdiction on justices, but only permits their jurisdiction to be extended so as to embrace all cases less than felony when the legislature shall so provide, acting under § 20, providing that justices of the peace shall have such criminal jurisdiction as shall be provided by law. *Ex parte McGrew*, 40 Tex. 472.

As the criminal district court of Harris county has appellate jurisdiction, under Rev. St., arts. 1496, 1497, of all criminal cases tried and determined by justices of the peace, its "original and exclusive jurisdiction" can not extend to the trial of an indictment for a misdemeanor cognizable by the justices' courts. *Davis v. State*, 32 Tex. Cr. App. 382, 23 S. W. 892.

Felony Alleged, Misdemeanor Proved — Allegation of Felony and Misdemeanor in Separate Counts.—"A felony being charged, the district court had jurisdiction to hear and determine the case, not only as to the felony, but as to any lower grade of offense which the proof might develop. It is expressly so provided by our statute, and we can not perceive that such provision

is in conflict with the constitution, as contended by defendant's counsel. *C. C. P.*, art. 69. Such has been the holding of this court in several cases in which this question has been presented. *Harberger v. State*, 4 Tex. Cr. App. 26; *Ingle v. State*, 4 Tex. Cr. App. 91; *Montgomery v. State*, 4 Tex. Cr. App. 140." *Nance v. State*, 21 Tex. Cr. App. 457, 1 S. W. 448. See, also, *Robles v. State*, 38 Tex. Cr. App. 81, 41 S. W. 620.

Where an indictment in the first count charged felony and in the second set forth a misdemeanor, the district court could not acquire jurisdiction of the misdemeanor averred in the second count by reason of the fact that a felony was charged in the first count, and on the acquittal of defendant on the first count, the jurisdiction of that court was terminated. *Robles v. State*, 38 Tex. Cr. App. 81, 41 S. W. 620.

Effect of Statute Changing Grade of Offense after Commission.—By art. 748, Revised Penal Code, the theft of hogs worth less than \$20 was, by the amelioration of the penalty, reduced from the grade of felony to that of misdemeanor, and by § 16, art. 5, Const., 1876, the jurisdiction to try parties charged with this or any other misdemeanor (with certain exceptions) is vested exclusively in the county courts, whether the offense was committed before or since the Revised Code took effect. *Whitsett v. State*, 9 Tex. Cr. App. 198; *Blunt v. State*, 9 Tex. Cr. App. 234. But see *Spence v. State*, 1 Tex. Cr. App. 541.

Assault and Battery.—See, generally, the title ASSAULT AND BATTERY, vol. 1, p. 493.

Justices of the peace have jurisdiction to hear and determine cases of assault and battery committed within their counties, when no deadly weapon is used or attempted to be used. *Bumpus v. Fisher*, 21 Tex. 561. See, also, *Norton v. State*, 14 Tex. 387.

Act Aug. 13, 1870, defining the ju-

risdiction of justices of the peace, did not give to those officers jurisdiction to try one charged with an aggravated assault. *Neil v. State*, 43 Tex. 91, citing *Ex parte McGrew*, 40 Tex. 472.

Unlawfully Entering upon Inclosed Land.—See the title TRESPASS.

Keeping and Bearing of Deadly Weapons.—See the title WEAPONS.

3. Extent of Penalty.

Where Fine Less than \$200.—"It has been held by this court, after full consideration of the various constitutional and statutory provisions relating to the jurisdiction of county courts, that said courts are vested with jurisdiction, concurrent with courts of justices of the peace, to try and determine all cases of misdemeanor, save such as involve official misconduct, even though the penalty prescribed may be by fine of less than \$200. *Woodward v. State*, 5 Tex. Cr. App. 296; *Jennings v. State*, 5 Tex. Cr. App. 298; *Solon v. State*, 5 Tex. Cr. App. 301; *Leatherwood v. State*, 6 Tex. Cr. App. 244." *Chaplin v. State*, 7 Tex. Cr. App. 87, 88. See, also, *Billingsly v. State*, 3 Tex. Cr. App. 686; *Uecker v. State*, 4 Tex. Cr. App. 234; *Hasken v. State*, 7 Tex. Cr. App. 107; *Galloway v. State*, 23 Tex. Cr. App. 398, 5 S. W. 246; *Ballew v. State*, 26 Tex. Cr. App. 483, 9 S. W. 765; *Brady v. State*, 43 Tex. Cr. App. 76, 63 S. W. 327; *Gray v. State* (Cr. App.), 86 S. W. 764. And see *Ex parte Coombs*, 38 Tex. Cr. App. 648, 44 S. W. 854, where it is held that this concurrent original jurisdiction of county and justices of the peace courts is not changed by the amended constitution of 1891. See, also, *Crutchfield v. State*, 1 Tex. Cr. App. 445, where it is held that since the Act of August 18, 1876, the jurisdiction of the county court is extended to include prosecutions for misdemeanors where the fine to be assessed is less than \$200, whereas prior to that act the fine had to exceed \$200 or the county court could not take jurisdiction.

Where Fine Exceeds \$100—Under Pas. Dig., Arts. 1187, 6280, 6286.—“After a full and thorough examination of the constitution and statutes regulating and defining the jurisdiction of the courts of justices of the peace, it was decided in this court, in the case of *Ex parte McGrew*, 40 Tex. 472, that they have not jurisdiction to try misdemeanors when the fine or penalty exceeds one hundred dollars. (See Const., art. 5, secs. 17 and 20; Pas. Dig., arts. 1187, 6280, and 6286.)” *State v. Newhouse*, 41 Tex. 185, 186.

Where Imprisonment Part of Punishment.—Under the constitution of 1876, justices of the peace have no jurisdiction of misdemeanors which are punishable by imprisonment. The power of justices to imprison for non-payment of fines and costs, or for enforcement of their legal authority in cases within their jurisdiction, is not impugned. *Tuttle v. State*, 1 Tex. Cr. App. 364. See, also, *Jacobs v. State*, 35 Tex. Cr. App. 410, 34 S. W. 110; *Ex parte Fagg*, 38 Tex. Cr. App. 573, 44 S. W. 294.

4. Offenses against United States and State or Territory.

See the title COUNTERFEITING, vol. 2, p. 148.

5. Offenses against State and Municipality.

See ante, “Municipal and Other Local Courts,” I, C, 2. See the title MUNICIPAL CORPORATIONS.

6. Locality of Offense.

See post, “Locality of Offense,” II, A, 3.

a. Offenses Outside of State.

See, generally, the title STATE AND REPUBLIC.

Propriety of Statutory Provision.—See, generally, the title CONSTITUTIONAL LAW, vol. 2, p. 9.

Cr. Code, art. 454, providing that persons guilty of certain enumerated offenses, whether committed within or without the state, may be punished

within the state, is a proper exercise of legislative authority, not infringing on the sovereignty of other states. *Hanks v. State*, 13 Tex. Cr. App. 289.

Bringing into State Goods Stolen in Another State.—See the title LARCENY.

Forgery in Another State of Title to Land in Texas.—See the title FORGERY, vol. 3, p. 301.

The forgery, in another state, of titles to lands in Texas, is a crime against the laws of Texas, punishable under Cr. Code, art. 454, providing that certain offenses not necessarily requiring personal presence shall be punishable in this state, whether committed within or without the state. *Hanks v. State*, 13 Tex. Cr. App. 289.

Independently of the act of 1876, the Texas courts have jurisdiction of an indictment for conspiracy to fabricate titles to lands in Texas, the conspiracy having been entered into in Texas and one or more overt acts there committed, although the forged instrument itself was executed in another state. *Ex parte Rogers*, 10 Tex. Cr. App. 655, 38 Am. Rep. 654.

One who aids his accomplice to fabricate in another state a deed purporting to convey land in Texas is amenable to prosecution in Texas. *Rogers v. State*, 11 Tex. App. 608.

b. Waters Bordering on or Forming Boundaries of State.

Inasmuch as the United States and Spain, by the treaty of 1819, adopted Red River as a coterminous boundary, without designating either of its banks, it must, under the general rule, be held that the channel or middle of the river was the line intended; whence it follows that the jurisdiction of Texas extends to that line at least. *Spears v. State*, 8 Tex. Cr. App. 467. See the title STATE AND REPUBLIC.

c. Territory Ceded to or under Exclusive Control of United States.

In a cession to the United States by the state of land for a military post,

a reservation of "concurrent jurisdiction" to serve state civil and criminal process in the ceded place does not defeat the exclusive jurisdiction of the United States over the ceded place, and the state courts have no jurisdiction of crimes committed therein. *Lasher v. State*, 30 Tex. Cr. App. 387, 17 S. W. 1064, 28 Am. St. Rep. 922.

Where the United States holds land by purchase, with the consent of the state, as a military post, the federal courts have exclusive jurisdiction of offenses committed thereon, including any part of the grant outside of the garrison wall and fence, though it is used as a street. *Baker v. State*, 83 S. W. 1122, 47 Tex. Cr. App. 482.

F. JURISDICTION OF THE PERSON.

See ante, "Nature and Scope of Criminal Jurisdiction," I, A. See, generally, the title EXTRADITION, vol. 3, p. 221.

"All the cases hold that the jurisdiction of the person is essential to the validity of a proceeding; otherwise, it is a nullity and void. This rule has been followed in Texas in its history. *Fleming v. Nall*, 1 Tex. 246; *Tulane v. McKee*, 10 Tex. 335; *Glass v. Smith*, 66 Tex. 548, 2 S. W. 195; *Mitchell v. Runkle*, 25 Tex. Supp. 132; *Horan v. Wahrenberger*, 9 Tex. 313, 315; *Thouvenin v. Rodrigues*, 24 Tex. 468; *Foster v. Andrews*, 4 Tex. Civ. App. 429, 23 S. W. 610." *Emery v. State*, 57 Tex. Cr. App. 423, 123 S. W. 133.

"Jurisdiction over the person, unlike jurisdiction over the subject matter, is a matter with respect to which only the person over whom the jurisdiction is being, or is sought to be, exercised, has, or can have, any concern. It can be denied or objected to by no one else. It may be waived by him, as he may waive any other right, except that of trial by jury in a felony case. If such person submits to the jurisdiction of the court over his person; if he makes no objection to being tried by the

court, he waives his privilege, whatever it may be; and as long as he does not assert such privilege, and challenge such jurisdiction, the court may proceed legally to try him, and in such case the proceedings had against him are not void, but, in any event, are merely voidable, and voidable only at the instance of the person entitled to the privilege, and can not be called in question by any other person." *Cordway v. State*, 25 Tex. Cr. App. 405, 8 S. W. 670, where defendant was prosecuted for perjury alleged to have been committed in a murder trial in which the court had no jurisdiction over the person of the alleged murderer.

G. MODE OF ACQUIRING JURISDICTION.

See, generally, the titles APPEAL, ERROR AND CERTIORARI, vol. 1, p. 87; APPEARANCE, vol. 1, p. 395; BAIL AND RECOGNIZANCE, vol. 1, p. 572; CRIMINAL LAW, vol. 2, p. 168; HABEAS CORPUS, vol. 3, p. 430; INDICTMENT AND INFORMATION, vol. 4, p. 239; JEOPARDY, ante, p. 1; PROCESS; TRIAL. See, also, post, "Change of Venue," II, B.

A justice of the peace, in the absence of an affidavit and warrant, and of an examination of the case, could not oust the district court of its jurisdiction to try the accused for an offense of higher grade than that to which he had pleaded guilty. *Warriner v. State*, 3 Tex. Cr. App. 104, 106.

A justice of the peace has no jurisdiction under the act of 1848 to try any offense on the voluntary appearance and confession of the offender. *Wilson v. State*, 16 Tex. 246.

Where a city recorder acts as a justice of the peace in prosecutions for violation of the Penal Code, he can only acquire jurisdiction by warrant issued on his own motion, if the offense is committed in his view, or on a sworn complaint (Code Cr. Proc. 1895, arts. 936-938); and a judgment of conviction entered without so acquiring jurisdiction

tion is void, and does not entitle officers to fees. *Harris County v. Stewart*, 91 Tex. 133, 41 S. W. 650.

"No man can, by express consent, confer jurisdiction upon the court to try him for crime." *Rainey v. State*, 19 Tex. Cr. App. 479, 486. See, also, *Og'le v. State*, 43 Tex. Cr. App. 219, 63 S. W. 1009. But see *Grooms v. State*, 40 Tex. Cr. App. 319, 50 S. W. 370.

Necessity for Return of Indictment.—In a prosecution for the theft of a mule in the district court of the county to which the mule was taken and was sold, the bare arrest of defendant in another county, from which he took the mule, and an examining trial there before a justice of the peace, who remanded him to the custody of the sheriff of the county of the trial, to await the action of its grand jury, did not defeat the jurisdiction of the court, since, to attach jurisdiction in such a case, it requires at least the return of an indictment. *Greathouse v. State*, 53 Tex. Cr. App. 218, 109 S. W. 165, citing *Pearce v. State*, 50 Tex. Cr. App. 507, 98 S. W. 861. See, generally, the title INDICTMENT AND INFORMATION, vol. 4, p. 239.

H. PRIORITY OF JURISDICTION.

Where two courts have concurrent jurisdiction, the one which takes the first step is entitled to go on to judgment. *Clepper v. State*, 4 Tex. 242; *Burdett v. State*, 9 Tex. 43; *Marrow v. State*, 37 Tex. Cr. App. 330, 39 S. W. 944; *Pearce v. State*, 50 Tex. Cr. App. 507, 98 S. W. 861. But see *Funderburk v. State* (Cr. App.), 64 S. W. 1059.

I. TRANSFER OF CAUSES.

See, generally, the title CRIMINAL LAW, vol. 2, p. 168.

1. From State to Federal Courts.

Under the civil rights bill a citizen of African descent defendant has the right to remove his case for final trial to the federal courts, upon showing that there exists in the county where he is indicted, and in the state, such a

prejudice against his race, and especially and particularly against himself, that he can not have justice done him. *Gaines v. State*, 39 Tex. 606.

2. Between State Courts in General.

From Justices of the Peace Courts to County Courts.—"The contention is made here that the justice of the peace had no right to transfer the case to the county court for trial where the affidavit charged an offense over which he had jurisdiction. In a proper case this proposition would be correct. See *Gill v. State*, 45 Tex. Cr. App. 256, 76 S. W. 575. If an affidavit is filed before the justice of the peace against a party charging an offense over which the justice of the peace has jurisdiction, it would be his duty to try the same, and he could not transfer the case to the county court, and an information there be filed upon the same. The justice of the peace, first having acquired jurisdiction, could not be lost or ousted, except in one of the ways provided by law. But where an affidavit is filed before the justice of the peace in which said affidavit there is embodied two offenses, one over which the justice of the peace has jurisdiction and the other over which the county court has jurisdiction, and the justice of the peace proceeds upon an examining trial, sitting as an examining court, and it is discovered that an offense was committed over which he did not have jurisdiction, or if it should develop before said justice of the peace that relator was guilty of one or the other offense or of both, then we are of opinion that the justice of the peace would be correct in transferring the case to the county court for final disposition; the county court having conferred upon it concurrent jurisdiction with the justice of the peace for trial of misdemeanors." *Ex parte Holcomb*, 60 Tex. Cr. App. 204, 131 S. W. 604, 605.

From District to County Courts.—The district court has no authority to transfer a felony case to the county

court; and therefore an order purporting to make such a transfer is a nullity, and does not divest the jurisdiction of the district court. No order of the county court to retransfer the case is requisite. *Fossett v. State*, 11 Tex. Cr. App. 40.

In counties where the county court exercises criminal jurisdiction, in order to confer jurisdiction upon the district court to try misdemeanors, the cause must be one in which the official misconduct is involved, and out of which the prosecution grows. In all other cases it becomes the duty of the district court to transfer the indictment to the county court. *Craig v. State*, 31 Tex. Cr. App. 29, 30, 19 S. W. 504. See, also, *Davis v. State*, 6 Tex. Cr. App. 133, 137.

Information for misdemeanor was filed in the district court of Titus county, November 2, 1892, at which time said court was vested with jurisdiction of all misdemeanor cases of which, under the general laws, the county courts had jurisdiction. Pending the trial, Act April 13, 1883, transferring to, and vesting in, the county court of Titus county, jurisdiction of all such misdemeanors, went into effect, and the information and all papers in the case were transferred to the county court, in which trial and conviction were subsequently had. Held that in the first instance, the information was properly filed in the district court then having original jurisdiction of the offense, and its subsequent transfer to the county court, after jurisdiction over such misdemeanors had been vested in it, was regular. *Hildreth v. State*, 19 Tex. Cr. App. 195.

"The constitution provides that 'grand juries impaneled in the district courts shall inquire into misdemeanor, and all indictments therefor returned into the district courts shall forthwith be certified to the county courts, or other inferior courts having jurisdiction to try them, for trial.' Const., § 17,

art. 5. The transfer of all such cases is required to be made at end of each term of the district court (Gen. Laws Fifteenth Legislature, 135)." *Cassaday v. State*, 4 Tex. Cr. App. 96, 98. See, also, *Racer v. State* (Cr. App.), 73 S. W. 968, citing *Williams v. State*, 37 Tex. Cr. App. 238, 39 S. W. 664.

"If the case is not properly before the county court, proper orders can be made in the district court, and the cause then transferred to the county court, in accordance with the provisions of the statutes." *Winn v. State*, 34 Tex. Cr. App. 37, 28 S. W. 807.

Under Code Cr. Proc., art. 436, providing that, where an indictment is for an offense cognizable by a justice of the peace, and it appears to the district court that the offense was committed in an incorporated city, it shall transfer the cause to a justice therein, if there is any, where it is not shown to the court that the offense was committed in an incorporated municipality, and that there was a justice therein, when a transfer is made to a county court, the latter acquires jurisdiction by the transfer; and that jurisdiction can not be impeached by a plea that the offense was committed in a city in which there was a justice of the peace when the cause was transferred by the district court. *Patterson v. State*, 12 Tex. Cr. App. 222. See the title JUDICIAL NOTICE, ante, p. 53.

From District Court of Fifty-Fourth Judicial District to District Court of Nineteenth Judicial District.—As the district courts of the Fifty-Fourth and Nineteenth judicial districts are district courts of McLennan county, and the act under which they were constituted authorizes the transfer of cases from one district to another, but provides that the grand jury can only be impaneled by the judge of the Fifty-Fourth district, the Nineteenth district court had jurisdiction to try a cause transferred to it from the Fifty-Fourth, though the indictment was found in the

latter. *Moore v. State*, 36 Tex. Cr. App. 88, 35 S. W. 668.

Upon Organization of New County.

—See post, "Organization of New County," II, A, 3, b.

Where the offense charged was committed in the town of Del Rio while it was within the limits of Kinney county, and after indictment, and before trial, Valverde county was organized out of Kinney county so to include Del Rio, and was fully organized when the trial was had, the district court of Kinney county was divested of jurisdiction over the case, and jurisdiction was vested in the district court of Valverde county, to which court the case should have been transferred. *Hernandez v. State*, 19 Tex. Cr. App. 408.

3. Grounds for Transfer between State Courts.

See ante, "Between State Courts in General," I, I, 2. See, generally, the title JUDGES, ante, p. 40.

There is no authority in law to transfer a cause from the county to the district court because of prejudice on the part of the county judge. *Chaffin v. State* (Cr. App.), 24 S. W. 411.

When, because of the disqualification of a county judge to try a misdemeanor case, it is transferred to the district court, the jurisdiction of the district court attaches as amply as if it was original and exclusive; and if the district judge also is disqualified in the case, a special district judge must be chosen or appointed as provided by law, and his election or appointment be made matter of record, and, in the event of an appeal, be brought up in the transcript. The special district judge is empowered to try or dispose of the cause in the district court, but has no authority to transfer it back to the county court for trial, even though a new county judge, not disqualified in the case has acceded to the bench of that court; and therefore such a re-transfer to the county court can not invest it with jurisdiction over the cause. *Snow v. State*, 11 Tex. Cr. App. 99.

As the statute making the violation of the local option law a felony does not apply in counties which had previously adopted local option, a prosecution in such county for violation of the local option law, commenced in the district court, should be transferred to the county court. *Crawford v. State* (Cr. App.), 128 S. W. 1122. See the title INTOXICATING LIQUORS, vol. 4, p. 633.

4. Proceedings for Transfer between State Courts.

See post, "Proceedings after Transfer between State Courts," I, I, 5.

a. Order.

(1) Necessity for.

"Without the order of transfer having been entered by the district court, the clerk has no authority (under art. 473, Code Crim. Proc. of 1895) to transfer indictments from the district courts to the inferior courts. The law has not vested him with such authority, and, without the order of such transfer by the district court, the inferior court can acquire no jurisdiction, because the indictments could not be filed therein." *Austin v. State*, 38 Tex. Cr. App. 8, 40 S. W. 724, 725. See, also, *Donaldson v. State*, 15 Tex. Cr. App. 25, 30; *Harris v. State*, 57 Tex. Cr. App. 84, 121 S. W. 1116.

(2) Time for Making.

It is immaterial to the validity of an order transferring an indictment from the district court to the county court whether the district court had adjourned or not at the time the order was made, when the record shows that the indictment was returned into open court by the grand jury. *Williams v. State*, 39 S. W. 664, 37 Tex. Cr. App. 238.

Where the original order transferring a criminal case from the district court to the county court shows the case transferred before the beginning of the term of the district court, but the record contains another order showing the transfer to have been duly

made as to the matter of time, the defect is cured. *Palmer v. State* (Cr. App.), 70 S. W. 206, citing *Hasley v. State*, 14 Tex. Cr. App. 217; *Hawkins v. State*, 17 Tex. Cr. App. 593.

In the absence of a showing to the contrary, it will be presumed that at the time a cause was transferred from the district court to the county court the former court was in session. *Cantwell v. State*, 47 Tex. Cr. App. 521, 85 S. W. 18.

(3) Sufficiency of.

Identification of Cause Transferred.

—“If the order of transfer contained merely the file number of the case, this was a sufficient identification of the case transferred. *Haynes v. State* (Cr. App.), 83 S. W. 16.” *Cantwell v. State*, 47 Tex. Cr. App. 511, 85 S. W. 19. See, also, *Koenig v. State*, 33 Tex. Cr. App. 367, 26 S. W. 835; *Tellison v. State*, 35 Tex. Cr. App. 388, 33 S. W. 1082; *Forbes v. State*, 35 Tex. Cr. App. 24, 29 S. W. 784; *Malloy v. State*, 35 Tex. Cr. App. 389, 33 S. W. 1082; *Howard v. State*, 44 Tex. Cr. App. 39, 68 S. W. 274; *Mitchell v. State*, 46 Tex. Cr. App. 427, 80 S. W. 629; *Dittfurth v. State*, 46 Tex. Cr. App. 424, 80 S. W. 628; *Bell v. State* (Cr. App.), 85 S. W. 805.

Where an order was made in the district court transferring to the county court indictments numbered 180 to 193, and the names of the defendants were not given, only the file numbers being entered, such an order does not show that indictment numbered 214 in the county court was one of those transferred from the district court, and hence the county court obtained no jurisdiction. *Hyatt v. State*, 61 Tex. Cr. App. 421, 135 S. W. 142, citing *Austin v. State*, 38 Tex. Cr. App. 8, 40 S. W. 724.

Article 434, Crim. Proc., 1895, provides that, when an indictment is returned into the district court, it shall be entered upon the minutes of the court, noting briefly the style of the

criminal action and file number of the indictment, but omitting the name of the defendant, unless he is in custody or under bond. And it has been held that in making an order of transfer it is sufficient to give a copy of the order from the district court. Hence an order of transfer, under Code of Crim. Proc. 1895, art. 471, to the county court on the filing in the district court of an indictment against H. for violating the local option law, sufficiently identifies the case to give the county court jurisdiction, where the caption gives the file number of the case, though it also reads, “*State v. Unlawfully selling whiskey*” and the caption of the accompanying cost bill, which gives the file number, reads, “*State v. M.*,” as the words “Unlawfully selling whiskey” and “M.” may be rejected as surplusage. *Haynes v. State* (Cr. App.), 83 S. W. 16. See, also, *Massie v. State*, 52 Tex. Cr. App. 548, 107 S. W. 846.

Code Cr. Proc. 1895, art. 473, gives a form for an order transferring a case to the county court, which form has a space for a new number for the case in the latter court. The order of a district court transferring a number of cases was that a number of cases “are hereby transferred to the county court. *The State of Texas v. —*, No. 1,806, selling liquor to a minor; and 27 others.” Held, that in the county court, on trial of a prosecution for selling liquor to a minor, which case was numbered 1,069, the transfer of the case was sufficiently shown to discharge the burden that was on the state to show the transfer. *Dittfurth v. State*, 80 S. W. 628, 46 Tex. Cr. App. 424.

Designation of Court to Which Transferred.—

Under Code Cr. Proc. 1895, art. 473, requiring the clerk of the district court to deliver the indictment in all cases transferred, together with the papers relating to the case, to the proper court, as directed in the order of transfer, etc., an order trans-

ferring an indictment from the district court to the county court, which recited that the district court had no jurisdiction of the offense, which was a misdemeanor, and that the county court had jurisdiction, and that the cases should be transferred "to said county of said county," was sufficient, though it omitted the word "court" after the word "county" in the quoted phrase. *Ellis v. State*, 59 Tex. Cr. App. 626, 130 S. W. 170.

A plea to the jurisdiction of the county court on the ground that, in the order transferring the cause from the district court, the word "county" was omitted before the word "court," is properly overruled where it appears that only the county court had jurisdiction of the cause. *Johnson v. State*, 28 Tex. Cr. App. 562, 13 S. W. 1005.

Where the order transferring a criminal case from the district court to the county court sufficiently shows that it was transferred to the proper county court, the order is not invalid because it fails to name such county court. *Dittfurth v. State*, 80 S. W. 628, 46 Tex. Cr. App. 424.

Necessity for Particular Order in Each Case.—"As was said in the case of *Dittfurth v. State*, 46 Tex. Cr. App. 424, 80 S. W. 628: 'It has been held that, in the transfer of cases, a general order, giving the numbers in the district court and character of offense, is sufficient, and that a particular order is not necessary in each case.' *Forbes v. State*, 35 Tex. Cr. App. 24, 29 S. W. 784; *Tellison v. State*, 35 Tex. Cr. App. 388, 33 S. W. 1082; *Malloy v. State*, 35 Tex. Cr. App. 389, 33 S. W. 1082." *Ellis v. State*, 59 Tex. Cr. App. 626, 130 S. W. 170.

b. Transcript.

(1) In General.

Substantial Compliance with Statute.—"It has time and again been held by this court that a substantial compliance with the statute directing a transfer from the district to the county court is

all that is necessary. Code Crim. Proc., art. 471; *Lynn v. State*, 28 Tex. Cr. App. 515, 13 S. W. 867; *Brannon v. State*, 23 Tex. Cr. App. 428, 5 S. W. 132; and many other cases unnecessary to cite." *Richards v. State* (Cr. App.), 140 S. W. 459, 460. See, also, *Gaston v. State*, 11 Tex. Cr. App. 143, 145.

Necessity for Seal.—Under the Code requiring each district judge at the end of each term of his court to make an order transferring to inferior courts such criminal cases as pertain to their jurisdiction specifying the cases and the courts to which they are transferred and requiring the district clerk to deliver to such courts the transferred indictments and all the papers relating to the cases and to accompany each case with a certified copy of all the proceedings taken therein in the district court, the certified copy must be authenticated over the seal of the district court. *Walker v. State*, 7 Tex. Cr. App. 52. See, also, *Johnson v. State*, 28 Tex. Cr. App. 562, 13 S. W. 1005; *Cobb v. State*, 51 Tex. Cr. App. 464, 102 S. W. 1151.

Presumption as to Authority of Person Signing Certificate.—Where, in the body of an order transferring a criminal case from the district court to the county court, A. appeared as clerk of the district court, but the certificate, as given under the hand and seal of the court, was by S., the order was sufficient; the statute not requiring the clerk's name to appear in the body of the order, but merely that he shall certify, and it being presumable that the certificate was made by the proper officer. *Mitchell v. State*, 80 S. W. 629, 46 Tex. Cr. App. 427.

Effect of Filing of New Certificate on Question of Sufficiency of Former Certificate.—On appeal, the mere fact that a motion to dismiss the case on account of an improper certificate of transfer from the district to the county court resulted in the filing of another certificate of transfer by allowance of

the court, did not establish that the former certificate was insufficient. *Cantwell v. State*, 85 S. W. 19, 47 Tex. Cr. App. 511.

(2) Contents.

Substantial Compliance with Statute.

—See ante, "In General," I, I, 4, b, (1).

Identification of Cause.—"The record shows that the order transferring the case designated the same by number only. The transcript shows the name of the defendant in addition to the number. It is sufficient for the transcript to show the number of the cause. *Haynes v. State* (Cr. App.), 83 S. W. 16. Nor does the mere fact that the transcript is fuller than the order constitute a variance." *Cantwell v. State*, 47 Tex. Cr. App. 511, 85 S. W. 19. See, also, *Haynes v. State* (Cr. App.), 83 S. W. 16. See, also, *Lynn v. State*, 28 Tex. Cr. App. 515, 13 S. W. 867.

Upon the transfer of certain indictments from the district court to the county court, the clerk certified that all of them were signed by the foreman of the grand jury. The indictment in question was not so signed. Held, that the mistake of the clerk did not invalidate the indictment, where the transcript was in other respects sufficient to identify the indictment, as the clerk was not required to certify as to the signature. *Robinson v. State*, 24 Tex. Cr. App. 4, 5 S. W. 509.

Description of Offense.—Code Cr. Proc., art. 471, providing for the transfer of indictments to such inferior courts as may have jurisdiction to try the offenses therein charged, not requiring the transcript to state the name and nature of the offense charged, a statement in a transcript, otherwise sufficient, that defendant was charged with "adultery and fornication," instead of "adultery" alone, as charged in the indictment, did not vitiate the indictment and deprive the court to which it was certified of jurisdiction. *Roller v. State*, 66 S. W. 777, 43 Tex. Cr. App. 433. See, in accord, *Malloy v.*

State, 35 Tex. Cr. App. 389, 33 S. W. 1082; *Howard v. State*, 44 Tex. Cr. App. 39, 68 S. W. 274; *Koenig v. State*, 33 Tex. Cr. App. 367, 26 S. W. 835; *Reifert v. State* (Cr. App.), 26 S. W. 839. But see *Donaldson v. State*, 15 Tex. Cr. App. 25, 30; *Cobb v. State*, 51 Tex. Cr. App. 464, 102 S. W. 1151.

Copy of All Proceedings Taken in District Court.

—In *McDonald v. State*, 7 Tex. Cr. App. 113, 115, it is said: "It will be noticed that the clerk does not certify that the entries and orders which he had copied were copies 'of all the proceedings taken therein in the district court.' This he should have done, to have brought his certificate within the requirements of the statute. A motion to quash the indictment was made in the county court, the first ground of which was, 'because said indictment has never been transferred from the district court of Johnson county to this, the county court of said county, as the law directs and requires; for that no certificate of the clerk of the said district court, showing the action of the district court in regard to said indictment, has ever been filed with the papers in this cause, as the law requires.' This motion, coming as it did in limine, when the defect in the certificate might have been amended or a new certificate given by the district clerk, should have prevailed according to previous decisions in *Walker v. State*, 7 Tex. Cr. App. 52, and *Denton v. State*, 3 Tex. Cr. App. 635; and the court erred, it appears, in overruling the motion so far as this particular ground was concerned. But quære, should not the point have been made by plea to the jurisdiction, instead of by motion to quash?" See, also, *Brumley v. State*, 11 Tex. Cr. App. 114, 115.

Under Code Cr. Proc., arts. 435, 437, providing that the district judge at each term of the court shall transfer to the inferior courts such criminal cases as pertain to their jurisdiction, and the district clerk shall deliver to

such courts the transferred indictments and all papers relating to the case, and shall accompany each case with a certified copy of all the proceedings therein in the district court, such certified copy of the clerk must include the entry on his minutes of the presentment of the indictment by the grand jury and all other records pertaining to the case. *Walker v. State*, 7 Tex. Cr. App. 52.

"The statute provides that in the transfer of indictments for misdemeanor from district courts to inferior courts having jurisdiction of the offenses charged, the clerk of the district court shall deliver the indictment, and all the papers relating to each case, to the proper court or justice, as directed in the order of transfer, and shall accompany each case with a certified copy of all the proceedings taken in the district court in regard to the same. Laws 1876, chap. 91. The record before us discloses a regular presentment of the indictment in the district court, the order of transfer, and a certificate of the clerk 'that the above and foregoing is a true copy of the minutes of said court as regards said cause.' It has been held that no action could be taken by the district court in this class of cases, save to receive the indictment and to enter the proper order of transfer. *Cassaday v. State*, 4 Tex. Cr. App. 96. Under the law, these are noted upon the minutes; and we must presume, in the absence of a showing to the contrary, that a true copy of the minutes shows all the proceedings taken in the district court in regard to the case." *Coker v. State*, 7 Tex. Cr. App. 83, 85.

Presentment of Indictment.—"The transcript of transfer to the county court fails to show a presentment of the indictment in the district court by the grand jury. This is made the ground of dismissal in the county court, and was overruled. The point was properly presented, and should

have been sustained. We think it unnecessary to discuss the question, but refer to the statutory provisions relating to the question, and the decisions heretofore rendered. *Willson's Crim. St.*, §§ 1932, 1943, 2007, 2009; *Walker v. State*, 7 Tex. Cr. App. 52; *Brumley v. State*, 11 Tex. Cr. App. 114; *Donaldson v. State*, 15 Tex. Cr. App. 25; *Mitten v. State*, 24 Tex. Cr. App. 346, 6 S. W. 196." *Estes v. State*, 33 Tex. Cr. App. 560, 28 S. W. 469.

Order of Transfer.—"Because the transcript made out by the district clerk and filed in the county court does not contain an order of transfer from the district court to said county court, the plea to the jurisdiction should have been sustained." *Austin v. State*, 38 Tex. Cr. App. 8, 40 S. W. 724. See, also, *Johnson v. State* (Cr. App.), 79 S. W. 27, 28. But see *Cummings v. State*, 37 Tex. Cr. App. 436, 35 S. W. 979.

Bill of Costs.—The transcript of a transfer of a case from the district to an inferior court should include a bill of costs already accrued including the cost of the transcript. *Austin v. State*, 38 Tex. Cr. App. 8, 9, 40 S. W. 724.

Date of Adjournment of District Court.—Where a criminal case was transferred from the district to the county court, it was not necessary that the transcript should show the date on which the district court adjourned, it being presumed that the transfer was legally made before adjournment. *Cantwell v. State*, 85 S. W. 18, 47 Tex. Cr. App. 521; *Adams v. State*, 48 Tex. Cr. App. 7, 85 S. W. 1079.

Where there is a variance between the name of the defendant as given in the indictment and in the certificate of the clerk to the order of transfer, a motion made, in limine, to quash the indictment, or, more properly, to the jurisdiction of the court, should be sustained upon the failure of the state to procure a proper certificate of transfer. *Bonner v. State*, 38 Tex. Cr. App. 599, 44 S. W. 172, citing *McDonald v.*

State, 7 Tex. Cr. App. 113; *Brumley v. State*, 11 Tex. Cr. App. 114; *Mitten v. State*, 24 Tex. Cr. App. 346, 6 S. W. 196.

5. Proceedings after Transfer between State Courts.

See ante, "Proceedings for Transfer between State Courts," I, I, 4.

Filing of Indictment.—Code Cr. Proc., art. 438, providing that cases transferred from the district court shall be entered on the docket of the court to which they are transferred, does not require the indictment in a case transferred to the county court to be actually filed therein. *Short v. State* (Cr. App.), 29 S. W. 1073.

After trial of a case transferred from the district to the county court without objection that the indictment was not filed in the latter court, that objection can not be urged on appeal. *Short v. State* (Cr. App.), 29 S. W. 1073.

Impeachment of Jurisdiction — In General.—"When the district judge has transferred the cause to the county court, and that court has jurisdiction to try for the offense named, the jurisdiction of that court to try the particular cause can not, in any way, be impeached. *Patterson v. State*, 12 Tex. Cr. App. 222; *Temple v. State*, 15 Tex. Cr. App. 304." *Koenig v. State*, 33 Tex. Cr. App. 367, 26 S. W. 835. See, also, *Reiffert v. State* (Cr. App.), 26 S. W. 839.

"These particular statutes were passed upon by us in *Philpott v. State* (Cr. App.), 62 S. W. 921; and we held that the discretion was lodged in the district judge to transfer the cases to the territory authorized under the statute, and his discretion was not a matter that could be impeached or questioned after he had acted upon the same." *Ex parte Brown*, 43 Tex. Cr. App. 45, 64 S. W. 249.

Manner of Objecting to Transcript.—An objection to the district clerk's certificate of transfer can not, it seems, be made available by motion to set

aside the indictment. *Coker v. State*, 7 Tex. Cr. App. 83.

"A motion in arrest of judgment can not be used, in our practice, to question the validity of a transfer of an indictment from the district court to some inferior court having jurisdiction of the offense charged. Such motion can be based upon no other ground than such as would be good upon exception to an indictment or information for any substantial defect therein. Rev. Code Cr. Proc., art. 787. These grounds of exception are set forth plainly in the statute, and do not include the ground set up in the motion in this case, to wit, the invalidity of the order, or total want of an order, transferring the case from the district court to the county court. Rev. Code Cr. Proc., art. 528." *Friedlander v. State*, 7 Tex. Cr. App. 204, 205.

Time for Objection to Transcript.—See post, "Waiver of Objections," I, M.

Amendability of Certificate of Transfer.—In *Hawkins v. State*, 17 Tex. Cr. App. 593, the question arose as to whether, where a prosecution in the county court is dismissed because of an insufficient certificate to the proceeding in the district court from whence the case was transferred, the state's attorney may file a complete certificate, and proceed. The court said: "A question in every respect identical was made in *Hasley v. State*, 14 Tex. Cr. App. 217, and it was there said: 'While this proceeding as presented by the record was irregular, still we do not think it was such error as demands a reversal of the judgment. This court has held that where the certificate is defective it may be amended or a new one obtained (*McDonald v. State*, 7 Tex. Cr. App. 113), and it was proper for the county attorney in this cause to have filed a correct certificate; but this should have been done in reply to the motion to dismiss. But we do not think that the dismissal of the cause barred its further prosecution.

When a correct certificate was filed, it renewed the case and gave jurisdiction of the same to the court in the same manner and the same extent as if there had been no previous action of the court therein.'” See, also, *Malloy v. State*, 35 Tex. Cr. App. 389, 33 S. W. 1082; *Adams v. State*, 48 Tex. Cr. App. 7, 85 S. W. 1079; *Mitten v. State*, 24 Tex. Cr. App. 346, 6 S. W. 196, citing *Donaldson v. State*, 15 Tex. Cr. App. 25, 26; *Brumley v. State*, 11 Tex. Cr. App. 114. And see *Scrivener v. State*, 44 Tex. Cr. App. 232, 70 S. W. 214; *Bonner v. State*, 38 Tex. Cr. App. 599, 44 S. W. 172; *Cummings v. State*, 37 Tex. Cr. App. 436, 35 S. W. 979.

It is not error to permit the certificate transferring a cause from a district to a county court to be amended by affixing thereto the impress of the seal of the district court. *Johnson v. State*, 28 Tex. Cr. App. 562, 13 S. W. 1005, citing *Hasley v. State*, 14 Tex. Cr. App. 217; *McDonald v. State*, 7 Tex. Cr. App. 113. But see *Cobb v. State*, 51 Tex. Cr. App. 464, 102 S. W. 1151.

Burden of Proof of Transfer.—Where a criminal case returned to the district court was tried in the county court, the burden was on the state to show the transfer of the case. *Dittfurth v. State*, 46 Tex. Cr. App. 424, 80 S. W. 628.

J. LOSS OR DIVESTITURE OF JURISDICTION.

See ante, “Constitutional and Statutory Provisions,” I, B. See the title **COURTS**, vol. 2, p. 150.

Felony Alleged, Misdemeanor Proved.—See ante, “Nature or Grade of Offense,” I, E, 2.

K. JURISDICTION TO BE SHOWN BY RECORD.

See, generally, the titles **APPEAL**, **ERROR AND CERTIORARI**, vol. 1, p. 87; **JUDGES**, ante, p. 40.

L. PRESUMPTIONS AS TO JURISDICTION.

See, generally, the title **PRESUMPTIONS AND BURDEN OF PROOF**.

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“Every presumption is in favor of the jurisdiction of the county court, and in favor of its judgments and the validity thereof, and, unless it had no jurisdiction of the case, its judgments are valid, or, to say the least of it, are not void.” Ex parte *Cox*, 53 Tex. Cr. App. 240, 109 S. W. 369. See, also, *Bumpus v. Fisher*, 21 Tex. 561. But see *Harris County v. Stewart*, 91 Tex. 133, 41 S. W. 650, where it is said that the presumption of the existence of facts necessary to give jurisdiction, obtaining in civil cases, does not extend to criminal cases.

M. WAIVER OF OBJECTIONS.

See ante, “Jurisdiction of the Person,” I, F. See, generally, the title **EXCEPTIONS AND OBJECTIONS**, vol. 2, p. 743.

“Appellant's first complaint in his motion for new trial is that the court had no jurisdiction to try the case, because of a failure to make a proper and legal transfer of the indictment from the district to the county court. This objection can not be urged for the first time in motion for new trial, but should be made by plea to the jurisdiction. This exact question was decided by us in *Bonner v. State*, 38 Tex. Cr. App. 599, 44 S. W. 172. We there held that where defendant has pleaded to the indictment, without motion to quash or plea to the jurisdiction, it is too late to interpose such objection by motion in arrest of judgment, and clearly it would be too late on motion for new trial.” *Abbott v. State*, 42 Tex. Cr. App. 8, 57 S. W. 97. See, also, *Webb v. State* (Cr. App.), 58 S. W. 82, 83; *Palmer v. State* (Cr. App.), 70 S. W. 206.

An objection in the county court that the case had not been properly transferred from the district court is too late after plea and mistrial. *Thompson v. State*, 2 Tex. Cr. App. 82.

An objection to transfer of a criminal case from the district to an inferior court comes too late after the

verdict. *Friedlander v. State*, 7 Tex. Cr. App. 204, 205.

"A mistake in the date of filing the indictment must be taken advantage of before or at the trial and it is not available on motion in arrest of judgment. *Terrell v. State*, 41 Tex. 463." *Scrivener v. State*, 44 Tex. Cr. App. 232, 70 S. W. 214. See, also, *Banks v. State*, 52 Tex. Cr. App. 167, 105 S. W. 821.

"Another bill states that, after the cause had been tried and judgment rendered, and after motion in arrest of judgment had been filed and presented, and after motion for new trial had been presented, and before being passed upon, the county attorney introduced evidence to show that the date of the filing of the indictment in the county court, as shown by the file mark, was wrong, and the indictment, as shown by the books of the county clerk, was filed at a date one year later than the file mark showed. Appellant contends that the court further erred in permitting the clerk to testify that the file mark was a clerical error, caused by error in the stamp file mark, and that the court erred in permitting the county attorney to file a new transcript from the district court. * * * These matters all come too late after the trial. *Thompson v. State*, 2 Tex. Cr. App. 82; *Friedlander v. State*, 7 Tex. Cr. App. 204; *Bonner v. State*, 38 Tex. Cr. App. 599, 44 S. W. 172." *Scrivener v. State*, 44 Tex. Cr. App. 232, 70 S. W. 214.

II. Venue.

A. PLACE OF BRINGING PROSECUTION.

As to the necessity that the record on appeal show that the venue was proved as alleged, see the title APPEAL, ERROR AND CERTIORARI, vol. 1, p. 87. As to the proof of venue in general, see the title EVIDENCE, vol. 2, p. 324.

1. Nature and Necessity of Venue in Prosecution.

"The right to be tried in any particu-

lar court or county is neither an absolute nor a vested right. *March v. State*, 44 Tex. 64, 76." *Ham v. State*, 4 Tex. Cr. App. 645, 671.

2. Constitutional and Statutory Provisions.

See ante, "Constitutional and Statutory Provisions," I. B. See, generally, the titles CONSTITUTIONAL LAW, vol. 2, p. 9; STATUTES.

Constitutionality of Act Authorizing Prosecution in County Other than One of Alleged Crime.—See post, "Locality of Offense," II, A, 3; "Offenses Committed Partly in One County and Partly in Another," II, A, 6.

"Appellant urges the unconstitutionality of the act authorizing indictments in other counties than the one of the alleged crime as ground of his motion to quash the indictment. We deem it unnecessary to enter into a discussion of this question. The questions involved have been decided against appellant in *Mischer v. State*, 41 Tex. Cr. App. 212, 53 S. W. 627, and that case has been followed in *Griffey v. State* (Cr. App.), 56 S. W. 52, and *Dies v. State*, 56 Tex. Cr. App. 32, 117 S. W. 979. We therefore hold the motion to quash was not well taken." *Eckermann v. State*, 57 Tex. Cr. App. 287, 123 S. W. 424. See, also, *Bartlett v. State* (Cr. App.), 53 S. W. 629.

The act of June 18, 1897 (Acts Sp. Sess., p. 16), providing that "prosecutions for rape may be commenced and carried on in the county in which the offense is committed, or in any county of the judicial district, the judge of which resides nearest the county seat of the county in which the offense is committed," does not violate the sixth amendment to the federal constitution, providing in all criminal prosecutions the accused shall enjoy the right to a speedy trial by an impartial jury of the state and district wherein the crime shall have been committed. *Mischer v. State*, 41 Tex. Cr. App. 212, 96 Am. St. Rep. 780, 53 S. W. 627; *Bartlett v. State* (Cr. App.), 53 S. W. 629; *Dies v.*

State, 56 Tex. Cr. App. 32, 117 S. W. 979.

Construction of Gen. Laws (Sp. Sess.) 25th Leg., p. 40.—Gen. Laws Sp. Sess. 25th Leg., p. 40, § 1, providing for trial in another county of persons accused of killing by "mob violence," means those taking a prisoner from an officer, and killing him, and not persons conspiring to kill another through malice. *Alexander v. State*, 50 S. W. 716, 40 Tex. Cr. App. 395, denying rehearing 49 S. W. 229. See *Augustine v. State*, 41 Tex. Cr. App. 59, 52 S. W. 77, holding that this act, while not unconstitutional as embracing more than one subject, is void for uncertainty in defining mob violence. See, generally, the titles CONSTITUTIONAL LAW, vol. 2, p. 9; STATUTES.

The act of April 4, 1889 (Gen. Laws, 21st Leg., p. 37), entitled "An act to create art. 216a, 216b" of Code of Criminal Procedure of Texas, title 4, chapter 2, merely added two articles to chapter 2, which prescribes the venue of offenses, and did not operate as a repeal thereof. *Green v. State* (Cr. App.), 12 S. W. 872.

3. Locality of Offense.

a. In General.

The prosecution should generally be in the county where the offense is committed. *Holden v. State*, 1 Tex. Cr. App. 225, 239; *Gage v. State*, 22 Tex. Cr. App. 123, 2 S. W. 638; *Funderburge v. State*, 23 Tex. Cr. App. 392, 395, 5 S. W. 244; *Knowles v. State*, 27 Tex. Cr. App. 503, 507, 11 S. W. 522; *West v. State*, 28 Tex. Cr. App. 1, 11 S. W. 635; *Sims v. State*, 28 Tex. Cr. App. 447, 13 S. W. 653; *Manning v. State*, 43 Tex. Cr. App. 302, 65 S. W. 920; *Williams v. State*, 30 Tex. 404, 406; *Green v. State* (Cr. App.), 12 S. W. 872; *McKinney v. State* (Cr. App.), 68 S. W. 176.

In a prosecution for compounding a misdemeanor, it appeared that defendant went into another county and induced a party to go to the county

where the misdemeanor was committed and where the party guilty thereof resided, and secure from the latter certain money and stock to be delivered to defendant as compensation for his promise not to prosecute, and that the money and stock were there delivered to defendant. Held, that the offense was committed in the latter county. *Powell v. State*, 51 Tex. Cr. App. 342, 101 S. W. 1006.

Under Pen. Code 1895, art. 861, the place of theft of horses which one hires on a false pretext as to where he is going to drive them, and with intent to appropriate them to his own use, is where he obtains possession of them, and not where he attempts to sell them; such attempt being but evidence of his original intent and immediate appropriation. *Lewis v. State*, 87 S. W. 831, 48 Tex. Cr. App. 309.

b. Organization of New County.

See ante, "Between State Courts in General," I, I, 2.

"Mr. Bishop says: 'By the common law crimes are local, to be prosecuted in the county of their commission; only in such county can the grand jury inquire of them. Even where a county is divided, a criminal act done before the division is to be prosecuted in the particular new county in which is the place of the offense. The offense is against the state; the trial in the new county.' (7 Bish. Crim. Proc., § 49. See, also, *Nelson v. State*, 1 Tex. Cr. App. 41; *Weller v. State*, 16 Tex. Cr. App. 200, 206.)" *Hernandez v. State*, 19 Tex. Cr. App. 408. See, also, *Republic v. Smith*, Dallam 407. But see *Woodring v. State*, 33 Tex. Cr. App. 26, 24 S. W. 293.

c. Counties Attached to Others for Judicial Purposes.

In General.—Under a statute attaching an unorganized county to an organized county for "judicial purposes," the grand jury of the organized county has jurisdiction to indict, and its courts can try and punish for offenses com-

mitted in the unorganized county. *First Nat. Bank v. McElroy*, 51 Tex. Civ. App. 284, 112 S. W. 801.

Attached to Different Counties at Time of Commission of Offense and Institution of Prosecution.—S. county, to which G. county is attached at the time a person refuses to render to the assessor a list of his taxable property situated in G. county, in violation of Pen. Code, art. 113, has jurisdiction of a prosecution therefor, though before it is instituted G. county is attached to B. county. *Galbraith v. State*, 33 Tex. Cr. App. 331, 26 S. W. 502.

Indictment was presented in the district court of Kinney county September 19, 1882, when Kinney county had jurisdiction over Crockett county, but it charged that the offense was committed in Crockett county on March 30, 1882, at which time Crockett county was under the jurisdiction of Bexar county. It does not appear, however, that Bexar county ever exercised or attempted to exercise jurisdiction over the case. Under the well-settled rule that when the peace where an offense is committed is, after the commission of the offense, created into a new county, such new county has jurisdiction over the offense, it is held that Crockett county, having been attached to Kinney county for judicial purposes, the indictment, laying the venue of the offense in the unorganized county of Crockett, was properly presented in Kinney county, which county had jurisdiction to try and determine the case. *Weller v. State*, 16 Tex. Cr. App. 200.

This offense was committed in the unorganized county of Z., when that county was by law attached to M. county for judicial purposes. The indictment was properly found in M. county. Subsequently Z. county was attached to F. county for judicial purposes, and the district court of M. county transferred the indictment to the said F. county. Before the case

came on for trial in F. county, Z. county was partially organized, but its judicial autonomy was not completed, the legislature having failed to provide times for holding the terms of the district court, and the district judge, having failed to fix the same under the authority delegated to him by the act of April 25, 1882. When the case was called in F. county the defendant interposed his plea to the jurisdiction of the district court of that county, and insisted that the case should be transferred to Z. county. Held, that the plea was property overruled. *Barr v. State*, 16 Tex. Cr. App. 333.

By the act of January 22, 1875, Crockett county was created out of a portion of Bexar county. By the act of February 10, 1875, it was attached to Kinney county for judicial purposes. No further legislation was had concerning Crockett county until the adoption of the Revised Statutes, when it was embraced in the twentieth judicial district, but was not attached to any county for judicial purposes. By the act of April 28, 1882, it was again attached to Kinney county for judicial purposes, and again so attached by the act of April 9, 1883. It appears never to have been attached, for judicial purposes, to any county other than Kinney, and never to have been organized. Section 3 of the final title of the Revised Statutes provides as follows: "All civil statutes of a general nature, in force when the Revised Statutes take effect, and which are not included herein, or which are not hereby expressly continued in force, are hereby repealed." Held, that the effect of the section quoted was to repeal the act of February 10, 1875, which was a statute of a general nature. Held, further, that in divesting Kinney county of jurisdiction over Crockett county, the effect of the repealing statute was to restore the jurisdiction of Bexar county where it remained until the passage of the act of April 28, 1882,

when it was again conferred upon Kinney. *Weller v. State*, 16 Tex. Cr. App. 200.

An act of 1866 provided that Wilbarger county should, for judicial purposes, be attached to the county of Clay when the latter should be organized. In pursuance of requirements of the constitution of 1869, two acts were passed in 1870 creating judicial districts throughout the state, and prescribing the terms of the district courts therein, whereby the then unorganized counties of Clay and Wilbarger were attached for judicial purposes to the county of Montague. Clay county was organized in 1873, and subsequently the appellant was there indicted and tried for murder committed in Wilbarger county in 1874. Held, that the two acts of 1870 superseded and repealed the act of 1866, with its provisions for attaching Wilbarger county to Clay when organized; and, consequently, the district court of Clay county had no jurisdiction of the offense charged against appellant. *Holden v. State*, 1 Tex. Cr. App. 225.

4. Principals and Accessories.

See, generally, the title ACCOMPLICES, ACCESSORIES, AIDERS AND ABETTORS, vol. 1, p. 8.

Pen. Code, art. 79, defines an accomplice as one who is not present at the commission of an offense, but who, before the act is done, advises, commands, or encourages another to commit the offense. Code Cr. Proc., art. 216, provides that when property is stolen in one county, and afterwards carried by the offender into another, he may be prosecuted in the county where it was taken, or in any county through or into which he may have carried it. Held that, under these statutes, one can not be held liable to the charge of being an accomplice in the county where the stolen property was carried, unless it be proved that he "advised, aided, and encouraged" the principal in that county. *West v.*

State, 28 Tex. Cr. App. 1, 11 S. W. 635.

The district court of a county in which a murder is committed has jurisdiction to try an accomplice, though all the acts constituting defendant such accomplice were committed in another county. *Carlisle v. State*, 31 Tex. Cr. App. 537, 21 S. W. 358.

Where, on trial of an accessory to murder after the fact, the proof shows that defendant acted through an innocent agent in having the convicted principal released on a forged pardon from the penitentiary located in C. county, the venue was properly laid in C. county. *Dent v. State*, 65 S. W. 627, 43 Tex. Cr. App. 126.

One assisting in an embezzlement placed the property on the cars in one county to be shipped through another county to their destination, which he had been instrumental in selecting. A codefendant accompanied the property. Held, that the venue for the trial of the one remaining could be laid in the county through which the property was shipped. *Burk v. State*, 50 Tex. Cr. App. 185, 95 S. W. 1064.

5. Offenses Committed on or Near Boundary between Counties.

See, generally, the titles EVIDENCE, vol. 2, p. 324; INDICTMENT AND INFORMATION, vol. 4, p. 239.

Under the Code of Criminal Procedure, where an offense is committed within four hundred yards of the boundary line of two counties, venue may be laid in either county. *Cox v. State*, 41 Tex. 1, 10; *Willis v. State*, 10 Tex. Cr. App. 493, 495; *Mendiola v. State*, 18 Tex. Cr. App. 462, 466; *Abrigo v. State*, 29 Tex. Cr. App. 143, 15 S. W. 408; *Hackney v. State* (Cr. App.), 74 S. W. 554; *McElroy v. State*, 53 Tex. Cr. App. 57, 111 S. W. 948.

Code, art. 209, giving either county jurisdiction of an offense committed within 400 yards of the boundary, is, as to theft, controlled by art. 216, allowing prosecution in any county

through or into which the property is taken. *Cameron v. State*, 9 Tex. Cr. App. 332.

6. Offenses Committed Partly in One County and Partly in Another.

See, ante, "Locality of Offense," II, A, 3; "Principals and Accessories," II, A, 4. See the particular titles which treat of offenses that may be committed partly in one county and partly in another. See, also, the title JEOPARDY, ante, p. 1.

a. In General.

At common law, where an offense was committed in one county, and consummated in another, the venue could be laid in neither, and the offender went unpunished. *Searcy v. State*, 4 Tex. 450.

b. Abortion.

See the title ABORTION, vol. 1, p. 4.

A prosecution for abortion is properly had in the county where the acts producing the abortion were performed, though the miscarriage occurred in another county, under Code Cr. Proc. 1895, art. 246, providing that prosecution shall be had in the county "in which the offense was committed." *Moore v. State*, 40 S. W. 287, 37 Tex. Cr. App. 552.

c. Bigamy.

See the title Bigamy, vol. 1, p. 659.

Bigamy is indictable only in the county where the unlawful marriage took place. *Brown v. State* (Cr. App.), 27 S. W. 137.

d. Conspiracy.

See the title CONSPIRACY, vol. 2, p. 1.

Under Code of Criminal Procedure, art. 221, offense of conspiracy may be prosecuted in the county where the conspiracy was entered into, or in the county where it was agreed to be executed. *Kutch v. State*, 32 Tex. Cr. App. 184, 22 S. W. 594.

Under Code Cr. Proc. 1895, art. 242, giving jurisdiction of conspiracies to the county where they were entered

into, or the county where they were agreed to be executed, where the proof shows a conspiracy entered into in D. county, he executed in M. county, the latter county has jurisdiction, and it is not necessary to allege conspiracy in M. county. *Dawson v. State*, 40 S. W. 731, 38 Tex. Cr. App. 9.

e. Conversion and Embezzlement.

See post, "Larceny," II, A, 6, k. See the title EMBEZZLEMENT, vol. 2, p. 277.

Conversion.—Where property is borrowed or hired in one county, but converted in another, the former county has no jurisdiction of the case (under art. 877 of the Revised Penal Code), since there is no offense committed until the conversion occurs. *Yost v. State* (Cr. App.), 38 S. W. 192; *Lopez v. State*, 37 Tex. Cr. App. 649, 650, 40 S. W. 972; *Abbey v. State*, 35 Tex. Cr. App. 589, 34 S. W. 930. The latter case distinguishes art. 861, Revised Penal Code, and remarks that under such article the county in which the property was acquired would have jurisdiction. For cases in which the venue was held to be properly laid in such county, see *Givens v. State*, 32 Tex. Cr. App. 457, 24 S. W. 287; *Steadham v. State*, 40 Tex. Cr. App. 43, 48 S. W. 177; *Piper v. State*, 56 Tex. Cr. App. 121, 119 S. W. 869.

Embezzlement.—"Article 219 of the Code of Criminal Procedure provides as follows: 'The offense of embezzlement may be prosecuted in any county in which the offender may have taken or received the property, or through or into which he may have undertaken to transport it.' * * * We are of the opinion that the transportation of money, through or into a county, has the same effect with reference to the venue of the offense that the transportation of any other personal property would have. If, then, in this case, the defendant undertook to and did transport the money into Bosque county, the prosecution was properly

maintained in that county. *Cole v. State*, 16 Tex. Cr. App. 461; *Reed v. State*, 16 Tex. Cr. App. 586; *Cohen v. State*, 20 Tex. Cr. App. 224." *Brown v. State*, 23 Tex. Cr. App. 214, 4 S. W. 588, 589. See, also, *Pearce v. State*, 50 Tex. Cr. App. 507, 98 S. W. 861.

"Article 240, Code Cr. Proc. 1895, authorizes prosecution in the county where the money shown to have been embezzled was received, regardless of the county where it may have been embezzled or regardless of the county where he was to account for the same. See authorities cited in § 1628, White's Ann. Pen. Code." *Schweir v. State*, 50 Tex. Cr. App. 119, 94 S. W. 1049, 1051. See, also, *Cole v. State*, 16 Tex. Cr. App. 461. But see *Brown v. State*, 23 Tex. Cr. App. 214, 4 S. W. 588.

f. Counterfeiting.

See the title COUNTERFEITING, vol. 2, p. 148.

Where it appears that accused counterfeited half dollars in a certain county, and that he passed them in that county, he is triable therein, under Code Cr. Proc., art. 226, providing that a prosecution for counterfeiting coin may be brought in any county where the coins were passed. *Stroube v. State*, 51 S. W. 357, 40 Tex. Cr. App. 581.

g. Driving Cattle from Range.

See the title ANIMALS, vol. 1, p. 55.

Article 749 of the Penal Code declares that, if any person shall willfully take into possession, and drive, use or remove from its accustomed range, any live stock not his own, without the consent of the owner, and with intent to defraud the owner thereof, he shall be deemed guilty of theft, etc. Under the provisions of art. 216 of the Code of Criminal Procedure, theft may be prosecuted in the county of the original taking or in any county through or into which the thief may have taken the property. It is sufficient, therefore, in charging the offense described in art. 749 of the Penal Code, to allege

the venue in the county into which the stock was driven, and such allegation is supported by proof that the stock was taken from the range in another county. *Shubert v. State*, 20 Tex. Cr. App. 320; *McElmurray v. State*, 21 Tex. Cr. App. 691, 2 S. W. 892.

h. False Pretenses and Frauds.

See the titles FALSE PRETENSES, vol. 3, p. 239; FRAUD, vol. 3, p. 349.

"We are of opinion that the offense of swindling is committed in the county in which the property is acquired by the accused, and that a prosecution therefor can only be maintained in such county. This precise question has not heretofore been determined by this court, or by our supreme court, but analogous cases in harmony with our present opinion have been decided by this court. *Robberson v. State*, 3 Tex. Cr. App. 502; *Brockman v. State*, 16 Tex. Cr. App. 54; *Gage v. State*, 22 Tex. Cr. App. 123, 2 S. W. 638; *West v. State*, 28 Tex. Cr. App. 1, 11 S. W. 635." *Sims v. State*, 28 Tex. Cr. App. 447, 448, 13 S. W. 653.

"In *Robberson v. State*, 3 Tex. Cr. App. 502, where the prosecution was for selling mortgaged property, it was held that the venue of such offense was in the county where the sale was made, irrespective of where the lien upon it was executed, or where the property was removed from." *Williams v. State*, 27 Tex. Cr. App. 258, 11 S. W. 114.

Defendant, charged with obtaining money under false pretense, wrote from Cherokee county to the person swindled, in Houston county, to send him \$500. The latter notified a bank in Cherokee county that he would honor defendant's draft for that amount. Defendant drew a draft, with exchange, and when it was presented the bank placed the money to his credit. Held, that the offense was consummated in Cherokee county, and the venue was improperly laid in Houston county. *Dechard v. State* (Cr. App.), 57 S. W. 813.

i. Forgery.

See the title FORGERY, vol. 3, p. 301.

Under the Code of Criminal Procedure, art. 206, the offense of forgery may be prosecuted in any county where the written instrument was forged, or where the same was used or passed, or attempted to be used or passed. *Mason v. State*, 32 Tex. Cr. App. 95, 22 S. W. 144, 408; *Hocker v. State*, 34 Tex. Cr. App. 359, 363, 30 S. W. 783; *Thulemeyer v. State*, 34 Tex. Cr. App. 619, 621, 31 S. W. 659. See, also, *McGlasson v. State*, 38 Tex. Cr. App. 351, 360, 43 S. W. 93.

The statute on the subject of venue in forgery cases has a reference to some act done by the alleged forger in the county in which he is sought to be prosecuted. Hence, where he has parted with the alleged forged instrument, and has no further property in, or control over the same, he can not be prosecuted therefor in some other county, in which some other party that may have owned said instrument has subsequently passed it. *Thulemeyer v. State*, 34 Tex. Cr. App. 619, 31 S. W. 659.

The offense of uttering a forged instrument is not complete till the paper is negotiated, and, where a forged check was indorsed and mailed in Texas to the bank in Arkansas where it was negotiated, the court of the county where it was mailed had no jurisdiction of the offense, under *White's Ann. Code Cr. Proc.*, art. 246, authorizing the prosecution of such an offense in the county where it was committed. *Jessup v. State*, 44 Tex. Cr. App. 83, 68 S. W. 988.

j. Homicide.

See the title HOMICIDE, vol. 4, p. 1.

k. Larceny.

See the title LARCENY.

In General.—Under the provisions of the Code of Criminal Procedure, theft may be prosecuted in the county of the original taking or in any county

through or into which the thief may have carried the property. *Gardiner v. State*, 33 Tex. 692, 696; *Cox v. State*, 43 Tex. 101; *Connell v. State*, 2 Tex. Cr. App. 422; *Allen v. State*, 4 Tex. Cr. App. 581; *Lacy v. State*, 7 Tex. Cr. App. 403, 412; *Cameron v. State*, 9 Tex. Cr. App. 332; *Roth v. State*, 10 Tex. Cr. App. 27; *Dixon v. State*, 15 Tex. Cr. App. 480; *Clark v. State*, 23 Tex. Cr. App. 612, 5 S. W. 178; *West v. State*, 28 Tex. Cr. App. 1, 11 S. W. 635; *Abrigo v. State*, 29 Tex. Cr. App. 143, 15 S. W. 408; *Lyon v. State* (Cr. App.), 34 S. W. 947; *Thurman v. State*, 37 Tex. Cr. App. 646, 40 S. W. 795; *Coleman v. State* (Cr. App.), 55 S. W. 836; *Homer v. State* (Cr. App.), 65 S. W. 371; *Rose v. State* (Cr. App.), 65 S. W. 911; *Pearce v. State*, 50 Tex. Cr. App. 507, 98 S. W. 861.

"The rule is that, 'when a party is prosecuted in a county other than that in which the theft was committed, a complete offense must be shown in the county where the conviction was had.' *Roth v. State*, 10 Tex. Cr. App. 27; *Gage v. State*, 22 Tex. Cr. App. 123, 2 S. W. 638." *Clark v. State*, 23 Tex. Cr. App. 612, 5 S. W. 178. See, also, *West v. State*, 28 Tex. Cr. App. 1, 11 S. W. 635; *Nichols v. State*, 28 Tex. Cr. App. 105, 12 S. W. 500.

"If, however, the larceny in the first county is compound, as if it is committed in the course of a robbery, the conviction in the second county can be only for the simple larceny, not including its aggravations; because the aggravations took place only in the first county.' 1 *Bish. Crim. Proc.*, § 60." *Gage v. State*, 22 Tex. Cr. App. 123, 2 S. W. 638.

"Theft from the person' can transpire only in the county where the actual, overt act of taking was committed, and can be prosecuted only in the county where the act was committed. It can not, like ordinary theft, be prosecuted in any county through or into which the thief may carry the

property. *Gage v. State*, 22 Tex. Cr. App. 123, 2 S. W. 638; *Clark v. State*, 23 Tex. Cr. App. 612, 5 S. W. 178; *Willson*, Crim. St., § 1312; *West v. State*, 28 Tex. Cr. App. 1, 11 S. W. 635." *Nichols v. State*, 28 Tex. Cr. App. 105, 12 S. W. 500.

Live Hogs Stolen—Dead Hogs Carried into Another County.—Code Cr. Proc., art. 235, provides that where property is stolen in one county, and carried into another county, the offender may be prosecuted in the county into which the same is carried. An indictment charged the theft of hogs, and the evidence showed that the hogs were taken in another county while alive, but were dead when brought into the county where the trial was had. Held, that the refusal to instruct that, if the hogs were dead when brought into the county, the defendant was not guilty, was error, since a charge of theft of animals means live animals, and, the hogs having been killed before being brought into the county, the property was not the same as that stolen, and hence the court had no jurisdiction. *Ballow v. State*, 58 S. W. 1022, 42 Tex. Cr. App. 261; S. C., 58 S. W. 1023, 42 Tex. Cr. App. 263; *Grant v. State*, 42 Tex. Cr. App. 273, 58 S. W. 1026.

Horse Taken in One County, Branded in Another.—In a prosecution for horse theft a request to charge that if accused put his brand on the horse in B county, then the offense was committed in B county, and the venue has not been proved unless the jury further believed from the testimony that accused also took the horse to B county, was properly refused, since the venue depended upon the place of taking, and not the subsequent branding alone, the latter being merely evidence of actual appropriation. *Hart v. State*, 14 Tex. Cr. App. 657.

1. Purchasing Cattle without a Bill of Sale.

See the title SALES.

"Purchasing and receiving the cattle without taking a bill of sale therefor from the owner thereof, or his agent, is the offense charged in the indictment. The venue of the offense is the county in which the cattle were purchased and delivered." *Brockman v. State*, 16 Tex. Cr. App. 54, 57.

m. Receiving Stolen Goods.

See the title RECEIVING STOLEN GOODS.

Under Pen. Code 1895, art. 237, providing that the offense of receiving and concealing stolen property may be prosecuted in the county where the theft was committed, or in any other county into which the property may have been carried by the person stealing the same, or in any county where the same may have been received or concealed by the offender, one who receives a horse, stolen in one county, and carried into another county, with knowledge of the theft, may be prosecuted in the latter county, though he did not receive the property in such county. *Moseley v. State*, 36 Tex. Cr. App. 578, 37 S. W. 736, 38 S. W. 197.

Under White's Ann. Code Cr. Proc., art. 237, providing that the offense of receiving stolen property may be prosecuted in the county where the theft was committed, or in any other county into which the property may have been carried, or in any county where it may have been received or concealed, where the indictment charged accused with both receiving and concealing the property, if he received it in F. county and took it to T. county and concealed it there, T. county would have jurisdiction of the prosecution, but if he received it in F. county and brought it into T. county, without there concealing it, that county would not have jurisdiction. *Polk v. State*, 60 Tex. Cr. App. 150, 131 S. W. 580, distinguishing *Thurman v. State*, 37 Tex. Cr. App. 646, 40 S. W. 795, on the ground that in the latter case the

accused was charged only with receiving the property.

n. Threats.

See the title **THREATS**.

Where a letter sent to one threatening to accuse him of a crime is mailed in B. county, the offense of sending such a letter is committed there, and is not triable in C. county, under Cr. Code Proc., art. 225, providing that offenses shall be prosecuted in the county where committed. *Landa v. State*, 26 Tex. Cr. App. 580, 10 S. W. 218.

7. Offenses Committed Beyond Territorial Limits of Jurisdiction.

As to the constitutionality of the act of 1876 providing for the punishment of the offense of forging land titles, even when committed by persons out of the state, and fixing the venue for prosecutions thereunder, see the title **CONSTITUTIONAL LAW**, vol. 2, p. 9.

Under Code Cr. Proc., art. 205, providing that prosecutions for offenses committed wholly or partly without, and made punishable within, the state, may be carried on in any county in which the offender is found, a prosecution for removing mortgaged property from the state can be maintained in the county from which the property was removed, and to which the defendant is returned on being arrested in another county. *Williams v. State*, 27 Tex. Cr. App. 258, 11 S. W. 114.

Article 205, Code Cr. Proc., provides: "Prosecutions for offenses committed wholly or in part without and made punishable by law within this state may be commenced and carried on in any county in which the offender is found." Two counts charged theft of an animal in New Mexico, and that the property was brought by appellant into Texas, and that, at the time the bill was presented, appellant was in Martin county; the other, that the property was brought by him into Terry county, which was unorganized, and attached to Martin county for ju-

dicial purposes. Held, either of these counts was sufficient, and, if either was proven, appellant was properly indicted in Martin county. *McKenzie v. State*, 32 Tex. Cr. App. 568, 25 S. W. 426.

B. CHANGE OF VENUE.

1. Power and Duty of Court in General.

See, generally, the title **APPEAL, ERROR AND CERTIORARI**, vol. 1, p. 87.

"The power to change the venue of cases is by the constitution vested in the courts, to be exercised as provided by law. Const., art. 3, § 45; Code Crim. Proc., art. 18; *Cox v. State*, 8 Tex. Cr. App. 254; *Webb v. State*, 9 Tex. Cr. App. 490; *Bohannon v. State*, 14 Tex. Cr. App. 271." *Steagald v. State*, 22 Tex. Cr. App. 464, 3 S. W. 771.

If the district judge refused to hear and consider an application duly made for a change of venue, such refusal would be error and an abuse of his legal discretion, which the supreme court could correct. *Cotton v. State*, 32 Tex. 614.

2. Constitutional and Statutory Provisions.

See, generally, the titles **CONSTITUTIONAL LAW**, vol. 2, p. 9; **STATUTES**.

In General.—The sixth amendment of the United States constitution guarantees a jury of the vicinage to parties tried for crime in the tribunals of the federal government, but this imposes no restraint upon the states in the trial of their own citizens; nor does the constitution of this state contain any such limitation on the legislative power. Hence, the power conferred on a district judge of this state to change the venue of a felony case to another district is not violative of any constitutional right of a party charged with felony under the laws of this state. *Cox v. State*, 8 Tex. Cr. App. 254. See, also, *March v. State*, 44

Tex. 64; *Ex parte Cox*, 12 Tex. Cr. App. 665.

"While a change of venue is authorized by the constitution, yet it is subject to such regulations as the legislature may prescribe; and regulations which are reasonable and which do not tend to entirely defeat the right are as obligatory upon courts as the provision of the constitution itself." *Rothschild v. State*, 7 Tex. Cr. App. 519, 532.

The right to a change of venue is not a constitutional right, such as the right to trial by jury. It is a mere legal right, and to be claimed only on the terms and under the qualifications prescribed in or reasonably deducible from the law. *Cotton v. State*, 32 Tex. 614. See, also, *Barnes v. State*, 36 Tex. 639.

The act of 1876, "to provide for the change of venue by the state in criminal cases," does not affect the provisions of the Code of Criminal Procedure respecting the right of a defendant to a change of venue. *Harrison v. State*, 3 Tex. Cr. App. 558.

Misdemeanor Cases.—"There is no provision of law which authorizes a change of venue in a misdemeanor case." *Halsell v. State*, 29 Tex. Cr. App. 22, 18 S. W. 418. See, also, *Johnson v. State*, 31 Tex. Cr. App. 456, 461, 20 S. W. 985; *Fox v. State*, 53 Tex. Cr. App. 150, 109 S. W. 370; *Brignon v. State* (Cr. App.), 38 S. W. 783; *Henderson v. State* (Cr. App.), 39 S. W. 116, 117.

3. Right of Prosecution to Change.

See ante, "Constitutional and Statutory Provisions," II, B, 2.

"And if, as stated, the district attorney knew the facts, and that 'on account of the lawless condition of affairs in the county a fair and impartial trial as between the accused and the state could not be safely and speedily had,' 'or that the life of the prisoner would be jeopardized by a trial in the county in which the case was pending,'

then the statute gave him the right to move, and it was his duty to move, for and try to obtain a change of venue. Code Crim. Proc., art. 577." *Steagald v. State*, 22 Tex. Cr. App. 464, 3 S. W. 771.

Granting a change of venue because of combinations and influences in the county in favor of defendant, that would prevent a fair trial to the state, is within the court's discretion. *Gregory v. State* (Cr. App.), 37 S. W. 752.

4. Right of Accused to Change.

a. In General.

See ante, "Constitutional and Statutory Provisions," II, B, 2.

An agreement that the court would authorize a continuance of the cause if no motion for a change of venue would be made at the succeeding term does not estop the accused from making such a motion at the succeeding term. *Luttrell v. State*, 51 S. W. 930, 40 Tex. Cr. App. 651.

b. Codefendants.

"The court properly held that a change of venue by one of the parties indicted carried with it the whole case, including all the parties jointly indicted. *Kerbs v. State*, 8 Tex. Cr. App. 1." *Cock v. State*, 8 Tex. Cr. App. 659, 664. But see *Terry v. State*, 45 Tex. Cr. App. 264, 76 S. W. 928.

"In *Stevens v. State*, 42 Tex. Cr. App. 154, 168, 59 S. W. 545, we held that the failure to transfer the case so far as a part of the codefendants were concerned would not invalidate the transfer as to the others." *Terry v. State*, 45 Tex. Cr. App. 264, 76 S. W. 928.

Where defendant was indicted jointly with another, and, after change of venue, on application by the codefendant, was reindicted separately for the same offense in the county from which the change of venue was had, he is liable to trial in that county, notwithstanding the change of venue and the pendency of the original indictment. *Cock v. State*, 8 Tex. Cr. App. 659.

5. Discretion of Court in General.

See, generally, the title APPEAL, ERROR AND CERTIORARI, vol. 1, p. 87.

As to necessity on appeal for a bill of exceptions setting forth the facts on which an order granting or refusing a change of venue was made, see the title EXCEPTIONS, BILL OF, AND STATEMENT OF FACTS ON APPEAL, vol. 3, p. 1. See post, "Grounds for Change," II, B, 7; "Determination in General," II, B, 9, h.

A change of venue is within the judicial discretion of the trial court, and the appellate court will not revise its action in the absence of a showing of abuse of that discretion to the prejudice of accused. *Winkfield v. State*, 41 Tex. 148; *Walker v. State*, 42 Tex. 360; *Buford v. State*, 43 Tex. 415; *Buie v. State*, 1 Tex. Cr. App. 452; *Dixon v. State*, 2 Tex. Cr. App. 530; *Dupree v. State*, 2 Tex. Cr. App. 613; *Houillion v. State*, 3 Tex. Cr. App. 537; *Noland v. State*, 3 Tex. Cr. App. 598; *Johnson v. State*, 4 Tex. Cr. App. 268; *Grissom v. State*, 4 Tex. Cr. App. 374; *McCarty v. State*, 4 Tex. Cr. App. 461; *Labbaite v. State*, 6 Tex. Cr. App. 257; *Rothschild v. State*, 7 Tex. Cr. App. 519; *Dunn v. State*, 7 Tex. Cr. App. 600; *Myers v. State*, 7 Tex. Cr. App. 640; *Cox v. State*, 8 Tex. Cr. App. 254; *Grissom v. State*, 8 Tex. Cr. App. 386; *Myers v. State*, 8 Tex. Cr. App. 321; *Clampill v. State*, 9 Tex. Cr. App. 27; *Bohannon v. State*, 14 Tex. Cr. App. 271; *Magee v. State*, 14 Tex. Cr. App. 366; *O'Neal v. State*, 14 Tex. Cr. App. 582; *Martin v. State*, 21 Tex. Cr. App. 1, 17 S. W. 430; *Pierson v. State*, 21 Tex. Cr. App. 14, 17 S. W. 468; *Scott v. State*, 23 Tex. Cr. App. 521, 522, 5 S. W. 142; *Meuly v. State*, 26 Tex. Cr. App. 274, 9 S. W. 563; *Lacy v. State*, 30 Tex. Cr. App. 119, 16 S. W. 761; *Randle v. State*, 34 Tex. Cr. App. 43, 28 S. W. 953; *Gallaher v. State*, 40 Tex. Cr. App. 296, 50 S. W. 388; *Augustine v. State*, 41 Tex. Crim. 59, 52 S. W. 79;

Gray v. State, 43 Tex. Cr. App. 300, 65 S. W. 375; *Connell v. State*, 45 Tex. Cr. App. 142, 75 S. W. 512; *Gallagher v. State*, 55 Tex. Cr. App. 50, 115 S. W. 46; *Tubb v. State*, 55 Tex. Cr. App. 606, 117 S. W. 858; *Baldwin v. State* (Cr. App.), 28 S. W. 951; *Gaines v. State* (Cr. App.), 37 S. W. 331. But see *Barnes v. State*, 36 Tex. 639, 640, where it is said: "We can not revise the discretionary power of the court in granting or refusing a change of venue. In *Cotton v. State*, 32 Tex. 614, this question is fully discussed and determined." And see *Daugherty v. State*, 7 Tex. Cr. App. 480; *Gregory v. State* (Cr. App.), 37 S. W. 752, where the court expresses doubt as to the revisionary power of the court of appeals.

6. Successive Applications.

In General.—"It has been held in this state that a defendant is entitled to only one change of venue. *Rothschild v. State*, 7 Tex. Cr. App. 519, and *Webb v. State*, 9 Tex. Cr. App. 490." *Gibson v. State*, 53 Tex. Cr. App. 349, 110 S. W. 41.

"Where the venue has been changed upon motion of the court, the defendant is not prejudiced in his right to move to change the venue from the county to which the court has changed it, if he can show any of the statutory grounds provided for as reasons for the change of venue in the first instance. *Thurmond v. State*, 27 Tex. Cr. App. 347, 11 S. W. 451." *Frizzell v. State*, 30 Tex. Cr. App. 42, 16 S. W. 751. In such cases, the defendant's remedy for the court's action in overruling his original motion for change of venue is by a second motion for a change. *Lankster v. State*, 42 Tex. Cr. App. 360, 59 S. W. 888.

Court in Which Second Motion to Be Made.—Where the court, of its own motion, changes the venue, a motion made in the same court, to change to a different county, is properly denied, as the matter may be brought up in the county to which the case is sent.

Thurmond v. State, 27 Tex. Cr. App. 347, 11 S. W. 451. See, also, *Frizzell v. State*, 30 Tex. Cr. App. 42, 16 S. W. 751; *Lankster v. State*, 42 Tex. Cr. App. 360, 59 S. W. 888.

Successive Changes on Successive Indictments.—A change of venue granted in 1894 under an indictment then pending, on the ground of prejudice against the accused, is not res judicata where a new indictment for the same transaction is presented in the same court three years later. *Luttrell v. State*, 51 S. W. 930, 40 Tex. Cr. App. 651.

Change from Unauthorized County—Transfer after Organization.—Where a homicide occurred in an unorganized county which was attached to another county for judicial purposes, and the case was sent to a third county on a change of venue, the court, on the subsequent organization of the county in which the killing took place, properly refused to transfer it to that county. *Woodring v. State*, 33 Tex. Cr. App. 26, 24 S. W. 293.

7. Grounds for Change.

a. In General.

"The courts are not permitted to go outside of the statute in search of reasons for the change of venue when the motion is made for that purpose." *Lacy v. State*, 30 Tex. Cr. App. 119, 16 S. W. 761.

b. Disqualification or Prejudice of Judge.

See, generally, the title JUDGES, ante, p. 40.

"Our statute enumerates the grounds for a change of venue, and the prejudice of the judge trying the cause is not one of the enumerated grounds. See *Johnson v. State*, 31 Tex. Cr. App. 456, 462, 20 S. W. 985; *People v. Mahoney*, 18 Cal. 185; *People v. Williams*, 24 Cal. 31; *McCauley v. Weller*, 12 Cal. 500." *Gaines v. State*, 38 Tex. Cr. App. 202, 42 S. W. 385. See, also, *Cravey v. State*, 23 Tex. Cr. App. 677,

5 S. W. 162. But see *Early v. State*, 1 Tex. Cr. App. 248.

Code, Cr. Proc., art. 570, providing that, when a district judge is disqualified to try a criminal case, no change of venue for that reason shall be necessary, but the parties or their attorneys shall be entitled to select an attorney of the court to preside at the trial, was not in violation of Const., art. 5, § 11, providing that when a judge is disqualified the "parties to the cause" may, by consent appoint a special judge to preside. *Early v. State*, 9 Tex. Cr. App. 476.

c. Combination of Influential Persons against Accused.

"A general combination of influential persons to suppress lawlessness and crime generally is not such a combination as is contemplated by the statute. (Art. 578, Code Crim. Proc.) The statutory combination is one which is formed with reference to and against the particular individual." *Cravey v. State*, 23 Tex. Cr. App. 677, 5 S. W. 162.

The fact that decedent's father and some other relatives interested themselves and employed able counsel to prosecute defendant for homicide is insufficient to show the existence of a formidable combination in the county of influential citizens against defendant, so as to warrant a change of venue on that ground. *Alarcon v. State*, 83 S. W. 1115, 47 Tex. Cr. App. 415.

Resolutions of a secret order commemorative of the virtues of a deceased member are not necessarily indicative of a combination formed against one accused of murdering such member, to prevent him from obtaining a fair trial. *Lacy v. State*, 30 Tex. Cr. App. 119, 16 S. W. 761.

Where the great weight of testimony negatives the existence of the prejudice alleged, and does not show the alleged combination of influential persons, the refusal to change the venue

is not error. *Baw v. State*, 33 Tex. Cr. App. 24, 25, 24 S. W. 293; *Renfro v. State*, 42 Tex. Cr. App. 393, 56 S. W. 1013.

d. Local Prejudice.

As to local prejudice as a ground for continuance, see the title CRIMINAL LAW, vol. 2, p. 168. See post, "Change on Court's Own Motion," II, B, 8.

In General.—The right to a change of venue, under Code Cr. Proc., § 578, on a showing of local prejudice, does not depend on the application of the ordinary tests to determine the qualifications of jurors, since it is possible that a juror who has deliberately formed a conclusion that the accused is guilty will nevertheless qualify for service on the jury. *Randle v. State*, 34 Tex. Cr. App. 43, 28 S. W. 953.

The "fair and impartial trial" referred to in Code Cr. Proc., art. 578, providing that defendant in a criminal prosecution may obtain a change of venue on a showing that on account of local prejudice against him he can not obtain a "fair and impartial trial," means the "fair trial by an impartial jury" guaranteed by the Bill of Rights. *Randle v. State*, 34 Tex. Cr. App. 43, 28 S. W. 953.

The Code Cr. Proc., art. 579, providing that, when an unsuccessful effort has been made to procure a jury for the trial of a felony case, the court may on application of defendant order a change of venue, has no reference to or connection with art. 578 providing for a change of venue on account of local prejudice. *Randle v. State*, 34 Tex. Cr. App. 43, 28 S. W. 953.

Meaning of Prejudice.—"It does not matter under questions of this character whether the prejudice is against the defendant or against his case. If the prejudice is against him personally, he can not get a fair trial. If it is a prejudgment of the case, the reason is equally as strong why the change of venue should have been

granted. This question was discussed in *Randle v. State*, 34 Tex. Cr. App. 43, 28 S. W. 953. See, also, *Meyers v. State*, 39 Tex. Cr. App. 500, 46 S. W. 817; *Barnes v. State*, 42 Tex. Cr. App. 297, 59 S. W. 882; *Alarcon v. State*, 47 Tex. Cr. App. 415, 83 S. W. 1115; *Gallaher v. State*, 40 Tex. Cr. App. 296, 50 S. W. 388; *Dobbs v. State*, 51 Tex. Cr. App. 629, 103 S. W. 918." *Coffman v. State*, 62 Tex. Cr. App. 88, 136 S. W. 779, 781. See, also, *Renfro v. State*, 42 Tex. Cr. App. 393, 56 S. W. 1013; *Faulkner v. State*, 43 Tex. Cr. App. 311, 65 S. W. 1093; *Cortez v. State*, 44 Tex. Cr. App. 169, 69 S. W. 536; *Streight v. State*, 62 Tex. Cr. App. 453, 138 S. W. 742.

Where Prejudice Limited to Particular Region.—In *Red v. State* (Cr. App.), 53 S. W. 618, 619, it is said: "Appellant's fourth ground is that the court erred in failing to change the venue in this case. We think the court's explanation to the bill reserved thereto in itself refutes the contention of appellant that there was error therein. The court says: 'The testimony of all the witnesses showed that, if any prejudice existed against the defendant, it was confined to the town of Mt. Vernon. Not one of the jurors selected to try defendant lived in or near said town of Mt. Vernon. Each and every one stated on his voir dire that he had merely heard the case mentioned, and had never heard the facts mentioned or discussed.' A review of the facts stated in the bill supports the conclusion of the judge and his action in refusing to change the venue. *Blain v. State*, 34 Tex. Cr. App. 448, 31 S. W. 368; *Mott v. State* (Cr. App.), 51 S. W. 368; *Davis v. State*, 19 Tex. Cr. App. 201; *Pierson v. State*, 21 Tex. Cr. App. 14, 17 S. W. 468." See, also, *Johnson v. State*, 26 Tex. Cr. App. 399, 9 S. W. 762; *Renfro v. State*, 42 Tex. Cr. App. 393, 56 S. W. 1013; *Earles v. State*, 47 Tex. Cr. App. 559, 85 S. W. 1; *Bowmer v. State*, 55 Tex. Cr. App. 416, 116 S. W. 798.

Cessation of Prejudice.—The fact that on a motion in L. county, where the indictment was presented, to change the venue, the court found that prejudice existed in D. county which would prevent defendant having a fair trial there, and changed the venue to F. county, does not show error in the refusal of the court of D. county, on the venue being transferred there at a subsequent term, to transfer the venue to another county, as the feeling in D. county towards defendants may have changed. *Moore v. State*, 49 Tex. Cr. App. 499, 96 S. W. 321.

Admissibility of Evidence.—Where defendant in a criminal case seeks a change of venue on the ground of prejudice in the county, evidence is admissible that the trial judge was beaten in his candidacy for re-election because of animosity of the voters of the county, engendered by granting the defendant a continuance. *Alarcon v. State*, 83 S. W. 1115, 47 Tex. Cr. App. 415.

Evidence held to show so great a prejudice against accused that the overruling of the motion for a change of venue constituted an abuse of discretion. *Meyers v. State*, 39 Tex. Cr. App. 500, 46 S. W. 817; *Gallaher v. State*, 40 Tex. Cr. App. 296, 50 S. W. 388; *Faulkner v. State*, 43 Tex. Cr. App. 311, 65 S. W. 1093; *Cortez v. State*, 44 Tex. Cr. App. 169, 69 S. W. 536; *Smith v. State*, 45 Tex. Cr. App. 405, 77 S. W. 453; *Alarcon v. State*, 47 Tex. Cr. App. 415, 83 S. W. 1115; *Dobbs v. State*, 51 Tex. Cr. App. 629, 103 S. W. 918; *Coffman v. State*, 62 Tex. Cr. App. 88, 136 S. W. 779; *Streight v. State*, 62 Tex. Cr. App. 453, 138 S. W. 742.

Evidence held not to show sufficient prejudice against accused to entitle him to a change of venue. *Buie v. State*, 1 Tex. Cr. App. 452; *Baw v. State*, 33 Tex. Cr. App. 24, 25, 24 S. W. 293; *Blain v. State*, 34 Tex. Cr. App. 448, 31 S. W. 368; *Renfro v. State*, 42 Tex. Cr. App. 393, 56 S. W. 1013; *Connell*

v. State, 45 Tex. Cr. App. 142, 75 S. W. 512; *Reeves v. State*, 47 Tex. Cr. App. 340, 83 S. W. 803; *Adams v. State*, 48 Tex. Cr. App. 452, 93 S. W. 116; *Harrison v. State* (Cr. App.), 43 S. W. 1002; *Mott v. State* (Cr. App.), 51 S. W. 368; *Cason v. State*, 52 Tex. Cr. App. 220, 106 S. W. 337; *Knight v. State*, 55 Tex. Cr. App. 243, 116 S. W. 56; *Hutcherson v. State*, 62 Tex. Cr. App. 1, 136 S. W. 53; *Ferguson v. State* (Cr. App.), 136 S. W. 465.

e. Convenience of Witnesses.

See ante, "In General," II, B, 7, a.

The action of the court in changing the venue to another county, not adjoining, but of convenient access for witnesses, will not be reviewed. *Cannon v. State*, 41 Tex. Cr. App. 467, 56 S. W. 351.

8. Change on Court's Own Motion.

See post, "County or District to Which Change May Be Made," II, B, 10.

In General.—"By" art. 576, Code Crim. Proc., the district judge is authorized, where he is satisfied that a fair and impartial trial can not be had in the county where the case is pending, upon his own motion to change the venue to any county in his own or an adjoining district. See, also, *Brown v. State*, 6 Tex. Cr. App. 286; *Cox v. State*, 8 Tex. Cr. App. 254; *Boyett v. State*, 26 Tex. Cr. App. 689, 9 S. W. 275; *McCoy v. State*, 27 Tex. Cr. App. 415, 11 S. W. 454; *Willson, Crim. St., § 2200.* *Frizzell v. State*, 30 Tex. Cr. App. 42, 16 S. W. 751. See, also, *Preston v. State*, 4 Tex. Cr. App. 186; *Rothschild v. State*, 7 Tex. Cr. App. 519; *Steagald v. State*, 22 Tex. Cr. App. 464, 3 S. W. 771; *Woodson v. State*, 24 Tex. Cr. App. 153, 6 S. W. 184; *Murphy v. State*, 41 Tex. Cr. App. 120, 51 S. W. 940; *Adams v. State* (Cr. App.), 23 S. W. 691; *Robinson v. State* (Cr. App.), 63 S. W. 869.

Under White's Ann. Code Cr. Proc., art. 616, providing that where an unsuccessful effort has been made in any

county to secure a jury, if it be made to appear by the written affidavit of any credible person that no jury can probably be had in the county, the court may order a change of venue, the court is not authorized to order such change on oral testimony. *Gray v. State*, 65 S. W. 375, 43 Tex. Cr. App. 300.

Art. 581, Code Crim. Proc., as Restricting Art. 576—Wisdom of Enactment.—"It has been ably argued by counsel that it is dangerous to the liberties and rights of the citizen to confide to its district judges such unrestricted power as is conferred by the broad and unqualified language of art. 576, above quoted, and that it should be limited by the provisions of art. 581, following it. We do not regard article 581 as being restrictive of the powers conferred by art. 576, and whether or not the power complained of is a dangerous one to be vested in district judges is not a question for this tribunal to determine. We will say, however, that, since the enactment of art. 576, no case has come under the observation of this court in which the discretion conferred has been, in our opinion, abused." *Bohannon v. State*, 14 Tex. Cr. App. 271, 302. See, also, *Augustine v. State*, 41 Tex. Cr. App. 59, 52 S. W. 77.

Discretion of Court—In General.—Code Crim. Proc., art. 613, authorizing the trial judge to change the venue in a criminal prosecution on his own motion, operates to leave the matter of such change of venue entirely within the discretion of the judge, and the exercise of such discretion is not matter to be controverted by evidence. *Augustine v. State*, 41 Tex. Cr. App. 59, 52 S. W. 77.

Under Code Cr. Proc., art. 613, authorizing the court, in its discretion, to change the venue on its own motion, the court's action in changing the venue from one county to another, and from that to a third county, will not

be disturbed, in the absence of oppression. *Augustine v. State*, 52 S. W. 77, 41 Tex. Cr. App. 59, 96 Am. St. Rep. 765.

Whether Failure or Refusal to Change Can Be Reviewed.—See, generally, the title APPEAL, ERROR AND CERTIORARI, vol. 1, p. 87.

"However, counsel insists that under some expressions used in *Steagald v. State*, 22 Tex. Cr. App. 464, 495, 3 S. W. 771, the court should have changed the venue in this case of his own motion. We do not believe the facts of this case on the question of venue, as suggested by this record, show anything like the conditions surrounding the *Steagald Case* with reference to a change of venue." *Elsworth v. State*, 52 Tex. Cr. App. 1, 104 S. W. 903. See *Murphy v. State*, 41 Tex. Cr. App. 120, 51 S. W. 940, holding that the action of the court in refusing to change the venue on his own motion is not reviewable.

Changes Held Not to Be Abuses of Discretion.—Where a former trial of a criminal case had greatly excited public prejudice, and the facts had been discussed in a warm political contest, in which certain incidents of the trial were in issue, an order changing the venue on the court's own motion on the ground that a fair trial could not be had in the county, and refusing to hear testimony offered by the defense to show that a fair trial could be had, was not an abuse of discretion, vested in trial courts by Code Cr. Proc., art. 613, to change the venue of criminal cases on their own motion. *Nite v. State*, 54 S. W. 763, 41 Tex. Cr. App. 340.

Under Code Cr. Proc., art. 576, authorizing a district judge, on his own motion, to change the venue of a case involving a felony when satisfied that an impartial trial can not be had, a change of venue in a homicide case may be ordered where the county of the venue is small, and two trials of

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 - b. Sale of Intoxicating Liquors, 166.
- 2. Particular Defenses, 166.
- 3. Weight and Effect of Evidence, 167.
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- K. Rejection on Court's Own Motion, 167.
- L. Waiver of Right to Object or Challenge, 168.
 - 1. Failure to Investigate, Challenge or Object in General, 168.
 - 2. Citizenship, 169.
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 - 5. Prior Service as Juror, 169.
 - 6. Formation and Expression of Opinion, 169.
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- M. Challenge to Panel or Array, and Motion to Quash Venire, 171.
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- O. Peremptory Challenges, 183.
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 - a. Order of Challenges, 184.

tal case, and it should affirmatively show by the record that this was done. *Steagald v. State*, 22 Tex. Cr. App. 464, 3 S. W. 771.

On an indictment charging a robbery to have been committed with firearms, defendant is entitled to a special venire, unless he waives it, such offense being a capital one. *Farrar v. State*, 44 Tex. Cr. App. 236, 70 S. W. 209.

Code Cr. Proc., art. 605, provides for special venire in "capital" cases only. Pen. Code, art. 55, defines "a capital felony" as "an offense for which the highest penalty is death." Article 35 provides that "a person, for an offense committed before he arrived at the age of seventeen years, shall in no case be punished with death." Defendant was indicted for murder in the first degree, but the prosecuting attorney admitted in open court that he was under seventeen years old. Held, that it was not a capital case, and defendant was not entitled to a special venire. *Walker v. State*, 28 Tex. Cr. App. 503, 13 S. W. 860.

Under Code Cr. Proc., arts. 642-681, relative to special venires in capital cases, if the state has not acted in the matter of securing one, and if the court has not taken the steps to provide one, it is defendant's right to object to being tried by any other, at any time prior to his agreeing to be tried by the regular jury. *Farrar v. State*, 70 S. W. 209, 44 Tex. Cr. App. 236.

Where Post of Special Venire Engaged in Another Case.—Where, at the time an indictment for murder was called for trial, twelve of the special venire were engaged in another case, it was error to refuse defendant's motion to postpone the trial till their presence could be obtained. *Moody v. State*, 63 S. W. 641, 43 Tex. Cr. App. 168.

Waiver of Right.—In a capital case, after defendant's motion for a continuance had been overruled, the regular jury for the week was called into the

box, and he then objected to being tried by that body, and demanded a special venire as provided for by Code Cr. Proc., arts. 642-681. Held, that there had been no waiver of defendant's right to a special venire. *Farrar v. State*, 70 S. W. 209, 44 Tex. Cr. App. 236.

Where one of defendant's attorneys, some time before the trial, stated to the court that he did not wish at that time to call for a special venire, and the court stated that he should either call for the special venire then or the court would consider it waived, and that the special venire would not be ordered, there was no waiver of the right to be tried by a special venire. *Murdock v. State*, 106 S. W. 374, 52 Tex. Cr. App. 262.

3. Issuance and Requisites of Venire.

"Article 642 of our Code of Criminal Procedure is to this effect: 'A "special venire" is a writ issued by order of the district court, in a capital case, commanding the sheriff to summon such a number of persons, not less than thirty-six, as the court in its discretion may order, to appear before the court on a day named in the writ, from whom the jury for the trial of such case is to be selected.' The statute by its terms does not require that this writ shall state that the case in which it is issued is a capital case, or that it shall state the nature of the offense, but only provides that such special venire shall be issued in a capital case." *Harrelson v. State*, 60 Tex. Cr. App. 534, 132 S. W. 783, 785; *Murray v. State* (Cr. App.), 3 S. W. 104.

Statutes relating to writ of special venire are for the most part directory, and should be liberally construed. *Harrelson v. State*, 60 Tex. Cr. App. 534, 132 S. W. 783, 785; *Pocket v. State*, 5 Tex. Cr. App. 552; *Murray v. State*, 21 Tex. Cr. App. 466, 1 S. W. 522; *Roberts v. State*, 30 Tex. Cr. App. 291, 17 S. W. 450; *Franklin v. State*, 34 Tex. Cr. App. 625, 31 S. W. 643.

"The method authorized by law for the special venire to try a capital case is construed strictly, and any departure therefrom of a substantial character is depriving defendant of an essential right. *Harrison v. State*, 3 Tex. Cr. App. 558; *Osborne v. State*, 23 Tex. Cr. App. 431, 5 S. W. 251, and, for other authorities, see § 709, under art. 648, *White's Ann. Code Cr. Proc.*" *Horn v. State*, 50 Tex. Cr. App. 404, 97 S. W. 822, 823.

Where Directed to "Sheriff or Any Constable."—A writ of special venire facias, which was executed and returned by the sheriff, will not be quashed because it was improperly directed to the "sheriff or any constable," instead of the sheriff alone. *Suit v. State*, 30 Tex. Cr. App. 319, 17 S. W. 458; *Jackson v. State*, 30 Tex. Cr. App. 664, 18 S. W. 643.

Time Returnable.—Defendant was indicted for murder, and in January the trial was continued to the April term. The district court, on March 30th, ordered a special venire issued, returnable April 9th. Court convened April 6th, and the case was set for trial on the 13th. Held, that the special venire was properly made returnable at the term after it issued, under Code Cr. Proc., art. 606, which provides that "the district or county attorney may, at any time after indictment found, * * * obtain an order for a special venire to be issued in such case." *Roberts v. State*, 30 Tex. Cr. App. 291, 17 S. W. 450; *Franklin v. State*, 34 Tex. Cr. App. 625, 31 S. W. 643; *Murray v. State* (Cr. App.), 3 S. W. 104.

Omission of Word "of" before Name of County on Seal.—A seal upon a special venire which bears the legend "District Court, Bexar County;" instead of "District Court of Bexar County," is in substantial compliance with the law. *Cordova v. State*, 6 Tex. Cr. App. 207.

4. Size of Panel.

Upon a trial of a capital offense, the

law provides that special venire facias shall be issued for persons, not less than thirty-six nor more than sixty, for purpose of forming a jury. *Wasson v. State*, 3 Tex. Cr. App. 474.

Provisions of the Code of Criminal Procedure providing that a special venire shall consist of not less than thirty-six nor more than sixty persons, have not been repealed by the act of 1876, and venire consisting of more than sixty is unauthorized. *Harrison v. State*, 3 Tex. Cr. App. 558.

Whatever the reasons for the limitations on the number of persons drawn for a special venire in a capital case, as prescribed by Pasch. Dig., art. 3016, they should be respected and obeyed. *Harrison v. State*, 3 Tex. Cr. App. 558.

Discretionary Power of Court.—Under Code Cr. Proc., art. 605, defining a "special venire" as a writ issued by order of the court for any number of not less than thirty-six nor more than sixty, in the discretion of the court, to serve as a jury in the particular case, the fact that only fifty-nine names, instead of sixty, as asked for by defendant, were upon the list attached to the original writ, neither invalidates the writ, nor the venire summoned under it. *Hall v. State*, 28 Tex. Cr. App. 146, 12 S. W. 739.

Under a statute authorizing the court to order a venire of not less than thirty-six jurors, the fact that accused asked for sixty, and the court ordered only fifty, and one of these proved to be dead, and two others were incorrectly named, does not vitiate the venire. *Beard v. State*, 53 S. W. 348, 41 Tex. Cr. App. 173; *Kipper v. State*, 45 Tex. Cr. App. 377, 77 S. W. 611.

Clerk's Writ Must Conform to Court's Order.—Code Cr. Proc., art. 608, provides that an order for the issuance of a writ for a special venire shall specify the number of persons required to be summoned, and that the clerk shall issue the writ in accordance with such order. Held, that where the

court orders a special venire of ninety men, and the clerk issues a writ for only sixty, defendant's motion to quash the venire should be granted. *Hunter v. State*, 34 Tex. Cr. App. 599, 31 S. W. 674.

5. Selection or Drawing of Jurors.

Duties of Clerk in Drawing Jurors.

—After the court has made order for a special venire, the duties of the clerk are merely ministerial and he has no option but to draw the exact number of men ordered by the judge. *Hunter v. State*, 34 Tex. Cr. App. 599, 31 S. W. 674.

Under Acts 30th Leg. (Laws 1907), p. 269, c. 139, providing that the keys for the wheel containing the names of jurors shall be kept by the sheriff and the district clerk, and providing that the clerk of the district court and the sheriff shall draw from the wheel the names of jurors, etc., and that, when a special venire is ordered, the "clerk" shall draw from the wheel the names required, a special venire in the criminal district court of a county is properly drawn by the district clerk of the county. *Lee v. State*, 113 S. W. 301, 54 Tex. Cr. App. 382.

Under Gen. Laws 29th Leg., p. 18, c. 14, art. 647a, providing that when the names of persons selected to do jury service for the term shall have been drawn once, to answer summons to a venire facias, the names forming the special venire list shall be placed on tickets and placed in a box, from which the clerk in the presence of the judge shall draw the number of names required for further venire service, and shall prepare a list of the names in the order in which they are drawn, and deliver it to the sheriff, and it shall be his duty to prevent the name of any person from appearing more than twice on all of the lists, where one hundred names had been drawn from the list of two hundred and fifty-two jurors constituting the jury for the term prior to the time defendant's special venire was drawn, it was proper

to draw defendant's special venire from the remaining one hundred and fifty-two names, without replacing the one hundred names in the box. *Saye v. State*, 99 S. W. 551, 50 Tex. Cr. App. 569.

Under Code Cr. Proc., 1895, art. 647, providing that, whenever a special venire is ordered, the names of all the persons selected to do jury service for the term shall be used in drawing the venire, it is error to refuse to quash the special venire in a capital case where the clerk failed to place the names of all the jurors for the term in the box, although there were two other defendants charged with the same offense by separate indictments, on the trial of each of whom seventy-five jurors had been drawn from the box before defendant's jury was drawn, and it was their names which were not placed in the box. *Oates v. State*, 48 Tex. Cr. App. 131, 86 S. W. 769.

Clerk Need Not Draw Jurors with His Own Hand.—Under Acts 15th Leg., p. 82, § 23, providing for special venires, which requires the tickets to be placed in a box, which shall be well shaken, and from which the clerk, in the presence of the judge, shall draw the number of names required, the fact that the clerk did not with his own hand draw the jurors is merely a technical objection and will be disregarded. *Pocket v. State*, 5 Tex. Cr. App. 552.

Presence of Defendant Not Required.

—Neither the defendant nor his counsel is required to be present at the drawing of a special venire in a murder case. *Pocket v. State*, 5 Tex. Cr. App. 552.

After Exhaustion of Regular Venire.

—The court, after exhausting the regular venire in a capital case, has no right, over the objection of accused, to order an additional list of names to be drawn from the venire list of special jurors. *Gregg v. State* (Cr. App.), 100 S. W. 1161.

Drawn from List of Regular Jurors for Preceding Term.—A special venire in a homicide case, drawn out of the list of regular jurors for the term at the preceding term of the court, is drawn in accordance with the law. *Green v. State*, 49 Tex. Cr. App. 645, 98 S. W. 1059; *Gabler v. State*, 49 Tex. Cr. App. 623, 95 S. W. 521.

Order of Drawing as Affected by Other Cases.—In a murder trial, it was not error to allow the clerk to explain why the venire was drawn from the list of jurors for the week, instead of from the special venire list, and why the venire was drawn before that in other pending murder cases set for trial before the case at bar, since accused had no right to have his venire drawn in any particular order as to the other cases, and the clerk was required, in drawing the venire, to go to the special venire on exhausting the regular venire. *Rice v. State*, 54 Tex. Cr. App. 149, 112 S. W. 299.

Ordering New Venire before Quashing Original Venire.—Defendant moved to quash the service of a special venire which had been served upon him, but did move to quash the special venire itself. When his motion to quash the service was submitted, it was discovered that he had applied on a verbal motion for a special venire of sixty men, but that by inadvertance, only fifty-nine names had been drawn or placed upon the list attached to the writ. The court asked defendant if he waived his right to a venire of sixty men, or if he desired to make an application in writing under oath for a special venire as provided by the Code of Crim. Proc. art. 607. Defendant replied that he did not waive any of his rights, but that he did not wish to make oath in writing for another special venire; whereupon the district attorney made his oral motion as provided by art. 606, and upon his motion a new special venire for sixty men was ordered. Defendant objected to this new special venire because the

original special venire had never been quashed or vacated. Held, that it was error to require defendant to select his jury from the second special venire, over his objections to the same. *Hall v. State*, 28 Tex. Cr. App. 146, 12 S. W. 739.

Absence of Juror When Special Venire Is Called.—Under art. 640, Code of Criminal Procedure, any persons absent when a special venire is called, may, on coming into court, be tried and passed upon as jurors. *Hudson v. State*, 28 Tex. Cr. App. 323, 13 S. W. 388.

Presumption of Regularity.—Where the transcript shows no separate entry respecting the drawing of the names of the persons summoned on a special venire, but the writ itself recites that they have been selected in the manner provided by law, and nothing to the contrary is shown by the record, the presumption obtains that the requirements of the jury were observed. *Handline v. State*, 6 Tex. Cr. App. 347.

Presumption Where All Names in Alphabetical Sequence.—That the initials of the names of the forty special veniremen drawn by jury commissioners began with the letter "G" and ended with the letter "K" does not raise a presumption that the list was not drawn according to law, in the absence of evidence as to how the drawing was made. *Woodward v. State*, 50 Tex. Cr. App. 294, 97 S. W. 499.

Open Venire.—Where a case is called for trial after the regular jury for the week has been discharged, it is proper to order the sheriff to summon a jury to try such case. *Wyatt v. State*, 42 S. W. 598, 38 Tex. Cr. App. 256; *Castro v. State* (Cr. App.), 46 S. W. 239; *Thomson v. State* (Cr. App.), 44 S. W. 837.

Under the express provisions of Code Cr. Proc. 1895, art. 648, where only thirty-six jurors were drawn for the term, the special venire was properly drawn where the order provided for

the summoning of other jurors in addition to such thirty-six. *Delaney v. State*, 48 Tex. Cr. App. 594, 90 S. W. 642.

6. Qualifications of Jurors on Special Venire.

See post, "Prior Service of Juror," V, L. 5.

It is no objection to jurors, summoned on a special venire, that they belonged to the regular panel for the term. *Brennan v. State*, 33 Tex. 266.

Where the jury panel was quashed on motion of defendant, and the sheriff, as required by Code Cr. Proc. 1895, art. 695, summoned another jury, the fact that some of the jurors summoned had been summoned as jurors on the panel quashed by the court did not render them incompetent. *Arnold v. State*, 38 Tex. Cr. App. 1, 40 S. W. 734.

7. Who May Summon.

"All the service could be made by the sheriff's deputies, their returns made to him, and he make return to the court, or it could be made, as here, in part by him and his deputies, and in part by the constable. Of course, if the writ required amendment, this should be done by the sheriff." *Hull v. State*, 50 Tex. Cr. App. 607, 100 S. W. 403.

Writ Directed to Sheriff or Any Constable.—A writ for a special venire, directed to the sheriff or any constable of the county, need not be served by the sheriff personally; and a part may be summoned by him and the remainder by a constable. *Hull v. State*, 50 Tex. Cr. App. 607, 100 S. W. 403.

A direction of a writ of special venire to the sheriff or "any constable" is not such an irregularity as to require the writ to be quashed. *Suit v. State*, 30 Tex. Cr. App. 319, 17 S. W. 458.

Oath of Officer Summoning.—Article 3056, Rev. Stat., is sufficiently complied with if the prescribed oath is administered to the sheriff and deputies at

the beginning of each term, and it is not necessary that it be administered every time additional talesmen are to be summoned. *Habel v. State*, 28 Tex. Cr. App. 588, 13 S. W. 1001; *Shaw v. State*, 32 Tex. Cr. App. 155, 22 S. W. 588; *Deon v. State*, 37 Tex. Cr. App. 506, 40 S. W. 266.

Under Rev. St., art. 3056, which requires that whenever it may be necessary to summon jurors who have not been selected by the jury commissioners, a certain prescribed oath must be administered to the sheriff and his deputies, a conviction under a criminal indictment by a jury, part of which had been summoned by an officer to whom the required oath had not been administered, is void. *Wyers v. State*, 22 Tex. Cr. App. 258, 2 S. W. 722.

Belief of Defendant That Sheriff Is Prejudiced against Him.—Rev. St., arts. 3027, 3029, provides that the county court shall at the first term after December 31st and June 30th appoint jury commissioners to select jurors to serve at the term to be held six months after that term shall have ended. Article 3022 provides that the district court may appoint commissioners to select other jurors, where jury commissioners have not been appointed at the time prescribed, or fail to act, or the panels are set aside, or the jury lists lost. Held that, under such statutes, defendant can not demand that jury commissioners be appointed to select talesmen to be summoned to file vacancies in the jury by which he is to be tried, merely because he believes the sheriff is prejudiced against him. *Johnson v. State*, 31 Tex. Cr. App. 456, 20 S. W. 985.

When Sheriff May Act in Place of Jury Commissioners.—"It has been held by this court in a number of cases that where there is an intentional violation of the provisions of the Code with reference to the selection and organization of the jury that it will be grounds for reversal, and the court be-

low would have no authority to organize a jury under the provisions of art. 695. But it has been held in a number of cases that where a jury, through inadvertence, has not been selected as required by law, or through some oversight there is not a jury as required by law, then the court may order talesmen. See *Martin v. State*, 57 Tex. Cr. App. 595, 124 S. W. 681; *McKnight v. State*, 57 Tex. Cr. App. 594, 124 S. W. 423; *Green v. State*, 53 Tex. Cr. App. 473, 110 S. W. 925; *Schuh v. State*, 53 Tex. Cr. App. 165, 124 S. W. 908." *Kosmoroski v. State*, 59 Tex. Cr. App. 296, 127 S. W. 1056, 1057.

Under Code Cr. Proc. 1895, art. 695, providing that, when there are no regular jurors for the week from whom to select a jury, the court shall order the sheriff to summon forthwith such number of qualified persons as it may deem sufficient, and from those summoned a jury shall be formed to try the case, and Rev. St. 1895, art. 3150, providing that the court, whenever it may deem it necessary, shall appoint jury commissioners, where they have not been appointed in time to select the jurymen, and that these jury commissioners may draw for the term of court then in session, as well as the terms following, the court might proceed in either way, and in appointing jury commissioners to draw the jury for the trial of a criminal prosecution at the term of court then in session was not in error. *Schuh v. State*, 58 Tex. Cr. App. 165, 124 S. W. 908. See, also, *Roberts v. State*, 5 Tex. Cr. App. 141; *Williams v. State*, 24 Tex. Cr. App. 32, 5 S. W. 658; *Brotherton v. State*, 30 Tex. Cr. App. 369, 17 S. W. 932; *Hunter v. State*, 34 Tex. Cr. App. 599, 31 S. W. 674; *Sanchez v. State*, 39 Tex. Cr. App. 389, 46 S. W. 249; *White v. State*, 45 Tex. Cr. App. 602, 79 S. W. 523; *Hurt v. State*, 51 Tex. Cr. App. 338, 101 S. W. 806; *Green v. State*, 53 Tex. Cr. App. 490, 110 S. W. 920; *Lenert v. State* (Cr. App.), 63 S. W. 563.

Code Cr. Proc. 1895, § 695, provides that, when from any cause there are no regular jurors for the week from whom to select a jury, the court shall order the sheriff to summon qualified persons, whom a juror shall be formed. Held, that where all the criminal cases on the docket, including the prosecution against accused, were set for the first three days of the week beginning Monday, for which a regular jury had been selected, and the case against accused had been postponed at his request until Friday, the court, having inadvertently discharged the jury before that day, properly directed the sheriff to summon a jury to try his case. *Kosmoroski v. State*, 59 Tex. Cr. App. 296, 127 S. W. 1056.

Where Court Intentionally Disregards Statutes.—Where a jury commission was instructed by the county judge not to select a jury for the first two weeks of the term, and accused was placed on trial during that time before a jury selected by the county judge, a motion to quash the venire should be granted, notwithstanding the statute authorizes the selection of talesmen, where, through inadvertence or accident, a jury commission has not selected jurors for the time that the defendant's case is called for trial. *Bickham v. State*, 51 Tex. Cr. App. 150, 101 S. W. 210; *Elkins v. State*, 1 Tex. Cr. App. 539.

Where the county judge, who had been such for four years, during which time he had always been able to dispose of the jury docket in one week, had for that reason always had jury commissioners select jurors for the first week of the term only, and after they had so selected them for the term at which defendant was tried a large number of indictments were found, creating an emergency, to meet which the judge had jurors summoned by the sheriff, it is not necessary to set aside, on motion, the array summoned by him, as in case of a clear setting aside of the statutory law as to the se-

lection of jurors by jury commissioners. *Martin v. State*, 48 Tex. Cr. App. 619, 90 S. W. 29.

8. Return.

a. Sufficiency in General.

A return on a special venire must state the names of the persons summoned as jurors and must show diligence used to serve persons on the list who have not been served. *Charles v. State*, 13 Tex. Cr. App. 658.

After a special venire has been summoned, the sheriff must return the special venire facias, with his action upon it, to the clerk of the court. *Swofford v. State*, 3 Tex. Cr. App. 76.

Where an order for special venire directs the summons of thirty-six "persons," and a writ commands sheriff to summon "thirty-six good and lawful men of the county" and he returns that he has summoned the following named "jurors," there is no error. *White v. State*, 16 Tex. 206.

Directing a post card to each special venireman and requesting that he tear off and return a reply card for acknowledgment of service, is not good service under art. 650 of the Code of Criminal Procedure. *Clay v. State*, 40 Tex. Cr. App. 593, 51 S. W. 370.

Return Showing One Juror Summoned Twice.—In a criminal trial, defendant objected that the special venire as served upon him showed that one of the jurors had been summoned twice, held such return did not vitiate the panel. *Beard v. State*, 41 Tex. Cr. App. 173, 53 S. W. 348.

b. Statement of Diligence Used.

Article 614 of the Code of Procedure requires that the sheriff's return of a special venire shall state the names of the veniremen who have been summoned, "and if any of those whose names are upon the list have not been summoned, the return shall state the diligence that has been used to summon them and the cause of the failure to summon them." Held, that the latter requirement is complied with by a

return which, naming certain of the veniremen, states that they were "out of F. county, and could not be found, though diligent search was made for them by the sheriff of F. county and his deputies," and which, naming others, states that they "could not be found in F. county, though diligent search was made for them at their residences and places of business and at any point at which they were likely to be found." *Lewis v. State*, 15 Tex. Cr. App. 647.

A sheriff's return of service of a special venire of jurors should state what diligence he used to obtain service on a juror returned as not found. *Gay v. State*, 40 Tex. Cr. App. 242, 49 S. W. 612.

Failure to Serve Because Living in Remote Part of County.—The return on a writ of special venire in a criminal cause that certain persons named in the writ, after diligent effort, could not be reached within the time allowed for service, as they resided in a remote part of the county, is sufficient on a motion to quash on the ground that the return did not show what diligence had been used. *Parker v. State*, 33 Tex. Cr. App. 111, 21 S. W. 604.

Absence from County.—A sheriff's return to a special venire reciting that one of the venire was not then, nor when the writ was issued, in the county; that he then was, and for the past two years had resided, in another county; that another of the venire, when the writ was issued, was, and ever since had been, absent from the county—recites facts as to the jurors, rendering unnecessary any amount of diligence on the sheriff's part to secure their attendance. *Coleman v. State*, 48 Tex. Cr. App. 343, 88 S. W. 238.

Failure to Serve Jurors Living in Town Where Court Held.—Evidence that some of the jurors not served lived in the town where court was held, and that several others were repeatedly in the town after the sheriff had the writ, showed that he was lacking in

diligence. *Brown v. State* (Cr. App.), 65 S. W. 912.

Detailed Statement Unnecessary.—Code Crim. Proc., art. 651, providing that an officer shall state in his return of a summons to jurors the diligence that has been used to summon the jurors and the cause of a failure to serve them, does not require that the officer shall state in his return that he went to the home of the juror, or to his office or place of business, or how many times he went to such place or places, or how much time he spent in searching for the absent juror. *Furlow v. State*, 41 Tex. Cr. App. 12, 51 S. W. 938.

Return "Not Served for Want of Time."—Where a special venire of fifty jurors was drawn on October 2d, and writ issued for their service to appear on October 9th, returnable October 7th, a return showing service on thirty-four, and fourteen "not served for want of time," but not stating what manner of diligence had been used, was insufficient, and the court should have quashed the special venire and the return thereon. *Brown v. State* (Cr. App.), 65 S. W. 912.

Failure to Show Number Summoned Insufficient for Fair and Impartial Jury.—A motion to quash a writ of special venire in a criminal cause because the return did not show the diligence used in endeavoring to summon certain persons named in the writ was properly overruled where it did not appear that the jurors summoned were not sufficient to enable defendant to obtain a fair and impartial jury. *Parker v. State*, 33 Tex. Cr. App. 111, 21 S. W. 604.

Cured by Amendment.—A failure of the sheriff, in his return of a writ for a special venire of hundred and forty jurors, to make a full enough showing as to diligence in his efforts to secure service on seven not served, is not ground for quashing the venire, since, on proper motion, a more complete

return could be obtained. *Furlow v. State*, 51 S. W. 938, 41 Tex. Cr. App. 12.

c. Time of Service.

The return of a writ of special venire at 2:45 p. m., made returnable at 10 o'clock a. m. was without prejudice, where it appears that it was served on defendant one full day before trial. *Ryan v. State* (Cr. App.), 35 S. W. 288.

The statute provides that the accused shall have the one-day's service mentioned therein of a copy of all the names of persons summoned under the special venire facias, except where he waives the right or is on bail. *Foster v. State*, 38 Tex. Cr. App. 525, 526, 43 S. W. 1009.

d. Objections to Return.

Where the return on special venire shows a venireman to be unable to attend by reason of infirmity, defendant, if not satisfied of the truth of such return, must controvert same by proof. *Livar v. State*, 26 Tex. Cr. App. 115, 9 S. W. 552.

Objections to the service of the special venire must be taken at the proper time below, and, to authorize an inspection by this court, the facts must be presented by proper bill of exception. *Williams v. State*, 10 Tex. Cr. App. 528.

Service by Deputies Where Juror Unobjectionable.—Service of special venire is sufficient, after a return thereon has been amended, though it is shown that neither the sheriff nor the deputies present in court made summons of special veniremen, but service was made by other deputies who reported to the sheriff, where it is shown that defendant had not exhausted peremptory challenges and no objectionable juror was forced upon him. *Franklin v. State*, 34 Tex. Cr. App. 625, 31 S. W. 643.

Presumption of Regularity.—It is presumed, in the absence of evidence to the contrary, that the sheriff has made a truthful return on a special venire. *Charles v. State*, 13 Tex. Cr. App.

658; *Richardson v. State*, 7 Tex. Cr. App. 486.

Code Cr. Proc., art. 610, provides that when a special venire is ordered the names of all the persons selected by the jury commissioners shall be placed upon tickets, and the tickets placed in a box, from which the clerk, in open court, shall draw the number of names required, and shall attach a list of the names to the writ. Held that, in the absence of evidence to the contrary, it will be presumed that the names which appear on the list attached to the writ were properly drawn. *Smith v. State*, 21 Tex. Cr. App. 277, 17 S. W. 471.

Where no objection was taken in the trial court that the record did not show an order for a special venire, it will be presumed on appeal that such order as the law prescribes was made and entered, or that it was waived. *Williams v. State*, 29 Tex. Cr. App. 89, 14 S. W. 388, overruling *Steagald v. State*, 22 Tex. Cr. App. 464, 3 S. W. 771.

e. Amendment of Return.

Trial courts have the right to permit sheriffs to amend their returns to show the diligence used by them in the service of special venires, as required by Code Cr. Proc., art. 614. *Powers v. State*, 23 Tex. Cr. App. 42, 5 S. W. 153; *Rodriguez v. State*, 23 Tex. Cr. App. 503, 5 S. W. 255; *Franklin v. State*, 34 Tex. Cr. App. 625, 31 S. W. 643; *Rice v. State*, 49 Tex. Cr. App. 569, 94 S. W. 1024.

After defendant's motion to quash the special venire on the ground that no legal order had been made directing such venire, and that the return was not legal, as not showing any cause why certain veniremen were not summoned, etc., had been overruled, it was not error to permit the sheriff to amend his return so as to read that certain veniremen were "not found after diligent search." *Renfro v. State*, 56 S. W. 1013, 42 Tex. Cr. App. 393.

It was not material error that the

sheriff, under the direction of the court, amended the return of the special venire, where all the jurors had been summoned by officers of the court, except three, who were excused on peremptory challenge. *Williams v. State*, 29 Tex. Cr. App. 89, 14 S. W. 388.

To Show Reason for Striking Out Certain Names.—A sheriff's return on a writ of special venire, showing seven names contained in the venire to have been stricken out, but no statement as to the reasons why they were stricken out, may be amended by the court, upon motion. Code Cr. Proc., art. 614. *Murray v. State*, 21 Tex. Cr. App. 466, 1 S. W. 522; *S. C.*, 3 S. W. 104.

To Show Jurors Not Summoned Absent from County.—The return of the sheriff on a special venire may be amended to show that each of the jurors not summoned had either moved out of or was absent from the county. *Powers v. State*, 23 Tex. Cr. App. 42, 5 S. W. 153.

To Supply Omission of Figure in Date.—A special venire facias ordered to be returned "May 22, 189—," should not be quashed because of the omission after the figure 9, but it should be amended by inserting the proper figure. *Suit v. State*, 30 Tex. Cr. App. 319, 17 S. W. 458.

Amendment of Clerk's Certificate.—On motion to quash a special venire for insufficiency of the clerk's certificate and the sheriff's return thereon, service of the true copy on defendant not being denied, the court properly sustained motion as to clerk's certificate and sheriff's return and permitted those officers to amend. *Washington v. State*, 8 Tex. Cr. App. 377.

9. Effect of Errors and Irregularities.

Summoning Less Number than Ordered.—That a smaller number of jurors are summoned than are ordered by the court will not invalidate a special venire or constitute a valid objection to a return. *Hall v. State*, 28 Tex. Cr. App. 146, 12 S. W. 739.

Discrepancies between the names of persons drawn on a special venire and the names of such persons as written in the sheriff's return thereon is not ground for quashing a special venire, where none of such persons served on the jury and where it is shown that defendant had not exhausted his peremptory challenges, and where no prejudice to defendant is shown. *Bowen v. State*, 3 Tex. Cr. App. 617.

Mistake as to Date in Clerks Certificate.—Where a special venire in a capital case was actually issued on August 10th, and was made returnable on September 1st, following, and the jurors appeared on September 3rd under authority and by direction of the writ, the fact that the certificate of the clerk at the bottom of the venire bore the date of September 10th did not render the writ invalid. *Harrelson v. State*, 60 Tex. Cr. App. 534, 132 S. W. 783.

Variance between Minutes of Clerk and Order.—Where the order for a special venire in a murder case was not entered in the minutes by the clerk, it was proper, after the return of the venire, to make the minutes conform to the order. *Roderiquez v. State*, 32 Tex. Cr. App. 259, 22 S. W. 978; *English v. State*, 34 Tex. Cr. App. 190, 30 S. W. 233.

The action of the court in directing the clerk to amend an entry that certain deputy sheriffs were sworn to summon jurors as required by Rev. St., art. 3056, by showing, in addition, that they were instructed in regard to their duties, was proper. *Roderiquez v. State*, 32 Tex. Cr. App. 259, 22 S. W. 978.

Objections and Exceptions.—Objections to the service of the special venire must be taken at the proper time in the court below. *Williams v. State*, 10 Tex. Cr. App. 528.

Objections to a special venire must be taken in writing and settled in the manner provided by chapter 3 of the Code of Criminal Procedure. *Jackson v. State*, 4 Tex. Cr. App. 292.

A juror summoned on a special venire was excused by the court below because he had on a previous occasion, made oath that he was not a citizen of the United States. The defendant took no objection to this action at the time, but assigned it as cause for new trial and as error. Held, that the objection should have been raised when the juror was excused, so that the court could then have had the jurors sworn and again tested as to his qualifications. *Bejarano v. State*, 6 Tex. Cr. App. 265.

I. SPECIAL OR STRUCK JURY.

Where talesmen have been summoned to complete a struck jury, sworn touching their qualifications, and a list furnished, the refusal of the court to set aside the talesmen, and complete the jury with regular jurors who had just come in from another case, is not error, though such regular jurors came in before the striking of any of the talesmen. *Prince v. State* (Cr. App.), 20 S. W. 582.

Defendant, in a murder case, was not entitled to wait until the state should make its challenges and furnish him with its list of jurors, before striking from his list. *Vernon v. State* (Cr. App.), 33 S. W. 364.

The provision of Jury Law 1876, § 22, that a copy of the list of jurors shall be handed to the prosecuting attorney, and one to the defendant's attorney, from which each may strike a number of names equal to the number of peremptory challenges allowed, does not import that the defendant is entitled to be furnished the stricken list of the state before being required to strike from his own. *Phillips v. State*, 6 Tex. Cr. App. 44.

J. TALESMEN OR ADDITIONAL JURORS.

1. In General.

The jury law designs to supply the courts with a sufficient number of jurors at each term, and intends that

they be made available, if practicable, without summoning talesmen. *West v. State*, 7 Tex. Cr. App. 150; *McKinney v. State*, 8 Tex. Cr. App. 626.

2. When Proper.

a. No Regular Panel Ordered.

Where regular juries were drawn as provided by the wheel jury law for alternate weeks, and a felony case, not being reached on a week on which a jury had been ordered, was reset for the next week, there being no regular jury, the court could order the sheriff to procure talesmen to serve as jurors during that week. *Martin v. State*, 57 Tex. Cr. App. 595, 124 S. W. 681.

b. Exhaustion of Panel Summoned.

After exhausting the special venire in a criminal case, it is proper to have the sheriff summon talesmen to complete the jury, there being nothing to show there was any prejudice on the part of the sheriff. This case overrules *Keith v. State*, 50 Tex. Cr. App. 63, 94 S. W. 1044, and follows the ruling laid down after rehearing in the case of *Mays v. State*, 50 Tex. Cr. App. 165, 96 S. W. 329; *Williams v. State*, 60 Tex. Cr. App. 453, 132 S. W. 345. See, also, *Blackwell v. State*, 51 Tex. Cr. App. 24, 100 S. W. 774; *Horn v. State*, 50 Tex. Cr. App. 404, 97 S. W. 822; *Wallace v. State* (Cr. App.), 97 S. W. 1050; *Smith v. State*, 21 Tex. Cr. App. 277, 17 S. W. 471; *Williams v. State*, 29 Tex. Cr. App. 89, 14 S. W. 388; *Brotherton v. State*, 30 Tex. Cr. App. 369, 17 S. W. 932; *Jackson v. State*, 30 Tex. Cr. App. 664, 18 S. W. 643; *Thompson v. State*, 33 Tex. Cr. App. 217, 224, 26 S. W. 198; *Sinclair v. State*, 35 Tex. Cr. App. 130, 32 S. W. 531; *Thurmond v. State*, 37 Tex. Cr. App. 422, 35 S. W. 965; *Deon v. State*, 37 Tex. Cr. App. 506, 40 S. W. 266; *Mays v. State*, 50 Tex. Cr. App. 165, 96 S. W. 329.

In the absence of any request for attachment of an absent juror or any suggestion of prejudice to defendant, there is no error in completing a jury

with talesmen, where, after failure of some jurors to appear and others were excused, only twenty-two of the jurors summoned were present, of whom only five were accepted. *Gonzales v. State*, 58 Tex. Cr. App. 257, 125 S. W. 395.

Before Exhaustion of Jury for Week.

—Under Code Cr. Proc., art. 612, providing that "when from any cause there is a failure to select a jury from those who have been summoned upon a special venire, the court shall order the sheriff to summon any number of persons that it may deem advisable for the formation of the jury," the court is not bound, in a murder case, to call and exhaust the jury for the week, as selected by the jury commissioners, before directing the sheriff to summon talesmen from the body of the county. *Weathersby v. State*, 29 Tex. Cr. App. 278, 15 S. W. 823, overruling *Weaver v. State*, 19 Tex. Cr. App. 547; *Cahn v. State*, 27 Tex. Cr. App. 709, 11 S. W. 723; *Thompson v. State*, 33 Tex. Cr. App. 217, 26 S. W. 198. See, also, *West v. State*, 7 Tex. Cr. App. 150; *Deon v. State*, 37 Tex. Cr. App. 506, 40 S. W. 266; *Bates v. State*, 43 Tex. Cr. App. 589, 67 S. W. 504; *Riley v. State* (Cr. App.), 81 S. W. 711.

Under Code Cr. Proc. 1895, arts. 684-686, providing for the calling of additional jurors, there was no error in overruling defendant's motion to require that all the regular jurors drawn for the week be brought into court by process before talesmen were summoned; it appearing that there were eight regular jurors in the box, and, in addition, that no injury was suffered from the court's action. *Sweeney v. State*, 59 Tex. Cr. App. 370, 128 S. W. 390.

To Avoid Unreasonable Delay.—

The special venire being exhausted late in the day, the court asked counsel whether they wished attachments for absent jurors on such venire, and were informed that all were excused except one W., for whom no attach-

ment was asked. Talesmen were summoned, and, when they were brought in next morning, defendant's counsel asked an attachment for W., which was issued; but the court, on learning that W. lived ten miles away and had a sick child, proceeded to fill out the jury from the talesmen. Held no error. *Deon v. State*, 40 S. W. 266, 37 Tex. Cr. App. 506.

Under Code Cr. Proc., § 640, providing that in selecting a jury no cause shall be unreasonably delayed on account of the absence of a juror who has been summoned, where attachments have been issued for absent veniremen the court properly refused to postpone the summoning of talesmen until return was made on such attachments. *Habel v. State*, 28 Tex. Cr. App. 588, 13 S. W. 1001; *Thuston v. State*, 18 Tex. Cr. App. 26.

c. Regular Panel Otherwise Engaged.

Where the regular panels for the week were out considering other cases, it was not error for the court to order talesmen to be summoned to fill out the panel, in connection with those of the regular jury who were present. *Little v. State*, 61 S. W. 483, 42 Tex. Cr. App. 551; *Leslie v. State* (Cr. App.), 47 S. W. 367.

d. Insufficient Number Summoned or Present.

When the jury box contains less than the maximum number of names, it becomes the duty of the clerk to draw the names which are in the box and write them on two slips of paper, giving one to the attorney for the state and the other to the defendant or his attorney. If there are more than twelve names on the lists, the parties will select the jury therefrom; if there are less than twelve, the court will order a sufficient number of talesmen to complete the panel. This rule applies to the organization of juries in felonies less than capital. *Davis v. State*, 9 Tex. Cr. App. 634.

After all challenges there remained

but eleven of the regular panel, and the court ordered the sheriff to supply the deficiency by summons of a person having the requisite qualifications. Held, to be in conformity with the provisions of the jury act. *Speiden v. State*, 3 Tex. Cr. App. 156.

Article 647 was intended to provide, and did provide, that no juryman drawn by the jury commission should be required to serve or be drawn on but one venire in a capital case; but this act does not either expressly or by implication repeal art. 648, which provides that: "Where there shall not be a sufficient number of those selected to make the number required for the special venire, the court shall order the sheriff to summon a sufficient number of good and intelligent citizens, who are qualified jurors in the county, to make the number required by the special venire." *Gibson v. State*, 53 Tex. Cr. App. 349, 110 S. W. 41, 47. See *Weatherby v. State*, 29 Tex. Cr. App. 278, 15 S. W. 823, and *Deon v. State*, 37 Tex. Cr. App. 506, 40 S. W. 266.

Where Jurors Absent through Lack of Diligence on Part of Sheriff.—Accused having requested the court to issue process for absent jurors, the clerk was directed to issue an attachment, which was placed in the hands of the sheriff, who within two hours reported back to the court that the absent jurors could not be found in the city, and that they lived in the country at a distance, ranging from eight to twenty miles. The sheriff had previously returned that eight of the jurors could not be found in the county. Held, that the sheriff's diligence was insufficient to justify the court in ordering talesmen. *Rasor v. State*, 57 Tex. Cr. App. 10, 121 S. W. 512.

3. Selection of Jurors.

Of sixty persons named in a special venire, the sheriff found and served but thirty-five, and then, without authority, summoned twenty-five others so fill the venire, and returned their

names with those served by virtue of the writ. In forming the jury, however, the court extruded the persons illegally summoned by the sheriff, and filled the panel partly from those summoned under the venire and partly from talesmen summoned by verbal order of the court. Held, that the jury was legally organized, and no right of defendant was prejudiced. *Harris v. State*, 6 Tex. Cr. App. 97.

After the special venire was exhausted, defendant objected to talesmen ordered, on the ground that they were summoned while in a certain city, but it was not stated that all of them lived in the city. Held, that it was not error to overrule the objection. *Starr v. State* (Cr. App.), 86 S. W. 1023.

A defendant charged with homicide may waive his right to have talesmen to fill the panel chosen by the sheriff, as required by statute, and such waiver is accomplished by his objection to such procedure on the original venire being exhausted; whereupon the court ordered the sheriff to summon jurors from the list drawn by the clerk for the pending term of court. *Newman v. State* (Cr. App.), 70 S. W. 951.

Where a regular panel of jurors was tested on their voir dire, only twenty-two qualified, and the court ordered twenty-five talesmen to be brought in to complete the list of twenty-four names from which the parties should select a jury, and thirteen of the talesmen qualified, it was not error to refuse to have the names of the twenty-two jurors of the regular panel, and all of the talesmen who had qualified, placed in the box and drawn therefrom in the regular way, until the panel of twenty-four was completed, and to grant the request only in so far as securing the names of two additional jurors from the list of talesmen, was concerned. *Railey v. State*, 58 Tex. Cr. App. 1, 121 S. W. 1120.

Selection Left to Sheriff.—The sheriff may summon as talesmen, on the

exhaustion of the special venire, the original venire. *Adams v. State*, 35 Tex. Cr. App. 285, 33 S. W. 354.

Gen. Laws 29th Leg., p. 17, c. 14, providing for the summoning of jurors from a special venire list, is inapplicable to the selection of talesmen, and does not prevent the court from directing the sheriff to summon talesmen according to his own selection, without resorting to the special venire list. *Wallace v. State* (Cr. App.), 97 S. W. 1050.

Instructions to Sheriff as to Qualifications of Talesmen.—Where, after a special venire has been exhausted, talesmen are to be summoned to complete the jury, the judge is not required by the Code to caution the sheriff to summon only such persons as are legally qualified to serve as jurors, informing the sheriff what the qualifications are. This duty is enjoined on the judge when he orders the special venire, but not with respect to talesmen. *Dill v. State*, 1 Tex. Cr. App. 278.

Not Governed by Mode of Selecting Special Venire.—Code Cr. Proc. 1895, art. 647, provides that a special venire shall be selected by placing the names of those selected for jury service in a box, from which the clerk shall draw the number required. Article 649 provides that, when there is a failure to select a jury from the special venire, the court shall direct the sheriff to summon any number of persons it may deem advisable. Held, that it is not necessary that the names of the talesmen should be selected in the manner provided for the selection of a special venire. *Locklin v. State* (Cr. App.), 75 S. W. 705.

Bystanders.—The jury law of 1876, § 22, making it unlawful in summoning jurors to complete panels to summon persons in the courthouse or court yard, if they can be found elsewhere, was repealed by its omission from the Revised Statutes, and hence it was not error, in completing a panel, to receive jurors summoned in the court room.

Luttrell v. State, 14 Tex. Cr. App. 147; *Baker v. State*, 4 Tex. Cr. App. 223; *Johnson v. State*, 4 Tex. Cr. App. 268; *Matthews v. State*, 6 Tex. Cr. App. 23; *Frye v. State*, 7 Tex. Cr. App. 94, construing § 22 of jury law of 1876 were decided before the adoption of the Revised Statutes and are no longer of effect.

4. Number to Be Summoned.

Code Cr. Proc. 1895, art. 683, provides that the clerk shall draw from the box, if in the county court, the names of twelve jurors or so many as there may be if there be a less number, and deliver a list of the names to attorneys for the state and defendant. Article 684 provides that if, in the county court, there be not as many as six names in the jury box, the court shall direct the summoning of as many jurors as may be necessary to complete the panel. Held, that where there are only six names in the jury box, the court may refuse a larger panel, and when the first six names are struck off require six talesmen to be summoned. *Hackleman v. State*, 91 S. W. 591, 49 Tex. Cr. App. 229.

5. Oath of Officer.

Where a sheriff is sworn to summon talesmen, it is not error for the court to refuse to have the sheriff resworn, when it again becomes necessary to summon talesmen. *Adams v. State*, 35 Tex. Cr. App. 285, 33 S. W. 354; *Shaw v. State*, 32 Tex. Cr. App. 155, 22 S. W. 588; *Deon v. State*, 37 Tex. Cr. App. 506, 40 S. W. 266.

The special venire having been exhausted, the sheriff and his deputies, before going out to select talesmen, were sworn as required by law. The talesmen selected were exhausted, and additional talesmen were ordered, but the officers were not sworn before starting out the second time. Held, that an objection that the officers were not properly sworn was untenable. *Chism v. State* (Cr. App.), 78 S. W. 949.

6. Effect of Errors and Irregularities

An irregularity in the selection of talesmen, the summoning of whom is directed in the same writ with that of a special venire, is not ground for quashing the venire. *Locklin v. State* (Cr. App.), 75 S. W. 305.

The proviso of § 23 of the jury law of 1876, forbidding the summoning of talesmen within the courthouse yard, being merely directory, the failure to observe it will not be fatal, unless defendant is shown to be prejudiced thereby. *Matthews v. State*, 6 Tex. Cr. App. 23.

K. COMPELLING ATTENDANCE OF JURORS.

At the request of either party an attachment may issue for any person summoned as a juror who is not present. *Thuston v. State*, 18 Tex. Cr. App. 26.

Accused is not entitled to an attachment for a venireman who has not been summoned. *Osborne v. State*, 23 Tex. Cr. App. 431, 5 S. W. 251; *Rodriguez v. State*, 23 Tex. Cr. App. 503, 5 S. W. 255; *Brotherton v. State*, 30 Tex. Cr. App. 369, 17 S. W. 932; *Furlow v. State*, 41 Tex. Cr. App. 12, 51 S. W. 938.

Where a person not on list of veniremen has been summoned, the proper practice is to stand him aside, and in such case an attachment will not issue for the absent juror. *Thompson v. State*, 19 Tex. Cr. App. 593.

Application for Attachment—When Made.—Code Cr. Proc., art. 618, provides that "when a capital case is called for trial, and parties have announced ready for trial, the names of those summoned as jurors in the case shall be called at the courthouse door, and such as are present shall be seated in the jury box and such as are not present may be fined by the court in a sum not exceeding \$50; and at the request of either party an attachment may issue for any person summoned who is not present, to have him brought forthwith before the court." Held, under this provi-

sion, that in order for a party to avail himself of his right to have an attachment for the absent veniremen, he should apply for the same as soon as it is ascertained by the call at the courthouse door that any of the jurors summoned are not present, and if he fails to apply for his attachment at that time, he is presumed to have waived it. *Jackson v. State*, 30 Tex. Cr. App. 664, 18 S. W. 643; *Sinclair v. State*, 35 Tex. Cr. App. 130, 32 S. W. 531.

Where Absent Juror a Nonresident.

—It is not error to refuse to issue an attachment for an absent juror, when it appears that such juror is a nonresident, and therefore not liable to serve. *Furlow v. State*, 51 S. W. 938, 41 Tex. Cr. App. 12.

Discretion of Court.—Under Code Cr. Proc., § 618, providing that on motion of either party an attachment may issue for any absent venireman summoned, where, on calling the special venire in a criminal case, four veniremen failed to appear, and it was shown that they lived so far distant that it would take several days to bring them in, the action of the court in refusing to postpone the trial and issue attachments for the absentees was not reversible error, in the absence of any showing of prejudice to defendant, since the statute is directory only, and defendant can not unreasonably delay a trial on account of the absence of jurors. *Jackson v. State*, 30 Tex. Cr. App. 664, 18 S. W. 643; *Miller v. State*, 47 Tex. Cr. App. 329, 83 S. W. 393.

Code Cr. Proc., art. 618, authorizes attachment, at the instance of either party, for jurors who do not appear. Article 640 provides that "no cause shall be unreasonably delayed" for such absent jurors. Defendant demanded attachment; and, after eighteen or twenty hours, the officer not having had time to execute the process, the jury was completed. Though defendant exhausted his peremptory challenges, he did not show that any juror sat on the

trial against whom such cause for challenge existed as would affect his competency or impartiality. Held, that an abuse of discretion, in refusing to await the execution of the writ of attachment, was not shown. *Hudson v. State*, 28 Tex. Cr. App. 323, 13 S. W. 388.

Code Cr. Proc., art. 617, provides that no capital case shall be brought to trial until the defendant shall have had one day's service of a copy of the list of the persons summoned as jurors under special venire. Article 618 provides that a person who, being summoned, fails to attend, may, on motion of defendant, be attached. Article 640 prescribes that in selecting the jury from the persons summoned their names shall be called in the order in which they appear upon the list furnished, and a person summoned, but who does not appear when the examination is begun, may, if he appears before the jury is selected, be examined and impaneled, but a cause shall not be unreasonably delayed for the absence of such person. Out of the list of sixty included in a special venire but fifty were summoned, and of these only thirty-three attended. Held, that it was error to proceed to select a jury from those in attendance, without first issuing process to compel the attendance of the other seventeen veniremen. *Cahn v. State*, 27 Tex. Cr. App. 709, 11 S. W. 723.

In a criminal case, where the return of the sheriff shows failure to secure service on several jurors of a special venire, defendant can by motion secure a more complete return and in the absence of such motion the court is not required to have such absentees summoned. *Furlow v. State*, 41 Tex. Cr. App. 12, 51 S. W. 938.

L. EXCUSING AND DISCHARGING JURORS FROM ATTENDANCE.

1. Grounds in General.

Where a member of the regular jury, living eighteen miles from court, deposed that he was sick, and unable to attend, and the court excused him from

the regular jury, accused could not complain of his absence. *Beard v. State*, 53 S. W. 348, 41 Tex. Cr. App. 173.

There was no error in excusing a juror who had not been sworn except on the voir dire, where he stated that he was physically unable to sit on the jury, and counsel agreed to excuse him. *Collins v. State*, 83 S. W. 806, 47 Tex. Cr. App. 303.

If, upon a call of the jury list, it be made to appear satisfactorily that a juror's absence is from sickness or other unavoidable cause, the court may excuse his attendance. *Thuston v. State*, 18 Tex. Cr. App. 26; *Mitchell v. State*, 36 Tex. Cr. App. 278, 33 S. W. 367, 36 S. W. 450.

Only on the most satisfactory evidence of absence from unavoidable necessity should the court excuse a juror in his absence. *Thompson v. State*, 19 Tex. Cr. App. 593.

2. Discretion of Court.

After a juror has been accepted by both sides and sworn, the district attorney remarked that he had been told that some one of the jurors had sickness in his family, and perhaps should not serve, and that he believed this was the man. The court, after asking the juror the extent of sickness, asked defendant if he would excuse the juror, informing him he could do so or not, as he pleased. Defendant replied that he did not wish to excuse him. Held not error. *Boyd v. State*, 94 S. W. 1053, 50 Tex. Cr. App. 138.

Time of Granting Excuses.—The court may excuse a juror, though he does not make his excuse known on the call for excuses, but only when called for the purpose of being passed on by the parties; Code Cr. Proc., 1895, art. 657, not being mandatory with reference to the time of granting excuses. *Goodall v. State* (Cr. App.), 47 S. W. 359.

The court has no authority to excuse jurors drawn on a special venire until they have appeared in court in

answer to the summons. *Foster v. State*, 8 Tex. Cr. App. 248.

Trial courts can ordinarily act upon excuses tendered by a special venireman only when it has been called, placed in the jury box, and sworn to answer questions touching his qualifications to serve as a juror, and it is only when by consent of the parties that an excuse can be accepted from a juror, unless he is present and makes it in person. *Thompson v. State*, 19 Tex. Cr. App. 593.

In special cases, e. g., of illness or other unavoidable cause, the trial court may excuse special veniremen who are absent, and if defendant excepts to this action he should apply for an attachment for such excused veniremen. *Thompson v. State*, 19 Tex. Cr. App. 593; *Robles v. State*, 5 Tex. Cr. App. 346; *Livar v. State*, 26 Tex. Cr. App. 115, 9 S. W. 552; *Thuston v. State*, 18 Tex. Cr. App. 26.

After Acceptance of Juror.—The court has no power to excuse a juror in a felony case after he has been accepted and sworn; in case of sickness or accident rendering it impracticable to proceed with the trial of the case before the jury as then constituted, that jury should be discharged, and another jury formed to try the case. *Ellison v. State*, 12 Tex. Cr. App. 557.

Postmasters.—The rule that veniremen, although exempt, can not be excused unless he appear and present an excuse in person, does not apply where it should fail for want of reason in its enforcement, e. g., in case of a postmaster, and defendant if dissatisfied should apply for an attachment. *Kennedy v. State*, 19 Tex. Cr. App. 618.

3. Who May Excuse.

The fact that a venireman was sick does not relieve the sheriff from the duty of summoning him, since the court, and not the sheriff, is to determine whether he was too sick to at-

tend. *Gay v. State*, 49 S. W. 612, 40 Tex. Cr. App. 242.

The fact that a venireman claimed to be exempt from jury duty, as being over age, does not relieve the sheriff from the duty of summoning him, since the exemption must be claimed to the court, and not to the sheriff. *Gay v. State*, 49 S. W. 612, 40 Tex. Cr. App. 242.

M. COMPENSATION OF JURORS

The statute (Paschal's Dig., art. 1983) prohibiting district clerks and other officers from dealing in jury scrip is repealed by the act of 30 March, 1874 Gen. Laws, 14th Leg., p. 47), entitled "An act to prevent speculations by officers and ex-officers and agents in county, city, and town contracts and liabilities." *State v. Smith*, 44 Tex. 443; *Robinson v. State*, 2 Tex. Cr. App. 390.

N. DRAWING JURORS FOR TRIAL OF CAUSE.

1. Manner of Drawing in General.

Acts 29th Legislature, p. 17, c. 14 (art. 3159a), relating to the manner of selecting jurors by jury commissioners, does not change the venire law which requires the names of all the veniremen to be placed in the box prior to the drawing of the venire. *Wallace v. State*, 50 Tex. Cr. App. 374, 97 S. W. 471; *Pocket v. State*, 5 Tex. Cr. App. 552; *Oates v. State*, 48 Tex. Cr. App. 131, 86 S. W. 769; *Mays v. State*, 50 Tex. Cr. App. 165, 96 S. W. 329.

Code Cr. Proc. 1895, art. 682, provides that when the parties have announced ready for trial in a criminal action less than capital, the clerk shall write the names of all the regular jurors for that week on separate slips, place them in a box, and mix them well. Article 683 provides that the clerk shall draw the names from the box and write them on slips as drawn, delivering one slip to defendant and one to the state's attorney. Held, that the drawing of a

list from the box to try any case that might be called up, before the case in question was called, was reversible error; and this, irrespective of any showing of absence of injury to accused. *Adams v. State*, 99 S. W. 1015, 50 Tex. Cr. App. 586.

Under the direct provisions of Code Cr. Proc. 1895, arts. 682, 683, the duty of drawing the jury and making lists of the same for use of the state and the defendant is to be performed by the county clerk, and not by the sheriff. *Brogden v. State*, 80 S. W. 378, 47 Tex. Cr. App. 121.

2. Order of Calling Names.

The names of the persons summoned as the jurors shall be called in the order in which they appear on the list furnished the accused, and must be called one at a time as they so appear, and be tested and passed upon first by the state, and then by the defendant. Defendant has the right to know the order in which they are to be called, and they should be numbered from one to the last number, and thus served upon him; so that he might view the list as a whole, and determine therefrom as to his challenges for cause, as well as to his peremptory challenges. *Foster v. State*, 38 Tex. Cr. App. 525, 527, 43 S. W. 1009; *Horbach v. State*, 43 Tex. 242; *Robles v. State*, 5 Tex. Cr. App. 346; *Drake v. State*, 5 Tex. Cr. App. 649; *Wasson v. State*, 3 Tex. Cr. App. 474; *Taylor v. State*, 3 Tex. Cr. App. 169.

Requiring Defendant to Expose His List.—Under Pen. Code, art. 640, requiring that jurors' names be called in the order in which they appear on the list furnished to defendant, where the list summoned on special venire and delivered to defendant varied from the list returned by the sheriff as to the order of names, the court properly required defendant either to expose his list or to inform the sheriff of the order in which they stood on his list. *Clark v. State*, 8 Tex. Cr. App. 350.

Rule Unaffected by Act of 1876.—Code Cr. Proc., art. 556 (Pasch. Dig., art. 3034), provides that in forming a jury for the trial of a capital case, the names of the persons summoned shall be called in the order in which they stand on the list, and, if present, shall be tried as to their qualifications, and, unless challenged, shall be impaneled. Jury Act 1876 prescribes by § 22 the method of forming juries from the regular venire for the term, but has no reference to special venires; by § 23 prescribes the mode of obtaining names for a special venire, but not the method of impaneling them; and by § 29 repeals all laws or parts of laws conflicting with its provisions. Held, that the act of 1876 did no repeal article 556 of the Code. *Taylor v. State*, 3 Tex. Cr. App. 169; *Garza v. State*, 3 Tex. Cr. App. 286.

Absence of Jurors.—Under Code Cr. Proc., art. 677, requiring jurors to be called in the order in which they appear on the list furnished defendant, but that no cause shall be unreasonably delayed on account of the absence of such person, one accused of murder, not exhausting his peremptory challenge, is not prejudiced by the absence of two special veniremen at the impaneling of the jury, for whom attachments had issued, and whom the sheriff could not find. *Greer v. State* (Cr. App.), 65 S. W. 1075.

It was not error to compel defendant to select jurors from a list of talesmen summoned before the regular venire had been exhausted, when all the veniremen not sick were brought in by attachments, and it did not appear that defendant had exhausted his peremptory challenges, or was forced to take any particular juror. *Carlisle v. State* (Cr. App.), 56 S. W. 365.

At the calling of the special venire on a murder trial, two of the jurors failed to answer, and during the impaneling of the jury their names were

passed over, in spite of defendant's objection; the court inquiring each time if defendant desired an attachment, to which he replied that he stood upon his rights. On exhaustion of the venire the court ordered the sheriff to summon talesmen, but on request of defendant proceedings were suspended and attachments issued for the two absent jurors, under which they were brought in. On their examination one was challenged by the state, and the other was excused as disqualified. Held, that defendant's rights were not prejudicial. *Sinclair v. State*, 35 Tex. Cr. App. 130, 32 S. W. 531.

Waiving Attachment for Absent Jurors.—On a murder trial, where three out of a special venire of one hundred persons fail to appear, the overruling of a motion to postpone the trial, made by defendant, when he reached the names of the absent jurors, until such jurors should be returned, is not error prejudicial to defendant where, after the special venire was exhausted, the judge stated that he would then delay the organization until the absent veniremen were brought in, and defendant's counsel thereupon stated that they were willing to proceed with talesmen, but that they would not waive their objection to the original refusal of the court to postpone the organization of the jury. *Stephens v. State*, 31 Tex. Cr. App. 365, 20 S. W. 826.

Waiting for Return of Attachment.—Where an attachment was issued against an absent venireman at the instance of both the defendant and the state, the court properly refused to suspend the further impaneling of the jury till the sheriff brought in the venireman. *Jones v. State*, 31 Tex. Cr. App. 177, 20 S. W. 354.

Missing Juror Not Summoned.—Code Cr. Proc., art. 617, provides that no defendant in a capital case shall be brought to trial until he has had one

day's service of the list of persons summoned on special venire. Section 640 provides that in selecting the jury the names of the jurors summoned shall be called in the order in which they stand on the list served on defendant. Held, that where, before completing the jury in a capital case, the sheriff stated that one of the jurors, who had just been called, had not been summoned, the court erred in completing the jury from the other veniremen, without waiting to have the missing juror summoned and brought in. *Osborne v. State*, 23 Tex. Cr. App. 431, 5 S. W. 251.

Part of Panel Engaged but Called before Talesmen.—Defendant can not complain that the court refused, after the special venire were exhausted, to postpone the case till some of the regular panel should be through deliberating on another case, so that they could be passed on in their order, where such jurors were actually called and passed on before talesmen were ordered. *Hudson v. State*, 28 Tex. Cr. App. 323, 13 S. W. 388.

Passing a Juror Brought in by Attachment before Talesmen.—Under Code Cr. Proc., § 677, providing that in the selection of a jury the names shall be called in the order of the list furnished defendant, it was proper for the court to compel defendant to pass on a venireman who had been brought in by attachment on defendant's request, without regard to a list of talesmen who had been summoned. *Spears v. State*, 56 S. W. 347, 41 Tex. Cr. App. 527.

3. Right to Particular Juror or Jury.

If five jurors are impaneled upon a jury of a felony case, after they have been summoned in a murder trial, defendant's right, as the names of the five jurors are called in the murder case, to have the men produced in the jury box to be passed upon, is not compromised or waived by his failure to ask a postponement of the trial. *Thuston v. State*, 18 Tex. Cr. App. 26.

When a criminal case was called, a part of the jury impaneled for the week was engaged in trying another case, and the judge ordered the summoning of talesmen. They were brought in and found to be qualified, and, with the other six, were put in the box. About the time counsel was proceeding to interrogate the jurors, the jury trying the other case returned into court with a verdict, whereupon the court dismissed the jury in the case and discharged the talesmen, and placed the names of the regular jury for the week in the box and had a list of jurors drawn therefrom. Held, that the ruling of the court was not error. *Tankersley v. State*, 101 S. W. 234, 51 Tex. Cr. App. 170.

Where eight jurors had been impaneled out of the original special venire when it was exhausted, and a new venire was ordered, when return of new venire was made and persons summoned thereon were called, defendant has no right to challenge and strike out from the eight impaneled out of the original venire. *Drake v. State*, 5 Tex. Cr. App. 649.

4. Number to Be Drawn before Party Must Examine.

Under Code Cr. Proc., arts. 595, 646, a jury in the county court is composed of six men, and is formed by drawing from the box the names of twelve jurors, "or so many as there may be," etc. In this case there were but six regular jurors, and the defendant was required to pass upon them before others were summoned and placed in the box. Held correct, and that the court could not be required to have the panel filled to twelve unless there were twelve regular jurors, nor could it be required to fill the panel to twelve before passing on the six in the box. *Goforth v. State*, 22 Tex. Cr. App. 405, 3 S. W. 332.

5. Right to Full Panel to Select From.

Failure to Summon Full Venire.—Where the venireman not served with

summons were either out of the county or not found, and, of the forty-five served, only four of those not appearing were unexcused and unaccounted for, leaving twenty-three present, and no attachments were asked for the absent jurors, a motion to quash the venire was properly overruled. *Williams v. State*, 60 Tex. Cr. App. 453, 132 S. W. 345.

It is not required that every person drawn as a juror upon a venire shall be summoned, but only that the sheriff shall exercise reasonable diligence to summon the jurors. *Rodriguez v. State*, 23 Tex. Cr. App. 503, 5 S. W. 255.

Objection to a special venire that the sheriff did not show diligence in summoning certain jurors falls where the court's explanation in the bill of exceptions shows the sheriff was permitted to amend his return, by which it was shown one of the jurors was dead, and there were no persons in the county of the names of the others. *Beard v. State*, 53 S. W. 348, 41 Tex. Cr. App. 173; *Smith v. State*, 21 Tex. Cr. App. 277, 17 S. W. 471.

Where but eleven jurors out of a venire of fifty were present at the time defendant was required to commence the selection of the jury, and the required diligence to secure the attendance of the venire had not been exercised, the court should have postponed the case until the sheriff would have time to summon the venire, or should have quashed it and ordered another venire summoned. *Logan v. State*, 54 Tex. Cr. App. 74, 11 S. W. 1028; *Gardenhire v. State* (Cr. App.), 111 S. W. 1031; *Horn v. State*, 50 Tex. Cr. App. 404, 97 S. W. 822.

Accused can not complain of the sheriff's failure to summon a juror for whom he did not ask an attachment when the list was first called. *Gay v. State*, 49 S. W. 612, 40 Tex. Cr. App. 242.

In a prosecution for murder, on defendant's moving to quash a special

venire on the ground that the sheriff had not properly executed the writ, the court proposed to order attachments for the defaulting jurors, but defendant replied that, owing to the condition of the roads, he did not believe the jurors could be gotten in from the country; that a fair and impartial jury could not be secured; and he therefore insisted on quashing the venire, stating he would except to the action of the court, no matter how it might rule on the proposition. Held, that an exception was not well taken to the court's refusal to quash the special venire. *Starr v. State* (Cr. App.), 86 S. W. 1023.

Full Panel Not Present, Though Summoned.—Where jurors summoned that were absent when called were afterwards brought into court and passed on before the jury was completed, with the exception of one juror, for whom defendant declined to order an attachment, an objection that the court erred in requiring defendant to proceed with the selection of the jury from the list of eighteen out of the thirty-eight jurors drawn and ordered summoned was not well taken. *Newman v. State* (Cr. App.), 70 S. W. 951.

An accused can not be compelled to go to trial by a jury impaneled from a special venire, not all of which was present, unless the venire is summoned as required by law, though he is furnished with a fair and impartial jury, and is not prejudiced by the failure to summon the venire as the statute provides. *Clay v. State*, 40 Tex. Cr. App. 593, 51 S. W. 370.

The clerk drew twelve jurors from the panel. One of those drawn not answering, having stepped aside, another juror was drawn, whereupon the jury was sworn, and defendant entered his plea. Immediately afterwards the first juror returned, on noticing which the clerk dismissed the second juror, and, after swearing the first juror, the trial proceeded. Held no error. Ed-

wards v. State (Cr. App.), 44 S. W. 293.

Where one of the veniremen fails to respond as his name is called, it is not error to refuse a postponement until the juror can be brought in, where an attachment is issued and the veniremen subsequently appear and are peremptorily challenged by the defendant. *Shaw v. State*, 32 Tex. Cr. App. 155, 22 S. W. 588.

As Code Cr. Proc., art. 640, provides that no cause shall be delayed on the ground of absence of persons summoned as jurors, there was no error in proceeding without one whose presence the court sought by due diligence to secure. *Mitchell v. State*, 36 Tex. Cr. App. 278, 33 S. W. 367.

On a murder trial, where three out of a special venire of one hundred persons fail to appear, the court properly refused to postpone the trial and ordered process to issue instant for the absentees. *Stephens v. State*, 31 Tex. Cr. App. 365, 20 S. W. 826.

On a prosecution for murder, eight of the jurors drawn on a special venire were absent when their names were reached on the call of the venire, and when the list was exhausted the defendant moved that proceedings be stopped until the jurors could be brought in; but the state, which was entitled to eight peremptory challenges, challenged the jurors, and the challenges were sustained and defendant's motion overruled. Held, that there was no error. *Miller v. State*, 47 Tex. Cr. App. 329, 83 S. W. 393.

Where but twenty-nine of sixty of a special venire ordered were served and the sheriff's return as to the remaining thirty-one was "not found" and no exceptions were taken to the special venire facias, the manner of service, nor to the return of the sheriff, the court did not err in requiring accused to announce; Rev. Code of Cr. Proc., arts. 605-617, furnishing the rules in such cases not being yet in effect.

Walker v. State, 6 Tex. Cr. App. 576.

Part of Panel Engaged in Another Case.—Where a special venire has been summoned to try defendant's case, he has just cause of complaint, if five of them are trying another case when his panel is being filled. *Thuston v. State*, 18 Tex. Cr. App. 26.

When a case was called three or four of the jurors on the special venire were deliberating on another case, and when their names were recalled accused insisted on having them before the court, which the court declined to do, but proceeded to test the other jurors, and in the meantime the jury that was out came in and were discharged, and the jurors in question on the special venire were then placed in the box. Held, that there was no error. *Spencer v. State*, 48 Tex. Cr. App. 580, 90 S. W. 638.

Code Cr. Proc., art. 683, provides that the clerk shall draw twenty-four names, if so many are in the box, or so many as are there, if the number be less. Article 684 provides that, if there are less than twelve names in the box, the court shall direct the sheriff to summon such number of qualified persons as may be necessary to complete the panel. Article 686, provides that, if the number of jurors be reduced below twelve by challenge, the court shall order other jurors to be drawn and summoned, and placed on the lists, to replace those set aside. Held, that where a number of the regular jury were considering their verdict in another case, and the names of sixteen jurors, being all then in attendance were placed in the box, defendant, on trial for theft, was not prejudiced by the refusal of the court to wait until the return of the other jury to complete the panel to twenty-four. *Thurmond v. State*, 37 Tex. Cr. App. 422, 35 S. W. 965.

In a criminal case, while the jury was being formed, the judge, at defendant's instance, had a special jury,

which was out trying another case, and on which were three of the veniremen, brought into court, and these veniremen were tendered to defendant. Two of them appeared to be disqualified, and the third was challenged by the state. The court explained that, if either of said jurors had been taken, he would have at once discharged the special jury, and have placed the jurors taken therefrom in the box to try defendant. Held no error. *Reyna v. State* (Cr. App.), 75 S. W. 25.

Part of Panel Disqualified or Excused.—It is not error, after certain jurors summoned for the week have disqualified themselves, to require defendant in a criminal case to select a jury from those remaining. *Thomson v. State* (Cr. App.), 44 S. W. 837.

It was not ground for quashing a special venire that only forty-two out of one hundred jurors were in attendance, the others being disqualified or excused by the parties, where there was no unfairness, the jury was completed out of the first fifty-six of one hundred talesmen summoned by order of the court, and defendant had three challenges remaining when the jury was completed. *Martin v. State*, 38 Tex. Cr. App. 462, 43 S. W. 352.

Under Code Cr. Proc. 1895, art. 686, providing that, where the number of jurors is reduced by challenge to less than six, the county court shall order other jurors to be drawn and placed on the list, it is not error to require accused to proceed with the selection of a jury with seven jurors present and in the box, and to refuse to furnish accused with a full panel. *Logan v. State*, 55 Tex. Cr. App. 231, 115 S. W. 1192; *Speiden v. State*, 3 Tex. Cr. App. 156; *West v. State*, 7 Tex. Cr. App. 150.

6. Effect of Errors and Irregularities.

Code Cr. Proc., arts. 618-621, requiring the court, in obtaining a jury for a capital case from a special venire, to call the jurors summoned at the court house door, to grant attachments for

those absent, to seat those present in the jury box, and to test their qualifications under oath and hear their excuses, are merely directory; and hence, where such directions were not followed, but the court instead proceeded under art. 640, by calling the jurors present separately in the order in which they stood on the list, and testing their qualifications separately by the court, the state, and the defense, there was no reversible error, where the whole trial jury was drawn from the special venire originally summoned without exhausting it. *Murray v. State*, 21 Tex. Cr. App. 466, 1 S. W. 522.

The refusal to quash a venire for failure to summon all the jurors is no ground for reversal, where it does not appear but that the jury was made up of those who were summoned. *Charles v. State*, 13 Tex. Cr. App. 658.

That a jury in a criminal case was drawn by drawing unfolded jury tickets placed in a hat instead of in a box, as required by the statute, is not a ground for quashing the panel, in the absence of fraud intended to deprive accused of some right and which was calculated so to do. *Washington v. State*, 51 Tex. Cr. App. 542, 103 S. W. 879.

V. Competency of Jurors, Challenges and Objections.

A. COMPETENCY FOR TRIAL OF ISSUES IN GENERAL.

1. In General.

Under the constitution and laws of Texas, fairness and impartiality are prerequisite qualifications of all jurors in a criminal case, and no jury can be said to be fair and impartial when this idea has been transgressed in selecting such a jury. *Shannon v. State*, 34 Tex. Cr. App. 5, 28 S. W. 540.

To be "impartial" in the sense in which the word is used in provision of the Bill of Rights guaranteeing accused in a criminal case, a fair trial before an impartial jury means that the party,

his cause, or the issues involved in his cause, must not be prejudiced. *Randle v. State*, 34 Tex. Cr. App. 43, 28 S. W. 953.

An objectionable juror is one against whom such cause for challenge exists as would likely affect his competency or impartiality in the trial. *Hudson v. State*, 28 Tex. Cr. App. 323, 13 S. W. 388; *Aistrop v. State*, 31 Tex. Cr. App. 467, 20 S. W. 989.

2. Witnesses.

The fact that a proffered juror is a witness in the case is a ground for challenge for cause under Code Cr. Proc., art. 636, subd. 6. *West v. State*, 8 Tex. Cr. App. 119.

"Witness" under subdivision 6, art. 636 of Code of Criminal Procedure, making such person abnoxious to challenge for cause as juror, is one who bears testimony or furnishes evidence, and not one who has been merely summoned to attend as witness. *Seals v. State*, 35 Tex. Cr. App. 138, 32 S. W. 545.

Character Witnesses.—That persons had been subpoenaed as witnesses, one by the state and one by defendant, did not disqualify them as jurors, where they were summoned as character witnesses, and had been summoned in similar cases as character witnesses, but had not been called to testify. *Edgar v. State*, 59 Tex. Cr. App. 488, 129 S. W. 140.

Witnesses on Question of Change of Venue.—Witnesses on the question of a change of venue are not, for that reason alone, incompetent as jurors. *Hardin v. State*, 40 Tex. Cr. App. 208, 49 S. W. 607.

B. CONSTITUTIONAL AND STATUTORY PROVISIONS.

Only such jurors as are mentioned in Code Cr. Proc., Art. 636 Subd. 3, 4, 5, are ipso facto incompetent. All other grounds of challenge may be waived by the parties to a trial and the court can not deprive them of that

right. *Greer v. State*, 14 Tex. Cr. App. 179.

Challenges for a cause to particular jurors are enumerated in art. 636, Code of Criminal Procedure, and are the same, with exception of conscientious scruples regarding infliction of death penalty which applies only in capital cases, in all criminal cases. *Etheridge v. State*, 8 Tex. Cr. App. 133; *Jones v. State*, 8 Tex. Cr. App. 648.

A juror subject to challenge for causes mentioned in the statute is not ipso facto incompetent, except for conviction of, or indictment for, felony or for insanity, or physical incapacity. *Greer v. State*, 14 Tex. Cr. App. 179.

C. DISCRETION OF COURT.

"The rule is well settled that it is the duty of the court to superintend the selection of the jury, in order that it may be composed of fit persons. Large discretion must be confided to the trial court in the performance of this duty, nor will the action of the court in this behalf be made the subject of revision, unless some violation of the law is involved or the exercise of a gross or injurious discretion is shown." *Piereson v. State*, 18 Tex. Cr. App. 524, 559.

Whether a juror who is challenged for cause shall be rejected is left to the discretion of the court by the statute, and, unless this discretion is clearly abused, its exercise will not be interfered with. *Riddles v. State* (Cr. App.), 46 S. W. 1058; *Harkins v. State*, 6 Tex. Cr. App. 452; *Tooney v. State*, 8 Tex. Cr. App. 452; *Charles v. State*, 13 Tex. Cr. App. 658; *Mason v. State*, 15 Tex. Cr. App. 534.

It is held in a number of cases that one who contributes to a fund for the employment of counsel to prosecute defendant is not a private prosecutor within the meaning of the statute. *Heacock v. State*, 13 Tex. Cr. App. 97; *McInturf v. State*, 20 Tex. Cr. App. 335; *McGee v. State*, 37 Tex. Cr. App. 668, 40 S. W. 967; *Moore v. State*, 36

Tex. Cr. App. 574, 38 S. W. 209; King v. State, 50 Tex. Cr. App. 321, 97 S. W. 488; Taul v. State (Cr. App.), 61 S. W. 394.

D. PECUNIARY INTEREST.

See post, "Members in Association or Organization," V, H, 3.

Subscribers to Fund for Prosecution.

—A private prosecutor is one who prefers accusation against a person whom he suspects to be guilty of an offense; such person and his relatives within the third degree are disqualified to serve as jurors if challenged, to try the case. Heacock v. State, 13 Tex. Cr. App. 97.

E. RELATIONSHIP.

1. To Party or Person Interested.

To render a juror liable to a challenge because of the relationship to deceased for whose murder defendant is on trial, he must have been related within the third degree by consanguinity or affinity. Baker v. State, 4 Tex. Cr. App. 223; Jones v. State, 8 Tex. Cr. App. 648.

A person related within the prohibited degree to a party against whom defendant is charged with the commission of same sort of offense, committed at the same time as that to be tried, is not competent as juror. Wright v. State, 12 Tex. Cr. App. 163.

Where, on a motion for a new trial in a prosecution for murder, it appeared that one of the jurors (who had said on his voir dire that he was not related to deceased) and deceased had married first cousins, and that deceased's wife was dead, but had left two sons surviving, who were private prosecutors in the case, such juror was disqualified, since he was related to deceased and the prosecutors by affinity within the prohibited degree. Stringfellow v. State, 42 Tex. Cr. App. 588, 61 S. W. 719.

Second cousins are related to each other within the third degree; and under Code Cr. Proc., art. 636, subd.

10, disqualifying as jurors those related within the third degree to the person injured by the commission of the offense, a second cousin of the owner of the stolen property is disqualified to sit as a juror on the trial of one charged with the larceny. Page v. State, 22 Tex. Cr. App. 551, 3 S. W. 745.

The brother-in-law of a person from whom cattle were stolen is not a competent juror on the trial of one for the theft, under Code Cr. Proc., art. 636, subd. 10. Powers v. State, 27 Tex. Cr. App. 700, 11 S. W. 646.

Relationship to Parties Employing Private Prosecutors.—In a prosecution for the unlawful sale of liquor, jurors were not disqualified because they were uncles of a witness who belonged to a vigilance committee that employed counsel to prosecute violations of law in their town, especially where the objection to their competency was made after the jury was impaneled. King v. State, 50 Tex. Cr. App. 321, 97 S. W. 488.

Questioning Private Counsel in Order to Show Relationship.—It is proper to refuse to permit private counsel for the prosecution to be questioned as to what persons employed him, in order to show that some of the jurors were related to such persons, where the jurors testify that they do not know their names. Moore v. State (Cr. App.), 38 S. W. 356.

On a trial for illegal sale of liquor, a motion to require the state to disclose the names of parties employing counsel to assist the county attorney to enable defendant to inquire of the jurors if they were related to them was properly refused. McGee v. State, 37 Tex. Cr. App. 668, 40 S. W. 967.

2. To Attorney or Other Court Officer.

It is no ground for the challenge of a juror that he is the brother of deputy sheriff. Miller v. State, 36 Tex. Cr. App. 47, 35 S. W. 391.

To Whom Objection Available.—After the jury in a felony case was impaneled and sworn, the court, on motion of the state, and over the defendant's objection, struck from the panel one of the jurors because he was related to the prosecutor. Held, error. The objection to the juror was not available to the state, though it was available to the defense, if properly raised. *Black v. State*, 9 Tex. Cr. App. 328.

F. BUSINESS CONNECTION OR TRANSACTION WITH PARTY OR ATTORNEY.

One who, on his voir dire examination touching his qualifications as a juror in a criminal case, states that he has had business dealings with defendant, which still continue, and that he liked defendant, and would "dislike very much to find him guilty," is not indifferent toward defendant but biased in his favor, and is properly excluded as a juror upon a challenge of the state. *Pierson v. State*, 18 Tex. Cr. App. 524.

It is no ground for challenge to a juror that defendant's counsel had been involved in litigation against him. *Goodall v. State* (Cr. App.), 47 S. W. 359.

G. PRIOR SERVICE AS JUROR.

See ante, "Prior Service as Juror," III, K.

1. Nature of Prior Service in General.

Rev. St. art. 3012, subd. 5, disqualifying as a juror "any person who has sat as a petit juror in a former trial of the same case, or of another case involving the same question of fact," applies to criminal as well as civil cases. *Dunn v. State*, 7 Tex. Cr. App. 600; *Jacobs v. State*, 9 Tex. Cr. App. 278; *Willis v. State*, 9 Tex. Cr. App. 297. See, also, *Brill v. State*, 1 Tex. Cr. App. 572, where the contrary doctrine is laid down.

2. Rejection at Former Trial.

Because a juror had been peremp-

torily challenged by defendant on a former trial, is not a good cause for a challenge. *Wilson v. State*, 3 Tex. Cr. App. 63; *Nalley v. State*, 28 Tex. Cr. App. 387, 13 S. W. 670; *Easterwood v. State*, 34 Tex. Cr. App. 400, 31 S. W. 294.

3. Service in Same Cause.

A juror who has sat in a former trial for assault and battery, is disqualified. *Jacobs v. State*, 9 Tex. Cr. App. 278.

Member of Grand Jury Finding Indictment.—One who served as grand juror on the finding of an indictment is incompetent to serve as a petit juror on a trial of the offense. *Greenwood v. State*, 34 Tex. 334.

That a juror was also a member of the grand jury which returned the indictment, though not actually present when the bill was examined and returned, did not disqualify him as a juror, but was only a ground for challenge. *Bryan v. State* (Cr. App.), 139 S. W. 981.

The fact that a trial juror served on the grand jury which found the indictment, while a cause for challenge, is not a cause for disqualification, and, in an examination on his voir dire defendant should use due diligence to discover such fact. His inquiries should cover the statutory grounds of a challenge. *Self v. State*, 39 Tex. Cr. App. 455, 47 S. W. 26.

4. Service in Similar Cause.

a. Offenses by Same Defendant.

Where six jurors who had previously convicted accused on a similar charge of violating the local option law were again drawn to try him for an alleged unlawful sale of liquor to another person, and testified that though previously they had convicted accused, they had formed no opinion as to the present case, and would render an impartial verdict based on the evidence, the court did not err in denying a challenge for bias. *Edgar v. State*, 59 Tex. Cr.

App. 252, 127 S. W. 1053; *Anderson v. State*, 34 Tex. Cr. App. 96, 29 S. W. 384; *West v. State*, 35 Tex. Cr. App. 48, 40 S. W. 1069; *Arnold v. State*, 38 Tex. Cr. App. 5, 40 S. W. 735.

In *Holmes v. State* 52 Tex. Cr. App. 352, 106 S. W. 1160, the facts showed the defendant was tried in two cases for selling to same purchaser and it was held that he was entitled to another jury.

That jurors in a prosecution for violation of the local option law had sat on a former prosecution of accused for an illegal sale of liquor, and had convicted him, would not disqualify them as having formed an opinion, where the alleged sales were made to different persons and the state relied on different witnesses. *Ross v. State*, 56 Tex. Cr. App. 275, 118 S. W. 1034.

Credibility of Witness Principal Matter of Defense in Both Cases.—Where a prosecution for violating the local option law rested upon practically the same testimony of the same witness as in other cases in which defendant had been convicted, defendant was entitled to have the jury set aside, and to another jury. *Smith v. State*, 61 Tex. Cr. App. 328, 125 S. W. 154.

In a prosecution for the unlawful sale of intoxicating liquors, where the principal matter of defense was an attack on the credibility of the prosecuting witness, it was error to compel defendant to select a jury from a panel including six jurors who had previously sat in a similar case, in which almost the sole defensive matter was the credibility of the same prosecuting witness. *Edgar v. State*, 59 Tex. Cr. App. 488, 129 S. W. 140.

Where there were two cases against accused, based on the same kind of a transaction and supported by one witness, jurors who had sat on one trial and had affirmed their belief in the credibility of the prosecuting witness were disqualified from service in the second case, though on their voir dire

they declared that they had formed no conclusion as to the guilt or innocence of accused, and were not biased for or against him. *Hanes v. State* (Cr. App.), 107 S. W. 818.

Member of Grand Jury Indicting in Similar Case.—A juror who was on the grand jury which presented a bill charging the defendant with an offense is not disqualified from trying a similar offense against the same defendant. *Johnson v. State*, 34 Tex. Cr. App. 115, 29 S. W. 473.

b. Similar Offenses by Persons Other than Defendant.

Different Offenses and Different Parties.—Accused was charged with violating the local option law, six of the jurors composing the panel having on the same day sat in the trial of another for violation of the local option law, wherein a verdict of guilty was returned, based largely upon the testimony of one who was also a witness in the present case, and the rest of the panel was present when the testimony was taken in the other case. Held that, as the prosecutions were for different offenses and against different parties in the two cases, the panel was not incompetent to sit in accused's case. *Bailey v. State*, 56 Tex. Cr. App. 226, 120 S. W. 419.

"The mere fact that the prosecuting witness had testified against another defendant, and these jurors had convicted said defendant in another and different case and different defendant from this one, would be no basis for disqualification. See *Arnold v. State*, 38 Tex. Cr. App. 5, 40 S. W. 735; *Segars v. State*, 35 Tex. Cr. App. 45, 31 S. W. 370." *Irvine v. State*, 55 Tex. Cr. App. 347, 116 S. W. 591; *Bowman v. State*, 41 Tex. 417.

In a case where the transaction was of the same kind and in the same place, and where the jury had in a former case affirmed their belief of the credibility of the prosecuting witness by their solemn verdict, it is not believed,

however good and true they may be, that they are of that impartial quality that the law provides that every defendant may submit his case to and leave the determination of his rights with. *Hardgraves v. State*, 61 Tex. Cr. App. 422, 135 S. W. 144, 145; *Green v. State*, 54 Tex. Cr. App. 3, 111 S. W. 933; *Hanes v. State* (Cr. App.), 107 S. W. 818. See *Obenchain v. State*, 35 Tex. Cr. App. 490, 34 S. W. 278; *Holmes v. State*, 52 Tex. Cr. App. 352, 106 S. W. 1160.

Defendant Particeps Criminis in Former Offense.—A petit juror is disqualified by having sat on a trial of a person, who was indicted as particeps criminals in an offense charged against defendant and involving the same facts. *Dunn v. State*, 7 Tex. Cr. App. 600; *Sessions v. State*, 37 Tex. Cr. App. 58, 38 S. W. 605.

Jurors who tried a person for playing at a game with cards in a public place, and rendered a verdict of guilty, were incompetent to sit on a subsequent trial of another person for playing with the former at the same game, where the evidence on the second trial was the same as that on the first. *Obenchain v. State*, 35 Tex. Cr. App. 490, 34 S. W. 278.

A juror, who has sat on the trial of woman for adultery, is incompetent on the trial of the man for the same offense. *Willis v. State*, 9 Tex. Cr. App. 297.

Defendants Jointly Indicted but Tried Separately.—Where two parties jointly indicted for theft, severed on their trial, a member of the jury convicting one of them was not disqualified from serving as juror on the trial of the other defendant. *Thomas v. State*, 36 Tex. 315.

H. BIAS AND PREJUDICE.

1. In General.

Bias or prejudice in favor or against defendant from whatever cause it may arise, disqualifies a juror, and, when shown to exist, may be interposed as

an objection to any number of jurors. *Williams v. State*, 44 Tex. 34.

It is as much the right of the state to exclude from the jury a person who is biased in favor of defendant, as it is for defendant to exclude one who is prejudiced against him. *Pierson v. State*, 18 Tex. Cr. App. 524; *Mitchell v. State*, 36 Tex. Cr. App. 278, 33 S. W. 367, 36 S. W. 450; *Rothschild v. State*, 7 Tex. Cr. App. 519; *Jones v. State*, 8 Tex. Cr. App. 648; *Withers v. State*, 30 Tex. Cr. App. 383, 17 S. W. 936; *Randle v. State*, 34 Tex. Cr. App. 43, 28 S. W. 953.

A juror having had opinion generally of defendant which he expressed is not subject to challenge for cause. *Monroe v. State*, 23 Tex. 210.

"Bias" Defined.—The word "bias" as used in Code Crim. Proc., art. 636, subd. 12, relating to qualifications of a juror, comes within the definition of "a leaning of the mind; propensity towards an object; not leaving the mind indifferent; inclination; prepossession; bent." *Pierson v. State*, 18 Tex. Cr. App. 524.

Purpose of Act to Secure Fair and Impartial Trial.—The purpose of art. 636 of the Code of Criminal Procedure, making bias or prejudice for or against accused, ground for challenge of jurors, was to secure to the accused the right to a fair trial before an impartial jury. *Randle v. State*, 34 Tex. Cr. App. 43, 28 S. W. 953.

Expression of Hope of Acquittal.—The state's challenge of a proposed juror who has expressed hope for defendant's acquittal is properly sustained. *Mason v. State*, 15 Tex. Cr. App. 534.

Expression Showing Fear for Defendant.—That a petit juror said, immediately before the trial, that he would not "be in the shoes of the accused for ever so much," does not show bias or prejudice. *Nash v. State*, 2 Tex. Cr. App. 362.

Prejudice in Favor of Womanhood.—Under Code Cr. Proc., art. 636, subd.

12, which provides that a juror who "has a bias or prejudice in favor of or against the defendant" may be challenged for cause, a juror is incompetent when he states on his voir dire that the fact of defendant being a woman and a mother would prevent him from rendering a verdict according to the law and evidence. *Withers v. State*, 30 Tex. Cr. App. 383, 17 S. W. 936.

Answers Made under Misconception of Counsel's Questions.—That a juror answered affirmatively questions whether he would require accused to show that he did not kill decedent, etc., did not disqualify him; it appearing that the answers were given under a misconception of accused's counsel's questions, and the juror having stated that he would give accused the benefit of reasonable doubt, when the court explained the law to him. *Rice v. State*, 54 Tex. Cr. App. 149, 112 S. W. 299.

Statement That Defendant Was Going to Penitentiary Anyhow.—A statement by a juror, before a criminal trial, "that defendant was going to the penitentiary anyhow," or words to that effect, does not show bias or prejudice, where the juror or his voir dire declared himself free therefrom. *Nash v. State*, 2 Tex. Cr. App. 362.

Jurors from City Where Offense Committed.—In a trial for a homicide committed in the city of H., a first venire being exhausted without furnishing a jury, the court ordered a second, which the sheriff executed by summoning residents of the city. Accused, alleging that prejudice against him prevailed in the city, moved the court to quash the return on the venire, and to instruct the sheriff to summon persons from the county, outside of the city. Held, not error to overrule the motion. *Grissom v. State*, 4 Tex. Cr. App. 374.

Prejudice Formed at Trial.—Defendant can not complain of the prejudice of a juror, formed from the evidence at the trial of the case at which he was

convicted. *Griffin v. State* (Cr. App.), 53 S. W. 848.

Influence on Verdict.—A proposed juror stated on his voir dire that he was prejudiced in favor of defendant, but that he could find a verdict upon the evidence alone. Held, that the court properly sustained the state's challenge for cause. *Giebel v. State*, 28 Tex. Cr. App. 151, 12 S. W. 591.

2. Race Prejudice.

"Our statute as cause of challenge does not enumerate race prejudice as a ground of challenge, yet in accordance with the fourteenth amendment, and under the decisions of the supreme court of the United States, prejudice against the negro race which leads to discrimination in the formation of either grand or petit juries is considered sufficient ground to set aside an indictment or a conviction by a petit jury. See *Carter v. State*, 39 Tex. Cr. App. 345, 46 S. W. 236, 48 S. W. 508." *Moore v. State*, 52 Tex. Cr. App. 336, 107 S. W. 540, 542.

Jurors who testified on their voir dire examination in the prosecution of one negro for killing another that they could give accused as fair and impartial a trial for killing another negro as they could a white man for killing a white man under the same circumstances, but could not give a negro who had killed a white man as fair a trial as they could a white man, were not objectionable. *Williams v. State*, 60 Tex. Cr. App. 453, 132 S. W. 345.

In a trial of one negro for murdering another, jurors were not objectionable because they stated they would give more weight to a white person's testimony than to a negro's, where they stated they had no prejudice against defendant and would accord him all his legal rights, and that they would not convict a negro on less testimony than they would a white man. *Moore v. State*, 52 Tex. Cr. App. 336, 107 S. W. 540.

On the trial of a negro for the murder of a white man, a juror on his voir

dire, said he was prejudiced against negroes as a race but explained that by the prejudice he meant that he did not regard a negro to be as good as a white man but that he could, as a juror try a negro for killing a white man as impartially as he could try a white man for killing a negro. Held, that the juror was competent. *McGill v. State*, 25 Tex. Cr. App. 499, 8 S. W. 661.

A juror, on his voir dire, stated that he could give defendant, a negro, as fair a trial as if he were white; that he had no prejudice against defendant because he was a negro; that no negroes lived in his community, because the other residents objected, and that he would not employ a negro on that account, etc. Held, a challenge for cause was properly overruled. *Hubbard v. State*, 67 S. W. 413, 43 Tex. Cr. App. 564. See, also, *Smith v. State*, 44 Tex. Cr. App. 90, 69 S. W. 151; *Hanna v. State*, 52 Tex. Cr. App. 162, 105 S. W. 793.

3. Membership in Association or Organization.

It was not error to refuse to set aside the jury in a prosecution for violating the local option law, because many of the jurors were members of a local option league, whose object was to enforce the laws, and some of them had voted for local option, while others had voted against it; the officers not having acted fraudulently in selecting the jury. *Deadweyler v. State*, 57 Tex. Cr. App. 63, 121 S. W. 863.

In a prosecution for the violation of a local option law, the fact that the jury commissioners, as well as the jurors selected to try defendant, were all prohibitionists, was no ground for a reversal of the conviction. *Lively v. State* (Cr. App.), 73 S. W. 1048.

I. FORMATION AND EXPRESSION OF OPINION AS TO CAUSE.

1. In General.

The general opinion, formed with-

out a particular examination into the facts, and derived from a source in which a juror placed no great reliance, will not disqualify him. *Black v. State*, 42 Tex. 377.

In testing a juror for bias, the inquiry relates exclusively to the present condition of his mind; and the modes whereby he formed a conclusion are material only as indications of the strength or weakness of his conclusion. The code expressly recognizes hearsay as a basis on which a disqualifying conclusion may be formed; and, on the other hand, a mere impression, though derived from the evidence, does not disqualify a juror unless it would influence his finding. In determining whether the juror's opinion would influence his finding the tenor of the whole investigation is to be considered, and not merely the juror's statement that it would not so influence him. *Rothschild v. State*, 7 Tex. Cr. App. 519.

Mere Knowledge That Offense Was Committed.—A juror who stated that he had formed no opinion as to the guilt or innocence of accused, that he had been informed of the homicide by parties whom he did not know, that the same had made no impression on his mind, and that he then had no opinion as to the guilt or innocence of accused and that he could give him a fair trial, was properly permitted to serve as a juror. *Gregg v. State* (Cr. App.), 100 S. W. 1161.

Two jurors on their voir dire answered that, although they had heard about the homicide, there was not established in their minds, from hearsay or otherwise, any conclusion as to the guilt or innocence of the accused, such as would influence their verdict. Held, that the jurors were qualified, and a challenge for cause was properly overruled. *Sharpe v. State*, 17 Tex. Cr. App. 486. See, also, *McGrew v. State* (Cr. App.), 49 S. W. 226.

General Opinion That Crime Should Be Properly Punished.—In a murder

trial, jurors were not disqualified for prejudice because they believed decedent was murdered and had formed an opinion as to what punishment should be inflicted, where they had no opinion as to accused's guilt and could give him an impartial trial. *Cason v. State*, 52 Tex. Cr. App. 220, 106 S. W. 337.

Guilt of Particular Offense Charged.

—On a trial for illegally giving a prescription for liquor in a local option precinct, jurors are not disqualified by opinions as to defendant's having violated the local option law, if they have no opinion as to his guilt of the offense charged. *West v. State*, 35 Tex. Cr. App. 48, 40 S. W. 1069.

Opinion as to Guilt of Codefendant or Accomplice.—A juror on the trial of an accomplice is disqualified by an opinion of the guilt of the alleged principal, since the accomplice, under the code, is the same as accessory before the fact by the common law, and in order to convict the accomplice the state must prove the guilt of his principal. *Arnold v. State*, 9 Tex. Cr. App. 435.

It is proper in a murder case to refuse to permit defendant to ask the jurors whether, from hearsay or otherwise, they have an opinion as to the guilt or innocence of a person indicted with defendant, but not yet tried, though the theory of the state is that such person was the instigator of the conspiracy to murder deceased, and defendant was in his employ, and in his company, immediately preceding the homicide. *Peddy v. State*, 31 Tex. Cr. App. 547, 21 S. W. 542.

Opinion Held Through Misunderstanding.—A juror on his voir dire stated that he would consider the fact that the grand jury had indicted accused as evidence that he was guilty. On the matter being explained to him, he stated that he did not understand the matter, and that he would not consider the indictment as any evidence against accused, and that he did not know accused, or anything about the

case, and had no opinion in the case, and would give him a fair and impartial trial. Held, that the juror was qualified to serve on the case. *Green v. State*, 49 Tex. Cr. App. 645, 98 S. W. 1059.

Opinion Formed on Information Gained after Verdict.—Disqualification of a juror was not established by proof of a remark made by him after rendition of verdict, which, if unexplained, might have shown prior formation of an opinion, or prejudice against the accused, where the information on which the remark was based was acquired after verdict, and was not known to any of the jury prior thereto. *Jackson v. State* (Cr. App.), 40 S. W. 998.

Knowledge of Verdict on Former Trial.—That the jurors stated on their voir dire that they knew of the verdict on defendant's former trial would not have disqualified them. *Arnwine v. State*, 54 Tex. Cr. App. 213, 114 S. W. 796, 802.

A juror, on a subsequent trial of accused, who had heard of his previous trials and of his conviction and term of punishment, but who would not be influenced thereby in finding a verdict, was competent to act as juror. *Early v. State*, 51 Tex. Cr. App. 382, 103 S. W. 868.

Opinion That Father Was Sacrificing Property for Son.—In a prosecution for homicide, one of the jurors, a day or two before the trial, stated to another that it was strange defendant's father would sacrifice his home and team for his boy, when he might be hanged or sent to the penitentiary. The juror, on examination after verdict, stated that he had no opinion as to defendant's guilt when he was accepted as a juror, and did not mean to express any opinion that defendant was guilty, but was only talking generally as to the sacrifice the father would make for his son. Held, that the facts were insufficient to show prejudice on

the part of the juror. *Wallace v. State* (Cr. App.), 97 S. W. 1050.

Opinion as to Particular Matters.—In a prosecution for violating the local option law, the fact that all the jurors summoned in the case may have formed opinions that the notices of the local option elections required by law had been legally posted, does not effect their qualifications. *West v. State*, 35 Tex. Cr. App. 48, 30 S. W. 1069.

Time at Which Opinion Is Held.—The opinion as to the merits of the case which disqualifies a juror is the one which exists at the time of his examination for the trial; an opinion previously entertained, but renounced, does not disqualify. *Grissom v. State*, 8 Tex. Cr. App. 386.

2. Impressions.

Light impressions which may be fairly supposed to yield to the testimony to be offered, and which leave the mind open to its fair consideration, are no objection to a juror; but those strong and deep impressions which close the mind against the testimony, and combat and resist its force, constitute a sufficient objection. *Black v. State*, 42 Tex. 377.

Mere impressions formed by a juror, in conversing with defendant, do not disqualify him, where the opinion is not fixed. *Burrell v. State*, 18 Tex. 713.

Competency as a juror is not affected by an impression from what a party has heard, not amounting to a conclusion, as to defendant's guilt or innocence. *Ellison v. State*, 12 Tex. Cr. App. 557.

A mere impression founded on the testimony elicited on a former trial of the case, or the trial of accomplices, will not disqualify a juror, unless it will influence his judgment in finding a verdict. *Thompson v. State*, 19 Tex. Cr. App. 593.

3. Unqualified or Fixed Opinions.

Whenever the opinion of a juror has

been formed upon the evidence given in the trial at a former time, or has been so deliberately entertained that it has become a fixed belief of the prisoner's guilt, he is not competent to serve as a juror. *Grissom v. State*, 4 Tex. Cr. App. 374.

A juror must have a decided and fixed opinion which could not be removed by evidence, to be challenged for cause. *Monroe v. State*, 23 Tex. 210.

A juror is properly rejected if he has talked about the case and has strong opinions on the question of guilt, which he has expressed. *Ward v. State*, 19 Tex. Cr. App. 664.

Where it appeared that a juror had expressed an opinion prior to the trial that, if he was on the jury, accused's neck would break; that he ought to be hung so high he would never hit the ground; and that, if he was on the jury, he would hang him, and would make a contribution to get up a fund to have a good lawyer retained to prosecute him—the evidence was sufficient to show the juror disqualified. *Hughes v. State* (Cr. App.), 60 S. W. 562.

4. Inconsiderate or Purposeless Remarks.

A jocular remark, made by a juror drawn on a murder case before the trial, to the effect that "the defendant ought to have been hung twenty years ago," without reference to the particular case, is not necessarily a ground of disqualification. *Monroe v. State*, 23 Tex. 210.

Where a juror did not know appellant or deceased, nor the facts of the case, and his alleged remarks were jocular or misunderstood, though alleged to be prejudicial to defendant, he is competent. *Mayes v. State*, 33 Tex. Cr. App. 33, 24 S. W. 421.

A juror who acknowledged on his voir dire that when he first heard of the homicide he said the defendant ought not to have killed the deceased,

but denied that he had formed or entertained any opinion about the case, was not disqualified from jury service thereon. *Lewis v. State*, 15 Tex. Cr. App. 647.

Allowing a juror to sit in a murder trial, where he stated on his examination that he had expressed an opinion in a jocular way, but that he could give defendant a fair trial, is not error, where he was not challenged for cause or otherwise, and defendant's challenges for cause were not then or afterwards exhausted. *Kugadt v. State*, 44 S. W. 989, 38 Tex. Cr. App. 681.

5. Source of Information on Which Opinion Is Based.

a. From Rumor and Newspaper Reports.

An opinion disqualifying a juror for cause may be formed from hearsay. *Shaw v. State*, 27 Tex. 750; *Keaton v. State*, 40 Tex. Cr. App. 139, 49 S. W. 90.

In a prosecution for murder, a juror testified on his voir dire that he had talked of the case with one who had been a juror on a former trial and who had assessed the death penalty; that he had an opinion not based on talking with a witness or on knowledge, and not fixed, but an impression of defendant's guilt from newspapers, hearsay, and general talk; and that he could render a fair verdict. The juror on the former trial was not introduced as a witness, and what was ascertained from him was not disclosed. Held not sufficient to require a dismissal for cause. *Johnson v. State*, 94 S. W. 224, 49 Tex. Cr. App. 314.

On the voir dire of a juror he said that he heard a person in whom he had confidence make a statement of the case upon hearsay, and that thereupon he (the juror) formed an opinion, provided the statement was true, but had formed no conclusion as to whether or not it was true. Held not a disqualifying conclusion. *Bolding v. State*, 23 Tex. Cr. App. 172, 4 S. W. 579.

A juror, in answer to questions touching his qualifications, said "that he had read the report of the evidence in the case of *State v. Walker*, 46 Tex. 360; that he had formed an opinion thereon as to the guilt or innocence of the accused; that it would require other and different evidence to change that opinion; that the opinion so formed would not influence his verdict in the slightest degree; and that he would go into the jury box and give the accused a fair and impartial trial, according to the law and evidence appearing on the trial." Held, that the court below should not have been satisfied that the juror was impartial. *Black v. State*, 42 Tex. 377.

b. From Evidence at Former Trial.

The mere fact that a juror heard the evidence on a prior trial of the same case will not disqualify him. *Thompson v. State*, 19 Tex. Cr. App. 593; *Monroe v. State*, 23 Tex. 210; *Shaw v. State*, 27 Tex. 750; *Parchman v. State*, 2 Tex. Cr. App. 228, 244; *Grissom v. State*, 4 Tex. Cr. App. 374; *Shields v. State*, 8 Tex. Cr. App. 427; *Wade v. State*, 12 Tex. Cr. App. 358; *Shannon v. State*, 34 Tex. Cr. App. 5, 9, 28 S. W. 540.

Jurors present in court during the trials of accused and his paramour for adultery were not disqualified from serving on the jury impaneled to try accused on the charge of carrying a pistol, especially where they testify that they could try the case impartially and where they imposed on accused the minimum penalty. *Hubbard v. State*, 52 Tex. Cr. App. 399, 107 S. W. 351.

In a murder trial, retention of a juror who knew that accused had been convicted on a former trial was not prejudicial error, where the juror was fair, and did not disclose his knowledge to the other jurors. *Moore v. State*, 52 Tex. Cr. App. 336, 107 S. W. 540.

A satisfactory conclusion from hearing and carefully considering the evi-

dence at a former trial would disqualify a juror. *Black v. State*, 42 Tex. 377; *Grissom v. State*, 4 Tex. Cr. App. 374.

A juror who states that he believes, from what he had heard other jurors say, that the testimony of the prosecuting witness in another case, that defendant sold him liquor, is true, and that he has formed an opinion as to defendant's guilt is disqualified. *Drye v. State*, 49 S. W. 83, 40 Tex. Cr. App. 125.

c. From Evidence at Trial of Other Cause.

Where jurors who have heard the argument of a similar prosecution against defendant state that they have formed no opinion, and can try the case impartially, they are competent. *Armstrong v. State* (Cr. App.), 47 S. W. 1006.

The fact that jurors selected to try a charge of assault tried a case against the other party to the encounter a few hours before on a charge of using abusive language towards a third person immediately after the fight does not entitle defendant to excuse such jurors, each juror having answered that he had not formed an opinion from any source as to defendant's guilt or innocence. *Gruesendorf v. State* (Cr. App.), 56 S. W. 624.

A juror who states that he heard the evidence on the trial of persons who were indicted with defendant, and that he had formed an opinion as to the guilt of such persons, but had formed no opinion as to the guilty or innocence of defendant, and could give defendant a fair trial, is competent. *Pierson v. State*, 21 Tex. Cr. App. 14, 17 S. W. 468.

A juror stated on his voir dire that he had heard the testimony in the trial of one who had been separately indicted for the same offense charged against the defendant, and had formed an opinion that the person tried was guilty, as found by the jury, but, had formed no opinion as to the defendant's

guilt or innocence. Defendant's challenge for cause based on this statement was overruled; the bill of exceptions failed to show that the liability of the parties under the evidence was necessarily the same. Held, that the record failed to show error. *Dreyer v. State*, 11 Tex. Cr. App. 631.

Where Trial Grew Out of Same Statement of Facts.—Jurors having fixed opinions as to the guilt of the accused, formed from having heard the testimony in a companion case against him, are incompetent. *Goble v. State*, 60 S. W. 968, 42 Tex. Cr. App. 501.

That certain jurors heard the testimony of the state's witness in the trial of another growing out of the same statement of facts is a sufficient ground for challenge, even though the jurors testified that they had no prejudice against the accused, had formed no opinion of his guilt or innocence, and would give him a fair and impartial trial. *Kenecht v. State*, 53 Tex. Cr. App. 55, 108 S. W. 1183.

In a prosecution for violating the local option law, the issues were the same as in a case just tried, for a sale on the same day to the same prosecuting witness, on a complaint and information of identical wording, in which accused had testified as to his innocence, and the prosecuting witness had testified to his guilt. The panel consisted of six jurors, who had convicted accused in the prior case, and six others who heard the testimony thereon, and stated that they had formed a fixed opinion as to the merits of the prior case. Held, that the jurors were disqualified, and should have been excused on motion to quash the panel, even though they stated they were unbiased, and could try the case at bar on its merits. *Ross v. State*, 53 Tex. Cr. App. 162, 109 S. W. 153; *Gilmore v. State*, 37 Tex. Cr. App., 81, 38 S. W. 787; *Drye v. State*, 40 Tex. Cr. App. 125, 49 S. W. 83; *Barnes v. State* (Cr. App.), 88 S. W. 805.

Opinion Formed from Evidence at Trial of Accomplice.—Where a juror states that his opinion was formed from hearing the testimony in the trial of defendant's accomplice, he is incompetent. *Shannon v. State*, 34 Tex. Cr. App. 5, 28 S. W. 540.

On a prosecution for receiving stolen property it was error to allow on the jury some of those who had served on the jury on the trial of the thief and some of those who had heard the testimony on such trial, such testimony having conclusively shown the theft. *Clark v. State*, 72 S. W. 591, 44 Tex. Cr. App. 536.

6. Influence of Opinion on Verdict.

a. Weight and Effect of Opinion in General.

The mere fact that a juror has established in his mind a conclusion of the guilt or innocence of the party on trial is not a sufficient cause for disqualification. That conclusion, if entertained, must go further, and be of such character "as will influence him in finding his verdict." (Code Cr. Proc., art. 636, subd. 13). *Suit v. State*, 30 Tex. Cr. App. 319, 17 S. W. 458; *Rothschild v. State*, 7 Tex. Cr. App. 519; *Tooney v. State*, 8 Tex. Cr. App. 452; *Ellison v. State*, 12 Tex. Cr. App. 557; *Spear v. State*, 16 Tex. Cr. App. 98; *Kennedy v. State*, 19 Tex. Cr. App. 618; *Pierson v. State*, 21 Tex. Cr. App. 14, 17 S. W. 468; *McKinney v. State*, 31 Tex. Cr. App. 583, 21 S. W. 683; *Randle v. State*, 34 Tex. Cr. App. 43, 28 S. W. 953; *Stanton v. State* (Cr. App.), 24 S. W. 33; *Shannon v. State* (Cr. App.), 26 S. W. 410.

b. Belief of Juror That Opinion Will Not Effect Verdict.

Where answers of jurors show that those of said jurors as had formed any opinion in the case had done so, not from having heard any witness state the facts, but from rumor and hearsay; and they further declare that, notwithstanding any opinion then entertained as to the guilt or innocence of appel-

lant, they could give the appellant a fair and impartial trial on the evidence in the case, they are competent. *Tubb v. State*, 55 Tex. Cr. App. 606, 117 S. W. 858; *Bice v. State*, 55 Tex. Cr. App. 529, 117 S. W. 163; *Post v. State*, 10 Tex. Cr. App. 579; *Kennedy v. State*, 19 Tex. Cr. App. 618; *Johnson v. State*, 21 Tex. Cr. App. 368, 17 S. W. 252; *Suit v. State*, 30 Tex. Cr. App. 319, 17 S. W. 458; *Mayes v. State*, 33 Tex. Cr. App. 33, 24 S. W. 421; *Shannon v. State*, 34 Tex. Cr. App. 5, 28 S. W. 540; *Adams v. State*, 35 Tex. Cr. App. 285, 33 S. W. 354; *Trotter v. State*, 37 Tex. Cr. App. 468, 36 S. W. 278; *Hamlin v. State*, 39 Tex. Cr. App. 579, 47 S. W. 656; *Keaton v. State*, 41 Tex. Cr. App. 621, 57 S. W. 1125; *Wilkerson v. State* (Cr. App.), 57 S. W. 956; *Smith v. State* (Cr. App.), 65 S. W. 186; *May v. State*, 33 Tex. Cr. App. 74, 24 S. W. 910; *Gardner v. State*, 40 Tex. Cr. App. 19, 48 S. W. 170; *Miller v. State*, 32 Tex. Cr. App. 319, 20 S. W. 1103.

In a case in which defendant was accused of shooting at his wife's brother, K., with intent to murder him, it appeared that more than a year after the assault, and two days before the trial, while the court was in session, defendant shot and killed K. on the courthouse square; that the jurors were in the courthouse, and were soon at the scene of the shooting, and heard the remarks of the district judge, and heard the matter discussed then and afterwards by the people. On their voir dire they stated that they could give defendant a fair and impartial trial according to the testimony, and the law as given them by court, and that they had no opinion on the case and no prejudice. Held, that the jurors were not disqualified. *Gaines v. State* (Cr. App.), 37 S. W. 331.

Challenges should be sustained to jurors who state that they possess strong opinions as to guilt or innocence of accused, although they believe such opinions would not in-

fluence their verdict. *Ward v. State*, 19 Tex. Cr. App. 664.

c. Opinion Requiring Evidence to Remove.

Where, in a prosecution for violating a local option law, a juror stated that he had formed an opinion as to defendant's guilt, and that it would take evidence to remove such opinion, but the source of his opinion did not appear, and he answered that, notwithstanding such opinion, he could and would give defendant a fair trial, and render an impartial verdict on the law and evidence, it was not error to overrule a challenge for cause. *Parker v. State*, 77 S. W. 783, 45 Tex. Cr. App. 334.

A juror who testifies on his voir dire that he has formed an opinion as to defendant's guilt, and that evidence will be required to remove it, but that he can try the case without being influenced by such opinion, is competent, within Code Cr. Proc., art. 636, providing that a juror may be challenged for cause where there is "established" in his mind such a conclusion of defendant's guilt or innocence as will influence his verdict. *Shannon v. State* (Cr. App.), 26 S. W. 410, following *Suit v. State*, 30 Tex. Cr. App. 319, 17 S. W. 458; *Livar v. State*, 26 Tex. Cr. App. 115, 9 S. W. 552; *Lane v. State*, 29 Tex. Cr. App. 310, 15 S. W. 827; *Sawyer v. State*, 39 Tex. Cr. App. 557, 47 S. W. 650; *Taylor v. State*, 44 Tex. Cr. App. 547, 72 S. W. 396.

Opinion Which Will Yield to Evidence.—Where a juror in a capital case avowed on his voir dire that he had formed an opinion that the accused was guilty, and, unless he heard something to change it, he intended to act upon it, held, that he was subject to challenge for bias. *Rothschild v. State*, 7 Tex. Cr. App. 519.

One who, by affidavit, shows that he was prejudiced against defendant in a murder trial, that he believed him guilty, and that he ought to be hung,

and that he would so find unless appellant proved his innocence, was disqualified to sit as juror in the cause. *Randle v. State*, 34 Tex. Cr. App. 43, 28 S. W. 953.

d. Opinion Founded on Statements of Witnesses, Parties, or Persons Claiming to Know the Facts.

From Talking with Witnesses.—A juror, who has formed an opinion in relation to the case from having talked with witnesses, is disqualified; such opinion not being formed from hearsay within Code Crim. Proc., art. 673, subd. 13. *Keaton v. State*, 40 Tex. Cr. App. 139, 49 S. W. 90; *Obenchain v. State*, 35 Tex. Cr. App. 490, 34 S. W. 278; *Trotter v. State*, 37 Tex. Cr. App. 468, 36 S. W. 278.

"A distinction has been taken in the cases, between the formation of an opinion from hearsay and the formation of an opinion from having heard the evidence or having talked with the witnesses. See *Trotter v. State*, 37 Tex. Cr. App. 468, 36 S. W. 278; *Suit v. State*, 30 Tex. Cr. App. 319, 17 S. W. 458, and *Shannon v. State*, 34 Tex. Cr. App. 5, 28 S. W. 540." *Quinn v. State*, 51 Tex. Cr. App. 155, 101 S. W. 248.

Where, in a criminal case, a juror stated that he had formed an opinion from conversing with one of the witnesses, though he stated that he believed he could render a fair and impartial verdict on the evidence, a challenge to such juror for cause should have been sustained. *Quinn v. State*, 51 Tex. Cr. App. 155, 101 S. W. 248.

One who has formed an opinion of the guilt of accused, but states that he can try the case uninfluenced by his opinion, is not incompetent as a juror because he has talked with a witness; it not appearing that he got his opinion from talking with the witness. *Wade v. State*, 35 Tex. Cr. App. 170, 32 S. W. 772.

Talking with Member of Grand Jury.—A juror stated on his voir dire that

he had an opinion formed from having heard a member of the grand jury which had found the bill of indictment express his opinion as to the guilt of defendant, but that he could give defendant an impartial trial, regardless of his opinion. It was not shown that the grand juror stated to the juror any fact in regard to the case. Held, that the juror was competent. *Hamlin v. State*, 47 S. W. 656, 39 Tex. Cr. App. 579.

e. Opinion as to Particular Matters or Issues.

Where the only issue was the sanity of accused at the time of the commission of the offense, a juror, who stated that he had formed an opinion of the guilt or innocence of accused, but that he had no prejudice against insanity as a defense, and that he would give accused an impartial hearing on that issue, was not disqualified. *Tubb v. State*, 55 Tex. Cr. App. 606, 117 S. W. 858.

A venireman, who had formed no idea as to the guilt or innocence of the accused, who was indicted for perjury committed in testifying to an alibi on behalf of a person accused of murder, was not disqualified by reason of the fact that he had formed and expressed an opinion as to the guilt of the party in whose behalf the accused testified, when it further appeared that such opinion was not formed from hearing the evidence or talking with witnesses, and that he thought he could try the case at bar under the law and the evidence. *Tellis v. State*, 61 S. W. 717, 42 Tex. Cr. App. 574.

f. Opinion Founded on Rumor and Newspaper Reports.

Persons are competent to serve as jurors who, though they have formed an opinion from a rumor, entertain no such opinion as would influence their verdict or affect their impartiality. *Tooney v. State*, 8 Tex. Cr. App. 452, 455; *Steagald v. State*, 22 Tex. Cr. App. 464, 3 S. W. 771; *Bolding v. State*, 23

Tex. Cr. App. 172, 176, 4 S. W. 579; *May v. State*, 33 Tex. Cr. App. 74, 24 S. W. 910; *Adams v. State*, 35 Tex. Cr. App. 285, 33 S. W. 354; *Trotter v. State*, 37 Tex. Cr. App. 468, 36 S. W. 278; *Grisson v. State*, 4 Tex. Cr. App. 374; *Sharpe v. State*, 17 Tex. Cr. App. 486; *Reed v. State*, 32 Tex. Cr. App. 25, 22 S. W. 22; *Shannon v. State*, 34 Tex. Cr. App. 5, 28 S. W. 540; *Obenchain v. State*, 35 Tex. Cr. App. 490, 34 S. W. 278; *Morrison v. State*, 40 Tex. Cr. App. 473, 51 S. W. 358; *Bratt v. State* (Cr. App.), 41 S. W. 624; *Kegans v. State* (Cr. App.), 95 S. W. 122.

Code Cr. Proc., art. 675, subd. 13, provides that where a juror has a preconceived opinion, he shall be examined as to how his opinion was formed, and if it was formed from rumor, hearsay, or newspaper reports, and the juror swears that he feels able, notwithstanding his opinion, to render an impartial verdict, the court may, in its discretion, permit him to sit in the case. Held, that where preconceived opinions of jurors were not founded on the relation of a witness, but only on rumor, hearsay, and newspaper reports, it was not error to overrule defendant's challenges for cause or to admit such jurors to sit in the case, though such opinions were unfavorable to defendant; the jurors swearing that their opinions would not influence their verdict. *Wilkerson v. State* (Cr. App.), 57 S. W. 956.

Opinion Requiring Evidence to Remove.—Where a juror testified that he had formed an opinion from reading newspapers, which it would take evidence to remove, but that, if chosen, he could and would lay aside his opinion and try the case according to the law and evidence, he was qualified. *Groszoehmigen v. State*, 57 Tex. Cr. App. 241, 121 S. W. 1113; *Grisson v. State*, 4 Tex. Cr. App. 374; *Post v. State*, 10 Tex. Cr. App. 579; *Steagald v. State*, 22 Tex. Cr. App. 464, 3 S. W. 771; *Morris v. State*, 30 Tex. Cr.

App. 95, 16 S. W. 757; *Ashton v. State*, 31 Tex. Cr. App. 479, 21 S. W. 47; *Reed v. State*, 32 Tex. Cr. App. 25, 22 S. W. 22; *Trotter v. State*, 37 Tex. Cr. App. 468, 36 S. W. 278; *Deon v. State*, 37 Tex. Cr. App. 506, 40 S. W. 266; *Morrison v. State*, 40 Tex. Cr. App. 473, 51 S. W. 358; *Tellis v. State*, 42 Tex. Cr. App. 574, 61 S. W. 717; *Parker v. State*, 45 Tex. Cr. App. 334, 77 S. W. 783; *Tardy v. State*, 46 Tex. Cr. App. 214, 78 S. W. 1076; *Wilkinson v. State* (Cr. App.), 57 S. W. 956; *Campos v. State*, 50 Tex. Cr. App. 289, 97 S. W. 100.

Where a juror in a homicide case testified that he had not formed such an opinion as to the guilt or innocence of accused as would influence him in forming a verdict, that he was not biased, and that he could give a fair trial, stated on cross-examination that he knew decedent, that he read an account of the homicide and talked with several people about it, and then formed a conclusion as to the guilt of defendant which was still in his mind and which it would take evidence to remove, and stated in response to questions of the district attorney and court that he would try the case on the evidence only, accused's challenge for cause was properly overruled. *Gregg v. State* (Cr. App.), 100 S. W. 1161.

A juror, challenged by defendant, stated on his voir dire that he had heard what purported to be the facts in the case and had formed an opinion requiring evidence to remove, that he could and would presume defendant innocent till proved guilty, and that his opinion would not influence him in arriving at a verdict. The challenge being overruled, defendant peremptorily challenged the juror, and stated that he had exhausted his peremptory challenges and demanded another challenge; but nothing was said about any particular juror being distasteful. Held, that there was no error in over-

ruling the challenge and in refusing the demand for another peremptory challenge. *Russell v. State*, 53 Tex. Cr. App. 500, 111 S. W. 658.

Where Opinion Fixed.—Where a juror has come to a fixed opinion of defendant's guilt through reading newspapers giving full details of the alleged crime, and also defendant's alleged confession, and it will take evidence to overcome the opinion, he is disqualified, though he testifies that he can try the case according to the evidence, and give defendant the presumption of innocence. *Gallaher v. State*, 50 S. W. 388, 40 Tex. Cr. App. 296.

J. PERSONAL OPINIONS AND CONSCIENTIOUS SCRUPLES.

1. Subject Matter of Cause.

a. Crimes and Criminals.

Prejudice against the crime of murder does not disqualify a juror on a prosecution for homicide. *Franks v. State*, 88 S. W. 923, 47 Tex. Cr. App. 638.

A juror testifying as to his competency in a rape case, that he had a prejudice against the crime, which did not extend to the person charged, that he would not be influenced by any prejudice in making up the verdict, was competent, though he also stated that he would require accused to produce evidence to vindicate himself. *Dies v. State*, 56 Tex. Cr. App. 32, 117 S. W. 979.

b. Sale of Intoxicating Liquors.

On trial for the violation of the local option law whether the jurors had a prejudice against unlawful beer clubs run in a local option precinct would not be material, and is no ground of objection to their competency. *Arnold v. State*, 40 S. W. 735, 38 Tex. Cr. App. 5.

2. Particular Defenses.

Insanity.—Prejudice against the plea of insanity does not disqualify a juror on a prosecution for murder, when the

defendant interposes no plea of insanity in the case. *Franks v. State*, 88 S. W. 923, 47 Tex. Cr. App. 638.

A juror who stated on his voir dire that he had no opinion on defendant's plea of insanity, that his prejudice against such plea was that it was often unfounded, and that if selected as a juror he would give the same consideration to testimony relating to that defense as to any other, was not disqualified. *Cannon v. State*, 56 S. W. 351, 41 Tex. Cr. App. 467.

3. Weight and Effect of Evidence.

In homicide, a juror who was not willing to find a verdict of guilty on circumstantial evidence, if the effect thereof would be punishment by death was properly excused. *Martin v. State*, 83 S. W. 390, 47 Tex. Cr. App. 29, affirmed in 26 S. Ct. 338, 200 U. S. 316, 50 L. Ed. 497; *Clanton v. State*, 13 Tex. Cr. App. 139; *Shafer v. State*, 7 Tex. Cr. App. 239.

A juror was disqualified to sit in a murder case in which the sole defense was insanity, who stated on his voir dire that he would require overwhelming proof of insanity before acquitting on that ground; the law only requiring proof of insanity by a "preponderance" of the evidence, which may leave the mind in doubt, while "overwhelming" proof is such as is sufficient to remove every doubt from the mind. *Jones v. State*, 60 Tex. Cr. App. 139, 131 S. W. 572.

4. Punishment Prescribed for Offense.

Capital Punishment.—It is good cause of challenge by the state that a juror declares, on his voir dire, that he has conscientious scruples against finding any person guilty of a crime punishable with death. *White v. State*, 16 Tex. 206; *Hyde v. State*, 16 Tex. 445; *Burrell v. State*, 18 Tex. 713; *Kennedy v. State*, 19 Tex. Cr. App. 618; *Shafer v. State*, 7 Tex. Cr. App. 239; *Clanton v. State*, 13 Tex. Cr. App. 139; *Gonzales v. State*, 31 Tex. Cr. App. 508, 21 S. W. 253; *Sawyer v.*

State, 39 Tex. Cr. App. 557, 47 S. W. 650; *Thompson v. State*, 19 Tex. Cr. App. 593.

Const., art. 5, § 8, authorizing the jury in a capital case, in their discretion, to substitute imprisonment for life for the death penalty, does not abrogate the statutory provision making conscientious scruples as to inflicting the punishment of death for crime a disqualification of a juror. *Caldwell v. State*, 41 Tex. 86.

K. REJECTION ON COURT'S OWN MOTION.

Power of Court.—If defendant and state's attorney waive an objection to jurors for bias, the judge is without authority to reject the jurors upon his own motion. *Greer v. State*, 14 Tex. Cr. App. 179.

Where the court excuses a proposed juror on its own motion to which defendant excepts, and the juror is then recalled and tendered to defendant, the court asking him if he would accept said juror, whereupon defendant stands mute and the court again excuses the juror, defendant has nothing whereof to complain. *Pierson v. State*, 21 Tex. Cr. App. 14, 17 S. W. 468.

Grounds in General.—A special venire having been summoned to try a murder case, the judge permitted a jury to be taken therefrom to try another case, and while such jury were out called the murder case for trial, but failed to obtain a full jury from the remainder of the special venire. Thereupon the judge called the other jury into court, swore the several members, who were accepted by the state and defense, and interrogated them as to whether they were on such other jury and had agreed on their verdict, and, on their replying that they were not agreed, discharged them for cause, and sent them back to consider their verdict. Held, that the action of the court was improper, since the court should not excuse a juror as a means of curing its previous improper action

in derogation of the prisoner's rights, but that the jury should have been discharged from considering the other case when their services were needed in the murder case, or the murder case should have been postponed till the verdict in the other case was rendered. *Bates v. State*, 19 Tex. 122.

Where one juror stricken out by the defense is found in the box with twelve other jurors he may be dismissed after the trial has begun. *Davis v. State*, 9 Tex. Cr. App. 634, 636.

Formation and Expression of Opinion.—If the juror answers that a conclusion in his mind as to the guilt or innocence of defendant will not influence his verdict, and the court, on further examination, is not satisfied of his impartiality, he must be discharged, whether challenged or not. *Stagner v. State*, 9 Tex. Cr. App. 440.

Code Cr. Proc., art. 636, declares that where, on a trial for murder, a juror states under oath that there is an established conclusion as to defendant's guilt or innocence that would influence his verdict, "he shall be discharged." Held that, when a juror thus answers, he should be set aside, whether challenged or not. *Spear v. State*, 16 Tex. Cr. App. 98.

Personal Opinions and Conscientious Scruples.—Under Pen. Code 1879, art. 609, which provides that the punishment for murder in the first degree shall be death or imprisonment for life, it is the duty of the court to see that a jury organized which will be willing to assess either penalty, as the facts and circumstances should warrant; and it may, on its own motion, excuse jurors who, on their voir dire, state that they have conscientious scruples against the infliction of the death penalty. *Gonzales v. State*, 31 Tex. Cr. App. 508, 21 S. W. 253.

Where a juror in a capital case answered that he had no conscientious scruples against the infliction of death as a punishment, and was accepted by

both parties, but he subsequently informed the court that he had misunderstood the question and that he had answered wrong, it was not error for the court to dismiss him and proceed with the organization of the jury. *Black v. State*, 81 S. W. 302, 46 Tex. Cr. App. 590.

After Acceptance.—While neither party may peremptorily challenge a juror after he has been accepted, the court may in its discretion excuse a juror for good cause. *Drake v. State*, 5 Tex. Cr. App. 649.

After a juror has been sworn and impaneled in a felony case, the court has no power to excuse him without consent of defendant. *Sterling v. State*, 15 Tex. Cr. App. 249.

Physical Disability.—Under Const., art. 5, § 13, giving the remainder, after jurors not exceeding three have been disabled, the power to render the verdict, it is within the discretion of the court to discharge a juror on account of his sickness. *Ray v. State*, 4 Tex. Cr. App. 450; *Bates v. State*, 19 Tex. 122.

L. WAIVER OF RIGHT TO OBJECT OR CHALLENGE.

1. Failure to Investigate, Challenge or Object in General.

The disqualification of trial jurors is waived where it is not taken advantage of until motion for a new trial. *Cubine v. State*, 73 S. W. 396, 44 Tex. Cr. App. 596.

Any irregularities in special venire must be considered as having been waived by the acquiescence of the accused in the completion of the panel without objection. *Jackson v. State*, 4 Tex. Cr. App. 292.

If a juror is excused in his absence because of the sheriff's suggestion that he is postmaster, and defendant fails to apply for an attachment in order to test the bona fides of the excuse, he can not afterwards complain. *Kennedy v. State*, 19 Tex. Cr. App. 618.

It is no ground for reversal that one of the jurors, accepted by defendant and by the state, was omitted in the call for the jury, and that another juror served in the case, where defendant did not, upon discovering the mistake, ask that such juror be impaneled, and the last one be set aside. *Granger v. State* (Cr. App.), 31 S. W. 671.

A venireman in a criminal case, who stated, as a reason why he thought he was disqualified, that he was one of defendant's compurgators of an application for a change of venue, was held competent by the court, and was accepted by the state. The venireman then objected that, if he served on the jury, he would be blamed if defendant should be acquitted, whereupon the court excused him. Defendant excepted, and the venireman was recalled at the instance of the state's attorney and tendered to defendant. When asked if he would have the venireman sworn as a juror, defendant's counsel replied, "Defendant stands mute." The venireman was then discharged. Held, that defendant could not complain. *Pierson v. State*, 21 Tex. Cr. App. 14, 17 S. W. 468.

2. Citizenship.

Where defendant failed to test on voir dire examination the qualifications of a juror, he can not object after conviction on motion for new trial that the juror was an alien. *Mills v. State* (Cr. App.), 34 S. W. 270.

3. Electors, Freeholders or Taxpayers.

Where accused failed to question a juror as to his qualification as a freeholder, the fact that he was not qualified as such was not ground for reversal. *Corley v. State* (Cr. App.), 65 S. W. 1073.

4. Pecuniary Interest and Prejudice.

A party is not precluded from objecting to a juror on the ground of prejudice because he did not examine him upon his voir dire as to his prejudice, unless gross neglect shown upon his part. *Hanks v. State*, 21 Tex. 526.

5. Prior Service as Juror.

Jurors testified on their voir dire that they had neither formed nor expressed an opinion as to accused's guilt or innocence; that they had convicted another for having played cards in the same game; that they did not know what game of cards accused was to be tried for playing, but they did know they could give him a fair trial. They testified, on motion in arrest, that they were guided solely by the evidence, and not by the evidence in the companion case. Held, that accused's failure to further examine them on their voir dire touching the companion case precluded his urging their prejudice on motion in arrest. *Russell v. State*, 72 S. W. 190, 44 Tex. Cr. App. 465.

Where a party serving as a juror in a murder prosecution served in a prior prosecution, in which many of the same facts were involved, in which prior suit defendant's counsel was also counsel, such fact is not ground for a new trial, since counsel was aware of it before accepting such juror. *Garcia v. State* (Cr. App.), 63 S. W. 309.

6. Formation and Expression of Opinion.

Where a list of five talesmen was given to accused to strike from, and accused did not strike a particular juror, he could not complain of the court's action in compelling him to accept such juror, on the ground that he was disqualified for having a preconceived opinion. *Bice v. State*, 55 Tex. Cr. App. 529, 117 S. W. 163.

Where one of the jurors on his examination stated that he had expressed no opinion as to the case, and while the trial was pending defendant discovered that the juror had expressed an opinion, and he made a motion to suspend the trial and discharge the juror, he was in the exercise of proper diligence. *Hughes v. State* (Cr. App.), 60 S. W. 562.

Where one of the jurors stated on his voir dire that he had expressed no

opinion as to the case, defendant was not estopped, by his failure to examine the juror further as to the matter, from thereafter, on a motion for a substitution of a juror, and on a motion for a new trial, objecting to the juror on the ground that he had expressed an opinion. *Hughes v. State* (Cr. App.), 60 S. W. 562.

Under Code Cr. Proc. 1895, art. 673, subd. 13, declaring that if a juror answers that he has formed a conclusion as to defendant's guilt, but that such conclusion will not influence his verdict, he shall be further examined as to how his conclusion was formed, and the extent to which it will affect his action, etc., a party who accepts a juror after learning that he has formed an opinion, without pressing the inquiry further, can not afterwards complain, though the juror was not fair and impartial. *Kirk v. State* (Cr. App.), 37 S. W. 440.

7. Summoning, Drawing and Impaneling.

Objections to the mode and manner of drawing and preparing the jury lists, should be made at the time, and if not done then, defendant will not be heard to complain afterwards, but will be held to have waived all such objection. *Jones v. State*, 37 Tex. Cr. App. 433, 35 S. W. 975.

Where a special judge presided at the opening of a trial for murder, and no memorandum was made of the jurors on the special venire who were excused, and when the regular judge took charge of the case the counsel were unable to state what jurors had been excused, and the court declined to find the absent jurors, and excused them by announcement from the bench, and instructed the sheriff to summon a panel of talesmen, and no objection or exception was interposed by the defendant at that time, but on the following day when the impaneling was being proceeded with defendant objected to proceeding in the absence of

part of the jurors on the original special venire, the action of the court in overruling the objection was not error. *Hughes v. State*, 95 S. W. 1034. 50 Tex. Cr. App. 32.

Objections to irregularities in regard to a special venire can not be made for the first time after verdict. *Perry v. State* (Cr. App.), 45 S. W. 566.

It is competent for defendant in a criminal case to waive any particular requirement as to the manner of forming a jury, so long as the right of a trial by a jury is not impaired. *Grant v. State*, 3 Tex. Cr. App. 1.

Where there were two men of the same name, each being a competent juror, and, after one was subpoenaed, by agreement between them the other attended court, was accepted, and sat on the trial of defendant for murder, the change not being discovered until after the trial, there was no error of which defendant can complain. *Morgan v. State*, 67 S. W. 420, 43 Tex. Cr. App. 543.

Where counsel for the state and defendant in a trial for homicide agreed that the regularly drawn jury for the week should be regarded as the special venire, and both parties waived the summoning of any other number of persons than thirty-six regular jurors, defendant could not urge error in not having the special venire drawn in the usual way. *Collins v. State*, 83 S. W. 506, 47 Tex. Cr. App. 303.

Waiver by defendant of the right to have the jury impaneled under the new, instead of the old law, does not deprive him of the right of challenge or of any other right necessary to a fair and impartial trial. *Grant v. State*, 3 Tex. Cr. App. 1.

Certain of the persons named in the copy of the venire served on the accused had not been served by the sheriff, and others were not in attendance when the venire was called, and accused declined the proposal of the

court to suspend the call and run attachments for such persons, and the panel was filled out of the venire, and, so far as the record shows, without the accused exhausting their challenges. Held, that the irregularities must be deemed waived; and there being nothing to impugn the qualifications or impartiality of the jury, no prejudicial error is apparent. *Jackson v. State*, 4 Tex. Cr. App. 292.

When a special venire is called for the trial of a capital case and any persons summoned fail to appear, either party may have attachments, returnable forthwith, issued, for such absentees, and failure to demand such attachments, when a special venire is called, is deemed a waiver thereof. *Hudson v. State*, 28 Tex. Cr. App. 323, 13 S. W. 388.

Clerk's Failure to Draw Names as Provided by Statute.—Where, in a criminal case, the clerk failed to draw the names of the jury from the box and enter them on two slips of paper at the trial, as required by Code Cr. Proc., arts. 645, 646, but, prior to the announcement of ready for trial, had prepared the lists for the parties, defendant's failure to object at the time was a waiver of the irregularity. *McMahon v. State*, 17 Tex. Cr. App. 321.

8. Acceptance of Juror as Waiving Challenge.

Where defendant accepted the jury, without challenging the array or any particular juror, he waived any right to impeach its organization and could not do so on motion for a new trial, or in arrest of judgment. *Yanez v. State*, 6 Tex. Cr. App. 29; *Carter v. State*, 39 Tex. Cr. App. 345, 46 S. W. 236, 48 S. W. 508; *Hamilton v. State*, 3 Tex. Cr. App. 643; *Buie v. State*, 1 Tex. Cr. App. 452.

9. Effect of Failure to Exhaust Peremptory Challenges.

An accused can not complain because of the overruling of a challenge to a juror for cause, where he did not

thereupon peremptorily challenge the juror, and his peremptory challenges were not exhausted. *Lum v. State*, 11 Tex. Cr. App. 483; *Powers v. State*, 23 Tex. Cr. App. 42, 5 S. W. 153; *Williams v. State*, 30 Tex. Cr. App. 354, 17 S. W. 408.

Error in overruling a motion to quash a special venire for discrepancies between it and the copy served on defendant was waived by failure to exhaust peremptory challenges. *Scott v. State*, 29 Tex. Cr. App. 217, 15 S. W. 814.

Under Rev. St., art. 3010, disqualifying a juror who has served for six days within a certain time, it was error to dismiss a juror who had served five days only, on a challenge by the state for incompetency, though defendant did not exhaust his peremptory challenges. *Monk v. State*, 27 Tex. Cr. App. 450, 11 S. W. 460.

That defendant has not exhausted his peremptory challenges is no excuse for judicial infringement of the jury law, e. g., excusing a proposed juror wrongfully. *Wade v. State*, 12 Tex. Cr. App. 358.

M. CHALLENGE TO PANEL OR ARRAY, AND MOTION TO QUASH VENIRE.

1. Nature and Right in General.

While challenge to the array is not permitted in all of the states, it is a practice known and recognized in Texas and may be made propter defectum—from personal objections, such as alienage, infancy, or lack of statutory requirements; propter affectum, on account of bias or partiality, or propter delictum; because of crime, by which legal incompetency has been incurred. *Cooley v. State*, 38 Tex. 636.

A challenge to poll is a waiver of the right to challenge to array. *Cooley v. State*, 38 Tex. 636.

When Array Selected by Jury Commissioners.—Challenges to the array of petit jurors selected by jury commissioners is not allowed. *Woodard v.*

State, 9 Tex. Cr. App. 412; *Williams v. State*, 24 Tex. Cr. App. 32, 5 S. W. 658; *Bean v. State*, 17 Tex. Cr. App. 60; *O'Bryan v. State*, 12 Tex. Cr. App. 118.

Article 625, Code of Criminal Procedure, prohibiting a challenge to the array of jurors for any cause, where the jury was selected by commissioners, does not violate the fourteenth amendment to the federal constitution. *Cavitt v. State*, 15 Tex. Cr. App. 190.

Where the accused's right to trial by a jury, selected by jury commissioners, has been violated, a motion to quash the venire should be granted. *Richardson v. State*, 46 Tex. Cr. App. 83, 79 S. W. 536.

Challenges to the array of jurors and talesmen, interposed at the proper stage of a criminal trial, should be sustained; it is error to overrule them, where the jury and talesmen were not summoned as required by law. *Shackleford v. State*, 2 Tex. Cr. App. 385.

Where the venire has not been selected by jury commissioners as the law directs, it should be quashed. *Ray v. State*, 79 S. W. 536, 46 Tex. Cr. App. 176.

2. Grounds.

Correct Action of Summoning Officer.—Defendant may challenge an array for the following cause only: That the officer summoning the jury acted corruptly and willfully summoned persons known to be prejudiced against defendant with a view to convict him. *Bowman v. State*, 41 Tex. 417; *Swofford v. State*, 3 Tex. Cr. App. 76; *Harris v. State*, 6 Tex. Cr. App. 97; *Tuttle v. State*, 6 Tex. Cr. App. 556; *Castanedo v. State*, 7 Tex. Cr. App. 582; *Woodard v. State*, 9 Tex. Cr. App. 412; *Anderson v. State*, 34 Tex. Cr. App. 96, 29 S. W. 384; *Bateman v. State* (Cr. App.), 44 S. W. 290.

Under Rev. St. 1895, art. 3202, providing that an array of jurors may be challenged on the ground that prejudiced jurors have been summoned, a

motion to quash the array on the ground that the jury had been summoned by the sheriff under order of the judge, although a jury had been selected for that term of court by a jury commission, is untenable. *Sanchez v. State*, 46 S. W. 249, 39 Tex. Cr. App. 389.

Jury Commissioners Not Appointed.

—Where the accused's right to trial by a jury selected by jury commissioners has been violated, a motion to quash the venire should be granted, notwithstanding Code Cr. Proc., arts. 661, 696, giving the causes for challenging the array, do not include the failure to appoint jury commissioners. *White v. State*, 78 S. W. 1066, 45 Tex. Cr. App. 597.

A challenge to array based upon the ground that the jury commissioners who selected the jury were not properly appointed or qualified, is rightly overruled, evidence showing a valid appointment and a mere failure of the clerk to record entry thereof. *Hart v. State*, 15 Tex. Cr. App. 202.

Presumption When Manner of Selection Not Shown.

—Code Cr. Proc. 1895, art. 661, provides that accused may challenge the array for certain causes. Article 662 provides that the preceding article shall not apply where the jurors are those selected by jury commissioners. Held that, where there is no showing whether the jury was selected by the jury commissioners or not, it will be presumed that it was organized according to law and drawn by the jury commissioners, and no challenge to the array will be allowed. *Ross v. State*, 56 Tex. Cr. App. 275, 118 S. W. 1034.

Prosecuting Attorney Assisting Clerk in Checking List.

—That an attorney for the state assisted the clerk in checking a venire list with the list from which it was drawn is not cause for quashing the venire, on the theory that the state's attorney was appointed, before accused's counsel, as to who con-

stituted the venire, since after the venire list was drawn up it was subject to inspection by any one the sheriff cared to show it to. *Rice v. State*, 54 Tex. Cr. App. 149, 112 S. W. 299.

Failure to Summon Persons of African Descent.—Code Cr. Proc. 1895, art. 661, provides: "The defendant may challenge the array for the following causes only: That the officer summoning the jury has acted corruptly, and has willfully summoned persons upon the jury known to be prejudiced against the defendant with a view to cause him to be convicted." Article 662 provides that art. 661 does not apply "when the jurors summoned are those who have been selected by jury commissioners. In such case no challenge to the array is allowed." Held, that it is not ground for a motion to quash a special venire drawn by the jury commissioners that no persons of African descent were drawn thereon. *Carter v. State*, 46 S. W. 236, 39 Tex. Cr. App. 345, reversed in 20 S. Ct. 687, 177 U. S. 687, 44 L. Ed. 839.

The fact that a trial jury is composed of white men exclusively, or that jurors were selected from persons known not to be equals of the accused, is no ground for a challenge to the array. *Carter v. State*, 39 Tex. Cr. App. 345, 349, 46 S. W. 236, 48 S. W. 508.

Lack of Diligence on Part of Sheriff.—It was not error to refuse to quash a venire in a murder case on the ground that the sheriff's return failed to show diligence in summoning particular jurors drawn, where his amended return shows that such jurors, excepting one, were not found after diligent search, and that that juror was served and was in attendance, his name being omitted from the return by mistake, and where the state subsequently challenged such juror, and the sheriff and his deputies testified to the details of efforts made to find the other jurors, that some of the jurors were not of

the state, that none were omitted purposely, and that the sheriff and his deputies had carried a list of the jurors throughout the county, inquiring for them where they were supposed to live. *Rice v. State*, 54 Tex. Cr. App. 149, 112 S. W. 299; *Martin v. State*, 38 Tex. Cr. App. 462, 43 S. W. 352.

Mistake in Title of Summoning Officer.—The title of the summoning officer constitutes no ground for a challenge to the array. *Suit v. State*, 30 Tex. Cr. App. 319, 17 S. W. 458.

Mistake in Name of Juror.—One Bible was summoned on a special venire facias, but in the copy served on defendants, the name of Biffle, instead of Bible, appeared. Defendant moved the court to set aside the venire, on the ground that they had not been served with a copy of it. Held, that the motion was in effect a challenge to the array, which is maintainable only when the summoning officer acted corruptly and summoned persons prejudiced against the accused. *Swofford v. State*, 3 Tex. Cr. App. 76.

Selecting All Jurors from Same City.—The mere fact that all the jurors for a term were selected from one and the same city is not valid objection to the venire. *Williams v. State*, 45 Tex. Cr. App. 218, 75 S. W. 859.

Some of Jurors Incompetent.—That some of the jurors of a large venire are incompetent is not ground, of itself, for challenging the array. *Mitchell v. State*, 43 Tex. 512.

Jurors Had Heard Another Case of Same Character.—It is not ground for challenge to the array of jurors that they had heard and tried a case against another party charged with an offense of the same character. *Staley v. State* (Cr. App.), 29 S. W. 272. *Anderson v. State*, 34 Tex. Cr. App. 96, 29 S. W. 384.

Jury Commissioner Selecting Himself as Juror.—That a jury commissioner selected himself as a member of a jury is not ground for motion to quash the array, whatever its value as

ground of challenge to the poll. *McCainant v. State* (Cr. App.), 34 S. W. 610.

One of Jury Commissioners Witness in Case.—Motion to quash the special venire was based upon the ground that one of the jury commissioners was disqualified, inasmuch as he was a witness in the case, and had employed counsel to prosecute the appellant. But it is shown that he had not employed counsel when he acted as jury commissioner, and at that time had no cause in court to be tried by a jury. Held, that the motion was properly overruled. *McDonald v. State*, 15 Tex. Cr. App. 493.

3. Time.

All challenges to the array must precede those made to the poll and should a party make a challenge to the poll, he will be held to have waived his right to challenge to the array. *Cooley v. State*, 38 Tex. 636.

After Arrest.—A defendant, prosecuted criminally, is not bound to except or plead to the array or the polls, until after he is arrested. *Tompkins v. Republic*, *Dallam* 498.

After Jury Selected, Impaneled and Sworn.—A motion to quash a special venire, after the jury had been selected, impaneled, and sworn, comes too late. *Carter v. State*, 48 S. W. 508, 39 Tex. Cr. App. 345, denying rehearing in 46 S. W. 236, reversed in 20 S. Ct. 687, 177 U. S. 442, 44 L. Ed. 839.

When Panel Not Full.—Should a party wish to make a challenge to the array when the panel is not full, he may pray a tales to complete the number and then make his objection. *Cooley v. State*, 38 Tex. 636.

4. Making and Sufficiency.

Made in Writing Setting Out Grounds under Oath.—A challenge to an array based upon the misconduct of the officer in summoning the jury must state, under oath, that the officer has acted corruptly, and willfully summoned persons known to be prejudiced

against defendant, and such challenge can only be made when jurors have not been selected by jury commissioners. *Arnold v. State*, 38 Tex. Cr. App. 1, 40 S. W. 734; *Sanchez v. State*, 39 Tex. Cr. App. 389, 390, 46 S. W. 249; *Cooley v. State*, 38 Tex. 636; *Woodard v. State*, 9 Tex. Cr. App. 412; *Perry v. State* (Cr. App.), 34 S. W. 618, 619.

Specific Objection.—That the names of twenty-six jurors were drawn, instead of twenty-four, as required by statute, can not be taken advantage of by a general objection to the manner of organizing the jury. The objection should be taken specifically. *Jones v. State*, 37 Tex. Cr. App. 433, 35 S. W. 975.

Presumption of Regularity.—Where on a trial for murder, defendant's exceptions to two supplementary venires issued in consequence of the exhaustion of the original venire, on the ground that they were not summoned according to law, were overruled, and his bill of exceptions failed to show wherein the law was disregarded, it will be presumed that the court below conformed to the provisions of the law. *Swofford v. State*, 3 Tex. Cr. App. 76.

5. Affidavits and Other Evidence.

Objections Must Be Supported by Evidence.—There was no error in overruling a motion to quash a venire because selected by jury commissioners taken from different parts of the county, where there was no proof that the commissioners were not from different portions of the county. *Dailey v. State* (Cr. App.), 55 S. W. 821.

Evidence of Race Discrimination.—While the circumstances that for many years no negro had been selected or impaneled as a grand or petit juror might have weight in a close case, it can not be considered on a motion to quash a special venire in a criminal case when that fact is shown. *Pollard v. State*, 58 Tex. Cr. App. 299, 125 S. W. 390; *Thomas v. State*, 49 Tex. Cr. App. 633, 95 S. W. 1069.

Proceedings in Other Sections Irrelevant.—On motions to quash a petit jury panel summoned to try a negro charged with a criminal offense, because of race discrimination in the summoning of the jury, testimony of proceedings in other courts of the county with reference to the drawing of jurors was irrelevant. *Washington v. State*, 51 Tex. Cr. App. 542, 103 S. W. 879.

Affidavit.—A party wishing to challenge the array of jurors must make a motion "in writing, setting forth distinctly the ground of such challenge," supported by his own affidavit or that of some credible person, as prescribed by Code Cr. Proc., art. 626. *Perry v. State* (Cr. App.), 34 S. W. 618.

Presumptions and Burden of Proof.—Rev. St., art. 3032, requires that the district court shall, at each term, appoint jury commissioners, who shall select jurors to serve during the several weeks of the succeeding term, and that the said commissioners shall certify the several lists of names to be the lists drawn by them for the said several weeks, which lists shall be sealed in separate envelopes, indorsed, "Lists of Petit Jurors for the — Week of the — Term of the — Court of — County." Defendant's motion to quash the special venire was based upon the fact that the several lists were headed "Lists of Jurors for the April Term," instead of, properly, the May term. The bill of exceptions did not show, nor did it otherwise appear, that the envelopes inclosing said lists were not properly indorsed. Held that, as the statute does not require the "headings of the lists" to be indorsed in like manner as the envelopes, the presumption obtained in favor of the proper return of the lists. *Giebel v. State*, 28 Tex. Cr. App. 151, 12 S. W. 591.

Rev. St., art. 3027, provides that the county courts shall, at the January and July terms in each year, appoint three jury commissioners. Article 3022 pro-

vides that if, from any cause, commissioners should not be selected or should fail to act, or the panels be set aside or the list lost or destroyed, the court shall proceed to supply jurors, and may appoint commissioners for the purpose. Held that, where the record showed an appointment of commissioners by the county court at the May term, it would be presumed, in the absence of any showing to the contrary, that ground existed for the exercise of discretionary power conferred by § 3022. *O'Bryan v. State*, 12 Tex. Cr. App. 118.

6. Trial and Determination.

Where, on return of a special venire, it appeared that twenty-four had not been served and that twelve of those were not served for want of time, whereupon defendant moved to quash the special venire and return for want of a showing of diligence on the part of the sheriff in making service on those not summoned, the court should either have quashed the writ and ordered a new special venire, or have overruled the motion to quash, and was not authorized to direct the sheriff to bring in the jurors not summoned and to order the trial to proceed as to those present in court. *Horn v. State*, 50 Tex. Cr. App. 404, 97 S. W. 822.

Province of Court.—When the question is first asked a juror as to his opinion, he is made judge of the extent to which the conclusion he has formed will influence his action, but when further examined, the court becomes the judge. *Black v. State*, 42 Tex. 377.

N. CHALLENGES FOR CAUSE.

1. Nature and Right in General.

Challenge for cause is an objection to a particular juror, alleging some fact which renders him incapable or unfit to serve on the jury; as, for instance, that he has a bias or prejudice in favor of or against the defendant, or that, from hearsay or otherwise, there is established in his mind such a conclusion as to the guilt or inno-

cence of the defendant as will influence his action in finding a verdict. *Stagner v. State*, 9 Tex. Cr. App. 440.

Challenges to the poll are such as are made to individual jurors as distinguished from the array. *Cooley v. State*, 38 Tex. 636.

The right to challenge for cause is common to both parties and the court must judge of the sufficiency of the cause assigned. *Cooley v. State*, 38 Tex. 636.

Number of Challenges.—A party is not limited in the number of challenges he may make for cause. *Cooley v. State*, 38 Tex. 636; *Kennedy v. State*, 19 Tex. Cr. App. 618.

2. Grounds.

See ante, "Pecuniary Interest," V, D; "Relationship," V, E; "Business Connection or Transaction with Party of Attorney," V, F; "Prior Service as Juror," V, G; "Bias and Prejudice," V, H; "Formation and Expression of Opinion as to Causes," V, I; "Personal Opinions and Conscientious Scruples," V, J.

Act Aug. 1, 1876, § 26, provides that certain disqualifications of jurors "shall be a good cause for challenge." Held, that such section does not attempt to define all matters of disqualification and the parties to an action may urge any other matters which would render a juror unfitted to sit in a case. *Lester v. State*, 2 Tex. Cr. App. 432.

3. Time.

See ante, "Waiver of Right to Object or Challenge," V, L.

a. In General.

The time to make a challenge is between the appearance and the swearing of the jurors. *Cooley v. State*, 38 Tex. 636; *Lester v. State*, 2 Tex. Cr. App. 432; *Baker v. State*, 3 Tex. Cr. App. 525; *Jones v. State*, 14 Tex. Cr. App. 85; *Hannaman v. State* (Cr. App.), 33 S. W. 538.

In impaneling a jury from a special venire, each juror is to be passed upon as he is presented. *Ray v. State*, 4 Tex.

Cr. App. 450; *Mitchell v. State*, 43 Tex. 512.

If juror who fails to answer to the call of his name, but appears before the panel is complete, he may be examined and challenged or impaneled, but the cause shall not be unnecessarily delayed. *Sinclair v. State*, 35 Tex. Cr. App. 130, 32 S. W. 531.

It is not error for the court to require defendant to pass upon each juror of the special venire separately. *Garza v. State*, 3 Tex. Cr. App. 286; *Ray v. State*, 4 Tex. Cr. App. 450.

On a trial for murder, jurors having been summoned whom the court and both parties supposed to be qualified, a jury was selected. Before they were sworn it was discovered that two of the jury were nonresidents of the county. Held, that the state had the right to have the disqualified jurors stood aside, and other jurors summoned to take their place. *Monson v. State*, 76 S. W. 570, 45 Tex. Cr. App. 426.

After Verdict.—Where a juror on voir dire examination states that he has formed and expressed opinion, but that the same would not influence him as a juror, it is the duty of the defendant to probe the matter thoroughly, and it is too late after the verdict to go into the question as ground for a new trial. *Aud v. State*, 36 Tex. Cr. App. 76, 35 S. W. 671.

Objection that a juror sat on a mistrial of the case at a previous term comes too late after the trial, where defendant shows no prejudice. *Brill v. State*, 1 Tex. Cr. App. 572.

b. After Swearing or Impaneling of Jurors.

After a jury has been impaneling and sworn, it is too late, as a general rule, to inquire into the impartiality of a juror. *Evans v. State*, 6 Tex. Cr. App. 513.

A case may arise where a challenge should be allowed after a juror has been accepted, but the cause should be something arising subsequently to the time

allowed for a challenge, or that would not be discovered by an examination allowed on voir dire. *Baker v. State*, 3 Tex. Cr. App. 525; *Hubotter v. State*, 32 Tex. 479; *Mitchell v. State*, 43 Tex. 512.

Where, after a juror is impaneled, accused discovers that the juror answered erroneously in saying he was acquainted with accused, but it does not appear that the juror was not fair and impartial, it is not error to refuse to permit his challenge. *Andrews v. State* (Cr. App.), 76 S. W. 918.

After the jury had been sworn in a criminal case, defendant discovered in the box a juror whom he had previously challenged, and thereupon asked the court to stand him aside. Held, that defendant showed want of diligence in making the discovery. *Munson v. State*, 34 Tex. Cr. App. 498, 31 S. W. 387.

The jury in a murder case, having been impaneled, but no evidence adduced, one of the jurors was taken sick, and the defense proposed that he be discharged and another selected; but, a physician being consulted and the juror concluding he could remain, the trial proceeded. After several witnesses were examined, the juror became worse, and was discharged by the court; and thereupon the accused moved that the whole jury be discharged, and objected to being tried by the eleven remaining jurors. Held, not error to overrule the motion and proceed with the trial before the remaining jurors. *Ray v. State*, 4 Tex. Cr. App. 450.

Discretion of Court.—Though, as a general rule, it is too late, after the jury is empaneled and sworn, to inquire into the impartiality of a juror, yet if, after a juror has been sworn, he is found incompetent to serve, he may, in the exercise of a sound discretion, be excused by the court at any time before evidence is given; and this rule extends to capital cases, and as well for cause existing before as after the juror was

sworn. *Evans v. State*, 6 Tex. Cr. App. 513.

4. Making and Sufficiency.

Challenges to poll are made verbally, and should be couched in polite and respectful language. *Cooley v. State*, 38 Tex. 636.

Where defendant in a criminal prosecution presents his objection orally at the proper time to a juror who had sat on the jury in a similar prosecution of the same defendant, he is entitled to have such juror excluded for cause. *Holmes v. State*, 52 Tex. Cr. App. 352, 106 S. W. 1160.

Grounds of Objection.—An objection to a juror will not be considered where grounds of the objection and cause for a challenge are not stated. *Aistrop v. State*, 31 Tex. Cr. App. 467, 20 S. W. 989; *Thomas v. State*, 36 Tex. 315.

The objection that an incompetent juror was impaneled and sat on the jury after defendant had exhausted his peremptory challenges, is not sufficient to raise the question of the juror's competency, where no reason is stated why the juror is objectionable to defendant, or why he was not fair and impartial. *Rippey v. State*, 29 Tex. Cr. App. 37, 14 S. W. 448.

By Suggestion to Court to Agree—ment to Set Aside Juror.—Where a juror is accepted and retained by defendant, and he does not seek to have him set aside when it is ascertained that there is a possibility of his being prejudiced against him, the simple suggestion to the court that he would agree to excuse the juror is not sufficient. If the juror is obnoxious to defendant he should move at once, and promptly, to set aside if legal grounds exist therefor. (Willson's Cr. St., § 2293.) *Roberts v. State*, 30 Tex. Cr. App. 291, 17 S. W. 450.

A plea in abatement to the competency of individual jurors or to the array does not seem to be good practice in this state. *Cooley v. State*, 38 Tex. 636.

5. Examination of Jurors.

a. Right to Examine in General.

The paramount object of the preliminary examination of jurors in any case, but especially in trials for capital felonies, is to secure to the accused a fair trial by an impartial jury, in conformity with a constitutional guaranty and the statutory regulations subordinate thereto. *Stagner v. State*, 9 Tex. Cr. App. 440.

In forming a jury in a capital case, each venireman is tested, and, if accepted by both parties, is sworn to try the case. *Hill v. State*, 10 Tex. Cr. App. 618.

Rights and Privileges of Jurors.—While the fact that one is under an indictment for a felony imperatively disqualifies him from serving as a juror, the fact must appear otherwise than from the examination of the proposed juror on his voir dire. *Sewell v. State*, 15 Tex. Cr. App. 56.

b. Discretion of Court.

Rejection or allowance of questions to prospective jurors in impaneling a jury is within the trial court's discretion. *Cavitt v. State*, 15 Tex. Cr. App. 190.

That each venireman should be examined in the absence and without the presence of the remaining veniremen is a matter of procedure wholly subject to the discretion of the trial court. *Macklin v. State*, 53 Tex. Cr. App. 197, 109 S. W. 145.

On a murder trial, one of the veniremen on his voir dire qualified as a juror, and was fully interrogated by defendant's counsel. After defendant in person had interrogated the veniremen at length, his questions became irrelevant, and the court directed him to confer with his attorney as to other questions. The venireman was peremptorily challenged, but by so doing defendant did not exhaust such challenges. Held, that the discretion of the court was not abused, nor defendant's rights infringed, under such circumstances.

Shaw v. State, 32 Tex. Cr. App. 155, 22 S. W. 588.

That the court is made judge, after the proper examination of qualifications of jurors, does not deprive a party of the right in all criminal cases where a juror's qualification is in doubt from his own answers, to have him further examined by the court or under its direction. *Massey v. State*, 10 Tex. Cr. App. 645.

c. Extent of Examination.

Where persons on voir dire swore to their qualifications as jurors, defendant is not required to investigate further. *Armendarres v. State*, 10 Tex. Cr. App. 44.

If a juror states that the opinion formed will not influence his verdict, he is subject to further examination. *Stagner v. State*, 9 Tex. Cr. App. 440.

In a prosecution for unlawfully carrying a pistol, there was no error in refusing to allow the jurors to be examined as to whether they knew anything about the facts of a former case in which defendant was acquitted of a charge of assault with intent to murder; it not appearing what defendant proposed to prove by the questions. *Woodroe v. State*, 96 S. W. 30, 50 Tex. Cr. App. 212.

If special veniremen appearing in court had not been summoned properly by an officer, it was punishable for the counsel for the defendant to examine each of such jurors on his voir dire as to the character of service made on them. *Franklin v. State*, 34 Tex. Cr. App. 625, 31 S. W. 643.

Laying Foundation for Peremptory Challenge.—One on trial for homicide is not entitled to ascertain how the jurors voted at a local option election to enable him to exercise his peremptory challenges, on the grounds that the case arose out of violations of the local option law, and that witnesses for the prosecution were adverse to accused because of previous local option cases.

Yardley v. State, 50 Tex. Cr. App. 644, 100 S. W. 399.

Counsel for accused, in a local option case, may, in questioning the jury with a view to peremptory challenges, inquire into the bias of the jurors in the particular case and in local option cases, but can not question them as to whether they took any part in local option elections, and whether they resided in local option precincts. *Drye v. State* (Cr. App.), 55 S. W. 65.

Pecuniary Interest.—In a criminal prosecution, interrogatories to jurors as to whether they did not belong to an order pledged to assist the officers of the county in prosecuting criminal cases, and whether the society had not raised money to assist in such prosecutions and to suppress crime, were properly excluded, there being no claim made that any of the jurors had interested themselves in the case on trial. *Dodd v. State* (Cr. App.), 82 S. W. 510.

d. Bias and Prejudice.

"It is always proper to probe the conscience of a juror, to ascertain thereby whether he would be a fair and impartial juror both to the state and the defendant." *Irvine v. State*, 55 Tex. Cr. App. 347, 116 S. W. 591.

Where, in a prosecution for unlawful sale of liquor, the state expected to rely on the testimony of a private detective, it was not error to permit private counsel for the state on the voir dire examination of jurors to state that the law did not require corroboration of the evidence of a private detective, and that it stood in respect to the case as a testimony of any other witness, and to ask the jury as to their attitude and prejudice, if any, against the testimony of a detective as a witness, as a basis for intelligently exercising peremptory challenges. *Morrow v. State*, 56 Tex. Cr. App. 519, 120 S. W. 491; *Cavitt v. State*, 15 Tex. Cr. App. 190; *Fendrick v. State*, 39 Tex. Cr. App. 147, 45 S. W. 589; *Irvine v. State*, 55 Tex. Cr. App. 347, 116 S. W. 591.

• An application to exclude veniremen from the courtroom during the selection of a jury should be granted where there presence would prevent defendant from asking proper questions for fear of prejudicing the jury. *Streight v. State*, 62 Tex. Cr. App. 453, 138 S. W. 742.

Race Prejudice.—"In *Lester v. State*, 2 Tex. Cr. App. 432, it was held, where a white man was on trial for the murder of a negro, it was proper to permit the state's counsel to ask jurors if they could return the same kind of verdict against a white man for killing a negro as they could against a white man for killing another white man upon the same evidence, and, if he could not, that this would afford ground for challenge of the juror. See *Williams v. State*, 44 Tex. 34, and *Fendrick v. State*, 39 Tex. Cr. App. 147, 45 S. W. 589." *Moore v. State*, 52 Tex. Cr. App. 336, 107 S. W. 540.

In Favor of or against Injured Party.—It is not proper to ask the jurors whether they or either of them had any bias or prejudice in favor of or against the injured parties. *Jones v. State*, 8 Tex. Cr. App. 648.

e. Formation and Expression of Opinion.

In examining persons summoned as jurors, fact to be determined is, whether or not jurors have formed such opinions as will probably influence their verdict. *Post v. State*, 10 Tex. Cr. App. 579.

When the jurors had qualified by saying that they had no prejudice against the defendant, it was not error to exclude the question, "Have you, from hearsay or otherwise, so prejudged the defendant that you think him such a person as would be likely to commit the offense?" *Messic v. State* (Cr. App.), 25 S. W. 626.

It was error, in a trial for murder, not to allow defendant to ask a juror, before trial, if he believed him guilty and that he ought to be hung, when

another juror had answered such questions in the affirmative. *Randle v. State*, 34 Tex. Cr. App. 43, 28 S. W. 953.

The court erred in refusing to allow defendant's counsel to interrogate jurors who, in testing their qualifications, had answered that "they hardly knew whether they had formed an opinion such as would influence their verdict." *Massey v. State*, 10 Tex. Cr. App. 645.

When jurors have stated upon examination that they have no conclusion as to case in hand regarding defendant's guilt or innocence, further investigation in premises is cut off. *Arnold v. State*, 38 Tex. Cr. App. 1, 40 S. W. 734.

The injunction in Cr. Code, art. 636, that if a juror, on the voir dire, answers that in his opinion his conclusion as to the prisoner's guilt will influence his verdict, he "shall be discharged," is imperative. He cannot be further examined. *Stagner v. State*, 9 Tex. Cr. App. 440.

Under Willson's Cr. St., § 2281 (Acts 1885, p. 90), providing that if the juror, when asked if the opinion he has formed will influence his verdict, answers in the affirmative, he shall be discharged; if in the negative, he shall be questioned as to how his opinion was formed, and if he swears that he can render an impartial verdict the court may accept him—it is only where the juror answers in the negative that he can be further questioned. *Shannon v. State*, 34 Tex. Cr. App. 5, 28 S. W. 540.

f. Personal Opinions and Conscientious Scruples.

Where, in a prosecution for violating a local option law, defendant's attorney stated that he expected to prove that members of the jury had a prejudice against a person who, from his occupation, might be in a position to violate the local option law, he should have been permitted to ask the jurors whether they had such prejudice.

Patrick v. State, 78 S. W. 947, 45 Tex. Cr. App. 587.

In a local option case, it was not error to refuse to let defendant ask the jury whether they were prejudiced against the offense, as distinguished from other offenses, where he was permitted to test each juror as to whether he was prejudiced against defendant. *Leach v. State* (Cr. App.), 49 S. W. 581.

Death Penalty.—On prosecution for homicide, it was not error for the state, in examining jurors on their voir dire, to ask whether they had scruples against inflicting the death penalty on circumstantial evidence. *Johnson v. State*, 71 S. W. 25, 44 Tex. Cr. App. 332; *Little v. State*, 39 Tex. Cr. App. 654, 47 S. W. 984.

g. Examination by Court.

A judge himself may properly examine persons offered as jurors, concerning their competency and fitness, and should be fully satisfied of fairness and impartiality of person offered as a juror before allowing him to serve as such. *Pierson v. State*, 18 Tex. Cr. App. 524.

To prevent exceptions and pleas, the court ought to interrogate the jurors before they are sworn on the grand inquest, as to the qualifications of citizenship and being freeholders or householders. *Tompkins v. Republic*, Dallah 488.

Act Aug. 1, 1876, § 1, enumerates the qualifications of jurors. Pasch. Dig., art. 3043, provides that it is the duty of the court in every case of felony to cause questions to be asked a juror for the purpose of testing his qualification. Held, that the failure of the court to test the jurors as to their qualifications in a capital case was ground for reversal. *Lester v. State*, 2 Tex. Cr. App. 432.

A proposed juror is absolutely disqualified by answering that he has formed such an opinion of the defendant's guilt or innocence as would in-

fluence him in finding a verdict. It is only when he answers the qualifying question in the negative that he is required to be examined by the court as to how far his conclusions, however formed, will influence his action. *Rockhold v. State*, 16 Tex. Cr. App. 577.

White's Ann. Code Cr. Proc., art. 673, subd. 13, provides that, where a juror is being questioned as to his conclusion as to the guilt or innocence of the accused, if he answers in the affirmative he shall be discharged, and if he answers in the negative he shall be further examined by the court, or under its sanction. A juror, in being examined on his voir dire, became confused, and the court said that the juror must presume a man accused of crime to be innocent until his guilt is proven, and the mind must be perfectly impartial between the state and defendant, and must have no opinion as to the guilt or innocence of the accused. "Now, what they [attorneys for state and defendant] wish to know is, if you have formed any opinion as to the merits of the case; that is, as to the guilt or innocence of the accused." Held not prejudicial to defendant, as invading his right to question jurors, or intimating to them their requirements for qualification. *King v. State* (Cr. App.), 64 S. W. 245.

Where, before accused had been called on to exercise his right of challenge, the court had interrogated the entire jury as to, whether or not they had served as jurors in that court for as many as six days within the last six months, and they had all either answered "No" or made no dissent to the question, accused might assume in challenging, that they had not so served. *Benton v. State*, 52 Tex. Cr. App. 360, 107 S. W. 838.

h. Mode of Examination.

Examining Jurors Separately or Collectively.—In forming a jury from a special venire in a prosecution for murder, the questions should be put to

them separately and not en masse. *Wasson v. State*, 3 Tex. Cr. App. 474.

Cross-Examination.—It is not error for the court to require the defendant to cross-examine the jurors before the state had accepted or rejected them. *Hardin v. State*, 4 Tex. Cr. App. 355.

The accused, if desiring to cross-examine a juror on his qualifications, may be required to do so before the state accepts or rejects the juror. *Grissom v. State*, 4 Tex. Cr. App. 374.

Explanations by Court.—In a murder trial accused's counsel, in stating the case to the jury on their voir dire examination, stated that insanity was in issue, and asked them if they recognized the mental condition known as insanity, and, upon receiving an affirmative answer, asked them if they would acquit if they believed that accused was insane when the offense was committed, and upon receiving an affirmative answer asked if they would give accused the benefit of any reasonable doubt on the question of insanity, whereupon the court instructed that the jury need not answer the last question because the doctrine of reasonable doubt did not apply to the issue of insanity, but that he would charge that if the jury believed from a preponderance of the evidence that accused was insane when the offense was committed they should acquit. Held, that the court's action was proper. *Jones v. State*, 60 Tex. Cr. App. 139, 131 S. W. 572.

Where a juror had scruples against the infliction of the death penalty on circumstantial evidence, it was not error for the court to explain circumstantial evidence by means of an illustration, though the illustration stated an extreme case. *Morrison v. State*, 51 S. W. 358, 40 Tex. Cr. App. 473.

i. Oath.

In forming a jury from a special venire in a prosecution for murder, there is no objection to calling several of the venire together and swearing them simultaneously to answer ques-

tions touching their qualifications. *Wasson v. State*, 3 Tex. Cr. App. 474.

Bill of Rights, § 5, provides that "all oaths or affirmations shall be administered in the mode most binding upon the consciences." Rev. Civ. St., art. 370, provides that, unless a different meaning is apparent from the context, the word "swear," or "sworn," includes "affirm." Held, that one called as a juror who refused to make oath touching his qualifications on account of conscience, but offered to affirm, should be allowed to affirm. *Riddles v. State* (Cr. App.), 46 S. W. 1058.

j. Form and Sufficiency of Questions.

Where, in a prosecution for seduction, a juror on his voir dire answered in the negative a question propounded by defendant's counsel inquiring if the proof that defendant did have carnal intercourse with the girl, and she did give birth to a child afterwards, would influence him in finding a verdict, it was not error for the trial court to exclude the following question by the defendant's attorney: "I said to you the law does not make it an offense for a boy to have carnal intercourse with a girl, so that she is over the age of sixteen years. Now, then, would you in said case hesitate in returning a verdict of not guilty against defendant if the testimony showed that this act of carnal intercourse was willingly entered into between the prosecutrix and defendant?" as the answer of the witness to the first question necessarily included a negative answer to the last question, which was much involved. *Faulkner v. State*, 53 Tex. Cr. App. 258, 109 S. W. 199.

Formation of Opinion as to Guilt.—

Disallowance of a question to a juror whether in his opinion the accused was guilty or innocent is proper. *Stagner v. State*, 9 Tex. Cr. App. 440.

Personal Opinions.—In testing the bias of a white man summoned as a juror on a special venire for the trial of a negro, he may not be asked

whether he has "the same neighborly regard" for a negro as for a white man. *Cavitt v. State*, 15 Tex. Cr. App. 190.

8. Evidence.

In the examination of the qualifications of a juror, the parties are not confined to the interrogation of the juror himself, but may introduce other evidence. *Shaw v. State*, 27 Tex. 750.

A verdict will not be set aside for prejudice of a juror summoned on a special venire, and shown to be an honorable man, unacquainted with either defendant or deceased, or with the facts of the case, on evidence that he said to another venireman that he live so far away that he hoped to be called on some case so as to pay expenses, and that defendant "ought to have his d—d neck broke;" he testifying that he said "they would keep hauling him on the jury until he would get a chance to help break some one's neck." *Mayes v. State*, 33 Tex. Cr. App. 33, 24 S. W. 421.

7. Trial and Determination.

When it is doubtful whether a juror is qualified, it is safer to decide against his qualification. *Black v. State*, 42 Tex. 377; *Dreyer v. State*, 11 Tex. Cr. App. 631; *Pierson v. State*, 18 Tex. Cr. App. 524.

Errors and Irregularities.—The overruling of a good challenge for cause is not material error, unless it appears that an objectionable juror was thereby forced upon the defendant. *Holt v. State*, 9 Tex. Cr. App. 571.

Where a challenge to a juror for cause is improperly overruled, and the defendant challenges him peremptorily, the error is cured by allowing the defendant an extra peremptory challenge. *Blackwell v. State*, 29 Tex. Cr. App. 194, 15 S. W. 597.

Unless objection is shown to jurors who tried a case, the ruling of the trial court upon the competency or incompetency of such jurors will not be inquired into on appeal, even though defendant had exhausted his peremptory

challenges. *Holland v. State*, 31 Tex. Cr. App. 345, 20 S. W. 750.

Province of Court.—The court is the judge, after a proper examination, of the qualification of a juror, or as to whether or not he should be excused for cause, or because he was exempt from jury service. *Robles v. State*, 5 Tex. Cr. App. 346.

O. PEREMPTORY CHALLENGES.

1. Nature and Right in General.

A peremptory challenge is one made for which no reason need be given and must be allowed by the court so long as the number is not exhausted. *Cooley v. State*, 38 Tex. 636.

Right of peremptory challenge is not of itself right to select, but right to reject jurors. *Loggins v. State*, 12 Tex. Cr. App. 65; *Heskew v. State*, 17 Tex. Cr. App. 161.

On trial of a criminal case defendant's counsel was furnished with a list of the jurors consisting of seven names, and before exercising peremptory challenges he requested to be furnished with a full panel of talesmen. This was refused, and he was compelled to pass on the names on the regular list, from which he challenged three. He was subsequently furnished with an additional list of five talesmen, and the jury was completed from this, and he was refused permission to peremptorily challenge two of the jurors. Held not error. *Smith v. State* (Cr. App.), 75 S. W. 298.

An accused can not complain of being forced to a peremptory challenge so long as his peremptory challenges enable him to protect himself from objectionable jurors. *Sharp v. State*, 6 Tex. Cr. App. 650.

Defendant challenged for cause several of the regular panel, and then demanded that the panel be filled before he be required to make his peremptory challenges. Held, that, inasmuch as there was no residuum from which to supply the places of those challenged

for cause, the court correctly required defendant to proceed with those remaining. *Speiden v. State*, 3 Tex. Cr. App. 156.

2. Numbers.

Under Pasch. Dig., art. 3037, allowing a defendant in capital cases twenty peremptory challenges and in other cases only ten, a defendant after having been convicted of murder in the second degree, and obtained a reversal on appeal is only entitled to ten peremptory challenges at the new trial, as he has been acquitted of murder in the first degree. *Cheek v. State*, 4 Tex. Cr. App. 444; *Thompson v. State*, 19 Tex. Cr. App. 593; *Pierson v. State*, 21 Tex. Cr. App. 14, 17 S. W. 468; *Hudson v. State*, 28 Tex. Cr. App. 323, 13 S. W. 388.

It is defendant's duty to keep count of his challenges, and he can not complain that he was misled by clerk as to number used. *Miller v. State*, 36 Tex. Cr. App. 47, 35 S. W. 391.

One is entitled only to the number of challenges allowed at the time of trial, not to the number allowed at the time he committed the crime. *Edmonson v. State* (Cr. App.), 44 S. W. 154.

At Common Law.—Thirty-five peremptory challenges were allowed at common law in trials for felonies. *Cooley v. State*, 38 Tex. 636.

Allowance of Additional Challenges.

—It is not error to refuse to permit a defendant in a criminal case to challenge a juror peremptorily after he has exhausted his twenty peremptory challenges. *Pierson v. State*, 21 Tex. Cr. App. 14, 17 S. W. 468.

3. Time.

a. In General.

Challenges for cause should be exhausted before a peremptory challenge is made. *Cooley v. State*, 38 Tex. 636.

No peremptory challenge should be made until the full jury of twelve is in the box. *Cooley v. State*, 38 Tex. 636.

Discretion of Court.—Under Code Cr.

Proc., § 556, providing that in forming the jury the names of the persons shall be called in the order they stand upon the list, and, if present, shall be tried as to their qualification, and, unless challenged, shall be impaneled, after a juror from a special venire has been accepted by both parties, a peremptory challenge to him is not allowable, even by leave of the court. *Baker v. State*, 3 Tex. Cr. App. 525.

b. After Acceptance, Tender or Passing of Juror.

A juror already accepted can not be challenged peremptorily. *McMillan v. State*, 7 Tex. Cr. App. 142; *Drake v. State*, 5 Tex. Cr. App. 649; *Seals v. State*, 35 Tex. Cr. App. 138, 32 S. W. 545.

A juror can not be peremptorily challenged after he is accepted and impaneled, though the court may excuse such juror upon good cause shown. *Horbach v. State*, 43 Tex. 242.

4. Order and Exhaustion of Challenges.
a. Order of Challenges.

The proper mode of selecting a jury in a criminal case is by trial or examination, until twelve qualified jurors are found. Then the party holding the affirmative should be required to pass upon the jury. Should he pass upon it without challenge, the party holding the negative is then called upon to pass upon it. Should either make a peremptory challenge, another juror must be called, when the peremptory challenging may proceed. *Cooley v. State*, 38 Tex. 636.

On the trial of a criminal charge, after the state had tendered the defendant a full jury, he was required to pass upon all the jurors tendered, after which the places of those challenged were filled, and defendant required to pass on the new jurors (before the state was required to pass), until he was satisfied with the panel, or had exhausted his challenges. Held, that there was no error. *State v. Ezell*, 41 Tex. 35.

b. Exhaustion of Challenges.

It was not error to refuse to permit the defendant to challenge a juror peremptorily after he had exhausted his twenty peremptory challenges, his recourse against an objectionable juror at that time being by challenge for cause and if the court had erroneously forced the juror upon him, to apply for a reversal. *Thompson v. State*, 19 Tex. Cr. App. 593.

One can not complain of the overruling of his challenge to a juror by showing that he challenged him peremptorily, and exhausted his peremptory challenges, and was compelled to take a juror not acceptable to him, without showing that the latter juror was not an impartial juror. *Green v. State*, 49 Tex. Cr. App. 645, 98 S. W. 1059.

Defendant is not prejudiced by the erroneous overruling of his challenge to a juror for cause, so long as he had not exhausted his peremptory challenges. *Hubbard v. State*, 43 Tex. Cr. App. 564, 67 S. W. 413; *Tooney v. State*, 8 Tex. Cr. App. 452.

An objection that defendant was compelled to accept, because all his peremptory challenges were exhausted, a certain person called as a juror, will not be sustained where such person was in all respects qualified to sit as a juror. *McKinney v. State*, 31 Tex. Cr. App. 583, 21 S. W. 683.

That defendant in a criminal case was misled by the clerk as to the number of his peremptory challenges, and was thereby compelled to accept an objectionable juror, is not ground for reversal. *Miller v. State*, 36 Tex. Cr. App. 47, 35 S. W. 391.

The fact that the defendant exhausted his peremptory challenges before the panel was filled does not show that any disqualified juror was forced upon him. *Grissom v. State*, 8 Tex. App. 386.

Objections to jurors will not be heard or entertained if the jury has been se-

lected and completed without exhausting peremptory challenges allowed defendant. *Krebs v. State*, 8 Tex. Cr. App. 1.

Defendant can not complain, if, after his peremptory challenges were exhausted, the only other juror impaneled was passed by him without objection. *Morrison v. State*, 40 Tex. Cr. App. 473, 51 S. W. 358.

The error of discharging one called as a juror because he would not be sworn to answer concerning his qualifications, but would affirm, is not cured by the fact that defendant had not exhausted his peremptory challenges when the jury was completed. *Riddles v. State* (Cr. App.), 46 S. W. 1058.

Failure to Exhaust Peremptory Challenges.—A challenge to a juror on the ground that the sheriff who summoned him was prejudiced toward defendant is not good, where defendant makes no showing of prejudice and has not exhausted his peremptory challenges. *Tuttle v. State*, 6 Tex. Cr. App. 556.

Making and Effect.—It is not proper to make more than one peremptory challenge at the same time. *Cooley v. State*, 38 Tex. 636.

Where the court in a trial for murder refused to allow defendant to ask a juror on voir dire examination if he did not believe and had not said that defendant was guilty, whereupon accused peremptorily challenged the juror and afterward proved by affidavit of such juror that he did so believe and had so stated, the court should have excused the juror and set aside defendant's peremptory challenge. *Randle v. State*, 34 Tex. Cr. App. 43, 63, 28 S. W. 953.

Where a challenge to a juror is disallowed, and defendant peremptorily challenges him, whereupon the court reconsiders the ruling, discharges the juror, and does not count the peremptory challenge, no error is committed. *McGill v. State*, 25 Tex. Cr. App. 499, 8 S. W. 661.

In Absence of Juror.—The court held a juror disqualified, but subsequently changed his opinion at a time when the juror was out of the courtroom, whereupon the district attorney informed the court that he would peremptorily challenge the juror, and he was not again produced in court. Held, that there was no error on the theory that the juror had been challenged while not in the courtroom. *Dodd v. State*, 72 S. W. 1015, 44 Tex. Cr. App. 480.

Objections and Exceptions.—An objection that the counsel in a criminal trial exercised more challenges than allowed by law will be deemed as waived, unless excepted to at once. *Shackelford v. State* (Cr. App.), 53 S. W. 884.

VI. Impaneling for Trial and Oath.

See ante, "Summoning, Attendance, Discharge and Compensation," IV.

A. IN GENERAL.

Rules of practice in impaneling juries stated. *Lester v. State*, 2 Tex. Cr. App. 432; *Hardin v. State*, 4 Tex. Cr. App. 355.

Effect of Presence on Jury of Person Challenged.—Where defendant had challenged a juror by striking his name from the list, and after the jury were sworn, the indictment read and defendant had pleaded, discovered that the juror challenged was one of the jury impaneled, the court properly refused to set the juror aside and substitute another juror, for defendant did not exercise due diligence; he should have discovered the mistake before the jury was sworn and then made a motion to withdraw the plea, and discharge the jury and draw another juror. *Munson v. State*, 34 Tex. Cr. App. 498, 31 S. W. 387.

B. OATH.

1. In General.

Finding of a jury, not under oath,

can not constitute a legal verdict. *Arthur v. State*, 3 Tex. 403.

Reswearing Juror.—Code Cr. Proc. 1895, art. 549, provides that, when arraigned, a defendant may suggest his true name, if it is not given in the indictment, and the cause then proceed as if the true name had been first recited in the indictment. Held that, where defendant's name was improperly given in the indictment, but he corrected it on arraignment, it was not error not to reswear the jury. *Clark v. State*, 76 S. W. 573, 45 Tex. Cr. App. 456.

2. Form and Sufficiency.

A conviction will be reversed where the record shows that another and different oath was administered to the jury than the one prescribed by law. *Bawcom v. State*, 41 Tex. 189; *Edmondson v. State*, 41 Tex. 496; *Sutton v. State*, 41 Tex. 513; *Bray v. State*, 41 Tex. 560; *Morgan v. State*, 42 Tex. 224; *Leer v. State*, 2 Tex. Cr. App. 494; *Tharp v. State*, 3 Tex. Cr. App. 90; *Arthur v. State*, 3 Tex. 403; *Miles v. State*, 1 Tex. Cr. App. 510; *Smith v. State*, 1 Tex. Cr. App. 516; *Clampitt v. State*, 3 Tex. Cr. App. 638; *Tickle v. State*, 6 Tex. Cr. App. 623.

In cases less than capital the oath to be administered to the jury is: "You and each of you solemnly swear that in the case of the state against A. B., the defendant, you will a true verdict render according to the law and the evidence; so help you God." This oath and none other will suffice, and the recital in the judgment that "the jury were sworn to try the issue joined between the parties" does not show that the jury was sworn "according to law." *Holland v. State*, 14 Tex. Cr. App. 182.

The county court act of 1876 prescribes the same juror's oath in criminal cases as that prescribed by the Code of Criminal Procedure for Jurors in criminal cases in the district courts. *Chambliss v. State*, 2 Tex. Cr. App. 396.

Codes of 1856, providing an oath to be administered to the jury in all criminal cases without distinction between felonies and misdemeanor superseded jury oaths prescribed by the act of 1846. *Preston v. State*, 8 Tex. Cr. App. 30.

Oath Prescribed for Civil Cases Improper.—The oath set out in art. 3029 of Paschal's Digest, should be given to the jury in every criminal case, and not the one prescribed in civil cases. *Burch v. State*, 43 Tex. 376; *Stephens v. State*, 33 Tex. Cr. App. 101, 25 S. W. 286.

Substantial Compliance with Statute.—The jury were sworn "well and truly to try the cause, and a true verdict render according to law and evidence." Held, to be in substantial, though not literal, conformity with the statutory oath, and to be good. *Faith v. State*, 32 Tex. 373.

Illustrative Cases of Insufficient Oaths.—An oath of a jury, who were "sworn to try said cause, and a true verdict render according to the law and the evidence," was not the oath prescribed by Paschal's Dig., art. 3029. *Tharp v. State*, 3 Tex. Cr. App. 90.

The record recites that the jury were sworn "well and truly to try said cause of the state of Texas v. G. M." Held, that this is a different oath than that prescribed by article 563 of the Code of Criminal Procedure (Pasc. Dig., art. 3639), and in contemplation of law was no oath; wherefore the finding of the jury constituted no legal verdict. *Miles v. State*, 1 Tex. Cr. App. 510.

Recital that the jury were "sworn to well and truly try the issue joined between the state and said defendant" imports that an unauthorized oath was administered to the jury, which vitiates the verdict and necessitates a reversal of a judgment of conviction. *Collins v. State*, 5 Tex. Cr. App. 38.

In Criminal Prosecutions.—The words "well and truly to try the issue between state and defendant," is not

equivalent of oath prescribed by art. 563 to be administered to jury in all criminal cases. *Lopez v. State*, 42 Tex. 298.

Affirmation.—Under the Bill of Rights, § 5, Rev. Civ. Stat., art. 370, one called as a juror, who offers to affirm, should be allowed to do so. *Riddles v. State* (Cr. App.), 46 S. W. 1058.

Swearing Jury in Body.—The failure to swear, in a body, the jury in a criminal case, as provided by Code Cr. Proc., art. 657, is fatal to a conviction. *Stephens v. State*, 33 Tex. Cr. App. 101, 25 S. W. 286; *Ripley v. State*, 29 Tex. Cr. App. 37, 14 S. W. 448.

The rule under Code Crim. Proc., art. 642, that each juror must be sworn separately, applies only to the formation of the jury in capital cases, and under art. 657, in cases less than capital, the oath is administered to the jurors in a body. *Ellison v. State*, 12 Tex. Cr. App. 557.

Record.—If, in the record of a criminal prosecution, it nowhere appears that the jury who tried the prisoner were sworn, it is a fatal defect, and the case will be reversed on appeal. *Nels v. State*, 2 Tex. 280; *Berry v. State*, 10 Tex. Cr. App. 315; *Biles v. State* (Cr. App.), 4 S. W. 902; *Williams v. State* (Cr. App.), 140 S. W. 447.

The record need not recite the oath administered to the jury, but when it does and the recital shows that it was a different oath than that prescribed, the verdict will be set aside. *Collins v. State*, 5 Tex. Cr. App. 38.

A judgment entry reciting that the jurors (naming them) were "duly tried, impaneled, and sworn" was a sufficient recital of the due impaneling of the jury as against any objections made after verdict. *Lester v. State*, 2 Tex. Cr. App. 432.

The recital in the record of an oath administered to the jury, different from that prescribed by statute in criminal cases, is error and fatal on appeal. *Martin v. State*, 40 Tex. 19.

Copy of Oath Not Required.—The court minutes of a trial for murder recited that the jury were "duly sworn 'well and truly to try the issue between the state of Texas and the defendant, and a true verdict render in accordance with the law and the evidence.'" Held, to be sufficient as showing that the jury were duly sworn, but not to import a copy in hac verba of the oath which was administered to them, and which need not be set out in the record. *Cotton v. State*, 32 Tex. 614.

Presumption That Proper Oath Given.—An entry in a criminal case, that the jury were "sworn the cause to try according to law," can not be regarded as an attempt to spread the form of the oath actually administered upon the record; and, as it states that the jury were "sworn," the court will presume that the proper oath was administered. *Russell v. State*, 10 Tex. 288.

When the record merely recited that the jury were "duly sworn," or "were sworn according to law," the appellate court presumes that the oath administered was the oath prescribed by the Code; but such a presumption, can not be indulged in contradiction of the recital of the record. *Miles v. State*, 1 Tex. Cr. App. 510.

C. DISCHARGE OF JUROR OR JURY PENDING TRIAL.

It seems that a sound discretion must of necessity be allowed a judge, to discharge a jury in a criminal case, before verdict found, whenever there is a manifest necessity for such action, or whenever the ends of public justice would otherwise be defeated. *Taylor v. State*, 35 Tex. 97.

If an irregularity in impaneling thirteen jurors is discovered before the verdict is rendered, the cause should be withdrawn from the jury, and a lawful jury impaneled and sworn to try it; but if the last juror sworn can be pointed out before the jury begin to deliberate on the verdict, he may be

dismissed from the panel, and the trial proceed before the legally constituted jury. *Bullard v. State*, 38 Tex. 504.

Can Not Discharge One Juror without Discharging the Whole Jury.—

After a person has once been sworn as a juror in a capital case, he can not be excused or discharged by the court unless the whole jury is also discharged. *Ripley v. State*, 29 Tex. Cr. App. 37, 14 S. W. 448.

After a juror has once been impaneled in a felony case, it is beyond the power of the court to excuse him from serving in the case. If he becomes sick so that he can not proceed, the jury must be discharged and another one impaneled. *Ellison v. State*, 12 Tex. Cr. App. 557; *Bland v. State*, 42 Tex. Cr. App. 286, 59 S. W. 1119.

D. OBJECTIONS AND EXCEPTIONS.

Time of Making.—An exception to the manner of impaneling a jury must be taken at the time the jury is being impaneled, or it is deemed to have been waived; and, where it is not so taken, it can not be raised by embodying the entire motion for a new trial in a bill of exceptions. *Black v. State*, 81 S. W. 302, 46 Tex. Cr. App. 590.

An objection that accused was not present when the jury was sworn will not be revised by the court of appeals, unless it appear by a proper bill of ex-

ception that the attention of the court below was called to the objection at the time and that the court persisted in swearing the jury in accused's absence. *Tuttle v. State*, 6 Tex. Cr. App. 556.

Objections to form and manner in which the jury is sworn should be made at the time. *McConnell v. Ryan*, 1 App. Civ. Cases, § 1020; *Jones v. State*, 37 Tex. Cr. App. 433, 35 S. W. 975.

Objections to the mode and manner of drawing and impaneling the jury should be made by a challenge to the array, or a challenge to the particular juror. *Ray v. State*, 4 Tex. Cr. App. 450.

Evidence of Fact That Jury Was Sworn.—"It is reasonable to suppose that the judge who presided at the trial was quite as competent to decide whether the jury were sworn, as the persons whose testimony was proposed touching that question. We must presume that the fact that the jury were sworn was within the knowledge of the presiding judge; and he might well refuse to hear the testimony of witnesses offered to contradict the evidence of his senses." *Brewer v. State*, 12 Tex. 248, 251.

Immaterial Errors.—An error in impaneling is not necessarily a ground for reversal. *McKinney v. State*, 8 Tex. Cr. App. 626.

Jury Commissioners.

See the title JURY, ante, p. 110.

Jury Room.

As public place under gambling statutes, see the title GAMING, vol. 3, p. 353.

Jury Scrip.

See the title JURY, ante, p. 110.

JUSTICES OF THE PEACE.

CROSS REFERENCES.

See the titles APPEAL, ERROR AND CERTIORARI, vol. 1, p. 87; CRIMINAL LAW, vol. 2, p. 168; JUDGES, ante, p. 40; JURISDICTION AND VENUE, ante, p. 60; OFFICERS.

As to notice of appeal from justice court, see the title APPEAL, ERROR AND CERTIORARI, vol. 1, p. 148. As to bonds on appeal from justices' courts, see the title APPEAL, ERROR AND CERTIORARI, vol. 1, p. 117. As to questions of jurisdiction arising on appeal, see the title APPEAL, ERROR AND CERTIORARI, vol. 1, p. 99. As to jurat or certificate of office, see the title AFFIDAVITS, vol. 1, p. 49. As to taxing costs for holding examining trial in a justice's court, see the title COSTS, vol. 2, p. 144. As to jurisdiction of justices' courts, see the title JURISDICTION AND VENUE, ante, p. 60. As to justice of peace acting as notary, see the title NOTARIES. As to liability for particular offense, see specific head.

Authority as Magistrate.—A justice of the peace is a "magistrate," and when he sits for the purpose of inquiring into a criminal accusation against any person, he sits not as a justice of the peace, but as a magistrate, and the court which he then holds is not a justice's, but an "examining court." When holding such a court, his functions as a magistrate are the same as those of the judges of the county, district and supreme court or the court of appeals, when they sit as magistrates to hold examining courts; and the same rules govern each. *Kerry v. State*, 17 Tex. Cr. App. 178.

A justice of the peace has authority to sit as a magistrate under the express provisions of Code Cr. Proc., 1895, art. 41; but, in view of art. 62, providing that, when a magistrate sits to inquire into a criminal accusation, his court is called an examining court, his authority as a magistrate is entirely distinct from his jurisdiction as a justice of the peace. *Brown v. State*, 55 Tex. Cr. App. 572, 118 S. W. 139.

Under Pen. Code 1895, art. 25, providing that the words "accused" and "defendant" therein refer to one who in a legal manner is held to answer for an offense at any stage of the proceedings, or against whom complaint in a lawful manner is made, charging an

offense including all proceedings from the order of arrest to final execution, a defendant is not "accused" until charged with an offense, and hence a justice of the peace as magistrate can not sit as an examining court until a criminal action has been commenced against a person, and he has been arrested and brought before the justice, and therefore a justice does not act as a magistrate at a court of inquiry called to summon and examine witnesses as to a supposed crime, under the express provisions of Code Cr. Proc. 1895, art. 941; nobody being present and called upon to answer any accusation. *Brown v. State*, 55 Tex. Cr. App. 572, 118 S. W. 139.

Authority to Sit in Another Precinct as Justice of Peace.—One justice of the peace as such can not sit in the precinct of another justice and take jurisdiction of matters arising therein, even when the other justice is absent, under Rev. St. 1895, art. 1566, providing that, if a vacancy exists in the office of justice of the peace of a precinct, or the justice shall be absent or unwilling to perform the duties of his office, the nearest justice in the county may perform the duty of the office, in view of art. 1564, providing that each justice of the peace shall be commissioned as justice of the peace of his

precinct, but, if he performs such duties, they must be performed in his own precinct; and hence, under Code Cr. Proc., 1895, art. 941, providing that a justice of the peace, having good cause to believe that an offense against the state laws has been committed, may summon and examine witnesses in relation thereto, a neighboring justice, as a justice of the peace, can not go into another justice precinct where there is a resident justice, and hold a court of inquiry. *Brown v. State*, 55 Tex. Cr. App. 572, 118 S. W. 139.

Authority to Sit in Another Precinct as Magistrate.—After providing generally for the jurisdiction of justices, the constitution declares that they may have "such other jurisdiction, criminal and civil, as may be provided by law, under such regulations as may be prescribed by law." (Const., art. 5, § 19.) In prescribing their powers and jurisdiction, art. 1543, Rev. Stat., provides that "they shall also have and exercise jurisdiction over all other matters not herein before enumerated that are or may be cognizable before a justice of the peace under any law of this state." With regard to the final trial of causes coming within his jurisdiction, whether civil or criminal, the statute evidently contemplates that the action and jurisdiction of the justice's court shall be limited by and to his precinct, unless otherwise expressly authorized by the law in certain exceptional cases. But he is furthermore a "magistrate," made so by terms of the statute equally with judges of the supreme court, court of appeals, district and county judges (Code Crim. Proc., art. 42), and "when a magistrate sits for the purpose of inquiring into a criminal accusation against any person, this is called an 'examining court.'" (Code Crim. Proc., art. 63.) At such time he is a "magistrate" and not a "justice of the peace," and his court is an "examining" and not a "justice's court." A warrant of arrest may be issued by a magistrate (Code Crim. Proc., art. 232), and when

issued by a judge of the supreme court, court of appeals, district or county court, shall extend to every part of the state (Code Crim. Proc., art. 237); but, when issued by any other magistrate it can not be executed in any other county, except in certain instances mentioned. (Code Crim. Proc., art. 238.) It may, however, be issued to and executed anywhere in his county outside of as well as in his own precinct. When sitting as an "examining court," the law nowhere limits the magistrate, if he be a justice, to his particular precinct; and, not being limited in this regard, there is no reason why it was not intended that he should hold the court in any portion of the county most convenient for the purposes of the examination as to the commitment or discharge of the accused (Code Crim. Proc., Chap. 111), whether the place of the sitting be in the precinct of another justice, competent and qualified to act, or not. *Hart v. State*, 15 Tex. Cr. App. 202, 226.

Necessity of Proof of Contingency to Authorize.—Where a justice of the peace of one precinct holds court in another precinct as allowed by Rev. Stat. 1895, art. 1566, proof should be made of the contingency under which the statute authorizes this to be done. *Peacock v. State*, 37 Tex. Cr. App. 418, 35 S. W. 964.

Justices' courts are not courts of record. *Ex parte Quong Lee*, 34 Tex. Cr. App. 511, 512, 31 S. W. 391.

Complaints in justices' courts must charge some offense against the laws of the state. *Uecker v. State*, 4 Tex. Cr. App. 234.

A justice of the peace may hold an examining court while holding an inquest. *Ex parte Meyers*, 33 Tex. Cr. App. 204, 216, 26 S. W. 196.

A justice may compel the accused, when under arrest, to attend the inquest, even though he protests against it. Code Crim. Proc., art. 1011. *Ex parte Meyers*, 33 Tex. Cr. App. 204, 26 S. W. 196.

Removal from Office.—The 2nd section of chapter 84 of the acts of 1870, authorizing district judges to remove justices of the peace for certain causes, is repugnant to § 24 of art. 5 of the constitution. *Lafain v. State*, 36 Tex. 696.

Disqualification to Act Where Justice Is Injured Party.—It was held in *Ex parte Ambrose*, 32 Tex. Cr. App. 468, 24 S. W. 291, where accused was charged with an assault upon the justice, that such justice was disqualified to sit in the case and his acts were nullities. Citing art. 569, Penal Code. In *Tabor v. State*, 34 Tex. Cr. App. 631, 31 S. W. 662, the court, citing art. 569 of the Penal Code and also *Davis v. State*, 44 Tex. 523, held that, where the property stolen was that of the justice, that fact did not disqualify him to preside at the examining trial of the accused for the theft thereof.

Liability for Failure to Make Return for Violation of Sunday Laws.—There being no statute requiring a justice of the peace to make "return" to any court or tribunal of violations

of the Sunday law within his view or knowledge, his failure to make such return is not an offense under Pen. Code, art. 269, declaring that any justice of the peace who neglects to return, arrest, or prosecute any person committing a breach of the peace or other crime within his view shall be deemed guilty of a misdemeanor. *Green v. State*, 61 S. W. 482, 42 Tex. Cr. App. 549.

An indictment against a justice for failure to report the amount of money other than taxes, collected by him should allege that he was authorized to collect such money and that it had come into his hands. *Addison v. State*, 41 Tex. 462, 463.

Act April 7, 1873, "to regulate the conduct of public officers" (Acts 1873, p. 34), so far as it requires from officers a report of public moneys collected by them, and subjects them to indictment for failing so to report, applies to ministerial officers only, and not to justices of the peace. *Edwards v. State*, 2 Tex. Cr. App. 525. See the title OFFICERS.

Justifiable Homicide.

See the title HOMICIDE, vol. 3, p. 477.

Justification.

See references under DEFENSE, ante, p. 222. For libel or slander, see the title LIBEL AND SLANDER. For carrying weapons, see the title WEAPONS.

Keeping Disorderly House.

See the title DISORDERLY HOUSES, vol. 2, p. 230.

Keeping Gaming Table or Device.

See the title GAMING, vol. 3, p. 353.

Keeping Open Saloon Unlawfully.

See the title INTOXICATING LIQUORS, vol. 4, p. 633.

KIDNAPPING.

I. Nature and Elements of Offenses, 192.

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IV. Jurisdiction, 192.

CROSS REFERENCES.

See the titles ABDUCTION, vol. 1, p. 2; ACCOMPLICES, ACCESSORIES, AIDERS AND ABETTORS, vol. 1, p. 8; CONSPIRACY, vol. 2, p. 1; FALSE IMPRISONMENT, vol. 3, p. 231; JURISDICTION AND VENUE, ante, p. 40.

I. Nature and Elements of Offenses.

Kidnapping in an aggravated species of false imprisonment, and is defined in Penal Code, art. 821, as the false imprisonment of any person for the purpose of being removed from the state, or of a minor under the age of seventeen years, for the purpose of being concealed or taken from the lawful possession of a parent or guardian. *Castillo v. State*, 29 Tex. Cr. App. 127, 14 S. W. 1011; *Click v. State*, 3 Tex. 282.

Nonconsent Essential Element.—To constitute the offense of kidnapping, there must in every case be nonconsent of the person kidnapped, regardless of the age of such person. *Castillo v. State*, 29 Tex. Cr. App. 127, 14 S. W. 1011.

Force Where Person under Age of Fifteen.—If a person kidnapped is a female under the age of fifteen years it is not necessary that force should be used upon her in order to constitute the offense of kidnapping. *Castillo v. State*, 29 Tex. Cr. App. 127, 14 S. W. 1011.

II. Persons Liable.

Girl as Accomplice.—If the girl

charged to have been kidnapped was under fifteen years of age she could not be an accomplice to the offense. *Mason v. State*, 29 Tex. Cr. App. 24, 14 S. W. 71.

III. Indictment and Information.

It is not sufficient to charge a defendant with kidnapping generally, for he can not be thereby apprised of the facts he will be required to answer, but the indictment should state specifically the facts and circumstances which constitute that offense. *Click v. State*, 3 Tex. 282.

As to allegations charging kidnapping and abduction in same indictment, see the title ABDUCTION, vol. 1, p. 2.

VI. Jurisdiction.

Kidnapping Defendant in Another State.—A person accused of crime committed in this state may be tried by the courts of this state for such crime, although he may have been kidnapped in another state or territory and brought from thence to this state against his will and without lawful authority. *Brookin v. State*, 26 Tex. Cr. App. 121, 124, 9 S. W. 735. See the title JURISDICTION AND VENUE, ante, p. 60.

Killing.

See the title HOMICIDE, vol. 3, p. 477. As to killing animals, see the titles ANIMALS, vol. 1, p. 70; MALICIOUS MISCHIEF.

Kinship.

As disqualification of judge or jury, see the titles JUDGES, ante, p. 40; JURY, ante, p. 110.

Kleptomania.

See the title LARCENY.

Knife.

As deadly weapon, see the titles ASSAULT AND BATTERY, vol. 1, p. 520; HOMICIDE, vol. 3, p. 477; WEAPONS.

Knowingly.

See the title INDICTMENT AND INFORMATION, vol. 4, p. 239.

Knowledge.

See the titles INDICTMENT AND INFORMATION, vol. 4, p. 239; PERJURY. As to knowledge of crime and concealment, see the titles ACCOMPLICES, ACCESSORIES, AIDERS AND ABETTORS, vol. 1, p. 9. As element of perjury, see the title PERJURY.

Lager Beer.

See the title INTOXICATING LIQUORS, vol. 4, p. 633.

LANDLORD AND TENANT.

CROSS REFERENCES.

As to prosecutions arising over killing or maiming animals, see the title ANIMALS, vol. 1, p. 55. As to the offense of owning and letting disorderly houses, see the title DISORDERLY HOUSES, vol. 2, p. 230. As to prosecutions arising over fences, see the title FENCES, vol. 3, p. 275. As to theft of landlord's property by tenant, see the title LARCENY.

A tenant in possession of leased premises. Hooks v. State, 25 Tex. Cr. App. 601, 602, 8 S. W. 803. Lease by the State—Authority of Lessor.—On a prosecution under art. 687, Penal Code, where the prosecutor claimed that he had leased the premises from an agent of the state,

and it appeared that said agent based his authority to lease the premises upon the Act of 27th of February, 1891, § 8, which authorized the superintendent of public grounds and buildings to rent or lease "all vacant lots or parts of lots and blocks in the city of Austin," etc., held, this act does not authorize the superintendent to lease open land not laid off into lots and blocks, or to control the same. *Dean v. State*, 34 Tex. Cr. App. 474, 31 S. W. 378.

Pasturing on Leased Premises.—Appellant was convicted of knowingly causing horses to go within the enclosed land of one B. without his consent. The proof was that appellant rented from B. a part of a field, and turned his horses upon the part he rented, whence they strayed on to the other part. The crop had been gathered, and nothing was stipulated in the rental contract upon the subject. Held, that appellant had the right to pasture his horses on the land he had rented, and, the conviction not being warranted by law, the cause is dismissed. *Coggins v. State*, 12 Tex. Cr. App. 109. See the title ANIMALS, vol. 1, p. 55.

Contract Avoiding Offense of Theft.—By contract between the appellant and one T., the former became a cropper on the latter's land, and each was to be entitled to one-half of the crop

when gathered. The crop was bound to T. for any advances made by him to the appellant. Before the crop was gathered or divided, the appellant, in the absence of T., pulled and sold a bushel of corn. Held, that the taking was not theft. *Bell v. State*, 7 Tex. Cr. App. 25. For further treatment, see the title LARCENY.

Destruction of Growing Corn—Evidence Disregarding Tenant's Rights.

—In a prosecution for willfully destroying growing corn, evidence that the ownership of the land was in dispute; that defendant had rented it to prosecutor to reimburse him for taking up a claim thereto; that, after the prosecutor claimed possession of the land as owner, defendant proposed, in the settlement, that if the prosecutor would pay rent for a certain portion, he might work the corn, and on his refusal defendant plowed up the land, as he believed he had a right to do—was inadmissible to show defendant's good faith, since such facts tended to show a disregard of the tenant's rights. *Camp v. State* (Cr. App.), 57 S. W. 96.

In a prosecution for willfully destroying growing corn, evidence that prosecutor had rented the land on which the corn was growing from defendant, and had thereafter repudiated the tenancy and claimed title to the corn, was irrelevant. *Camp v. State* (Cr. App.), 57 S. W. 96.

Landmarks.

As to changing or cutting, see the titles BOUNDARIES, vol. 1, p. 668; TREES AND TIMBER.

Land Titles.

As to forgery of, see the title FORGERY, vol. 3, p. 301.

Language.

As to abusive language, see the titles ARGUMENT AND CONDUCT OF COUNSEL, vol. 1, p. 444; ASSAULT AND BATTERY, vol. 1, p. 526. As to knowledge of English as qualification of juror, see the title JURY, ante, p. 110. See, also, generally, the titles INJUNCTION, vol. 4, p. 379; INSTRUCTIONS, vol. 4, p. 385.

LARCENY.

BY W. F. SOUDER.

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CROSS REFERENCES.

See the title ANIMALS, vol. 1, p. 55; BRANDS AND MARKS, vol. 1, p. 669; BURGLARY, vol. 1, p. 703; EMBEZZLEMENT, vol. 2, p. 277; FALSE PRETENSES, vol. 3, p. 239; NEW TRIAL AND ARREST OF JUDGMENT; RECEIVING STOLEN GOODS; ROBBERY.

As to prosecution for purchasing cattle without taking bill of sale, see the title SALES. As to embezzlement of money or goods by one having possession thereof, see the title EMBEZZLEMENT, vol. 2, p. 277. As to receiving stolen property, see the title RECEIVING STOLEN GOODS. As to obtaining money or goods by false personation, see the title FALSE PERSONATION, vol. 3, p. 237. As to obtaining money or goods by cheating or false pretenses, see the title FALSE PRETENSES, vol. 3, p. 239. As to conviction of larceny on indictments for other offenses, see the title INDICTMENT AND INFORMATION, vol. 4, p. 239.

I. Definitions and Distinctions.

"At common law, as defined by Mr. Blackstone, larceny is 'the felonious taking and carrying away of the personal goods of another.'" *Bailey v. State*, 18 Tex. Cr. App. 426, 431; *Quit-zow v. State*, 1 Tex. Cr. App. 65; *Skipworth v. State*, 8 Tex. Cr. App. 135, 138; *Thompson v. State*, 16 Tex. Cr. App. 74; *Peralto v. State*, 17 Tex. Cr. App. 578; *Crowell v. State*, 24 Tex. Cr. App. 404, 409, 6 S. W. 318; *Willis v. State*, 24 Tex. Cr. App. 584, 585, 6 S. W. 856; *Dunn v. State*, 34 Tex. Cr. App. 257, 259, 30 S. W. 227; *Whitworth v. State*, 11 Tex. Cr. App. 414, 429; *Webster v. State*, 9 Tex. Cr. App. 75; *Johnson v. State*, 57 Tex. Cr. App. 308; 122 S. W. 877; *Chance v. State*, 27 Tex. Cr. App. 441, 11 S. W. 457; *Champlin v. State*, 1 Tex. Cr. App. 108, 111; *Loza v. State*, 1 Tex. Cr. App. 488, 491; *Harberger v. State*, 4 Tex. Cr. App. 26, 28; *Dignowitty v. State*, 17 Tex. 521; *Lindley v. State*, 8 Tex. Cr. App. 445; *Marquez v. State*, 41 Tex. Cr. App. 85, 51 S. W. 1119.

Theft is defined in art. 745 of Penal Code. *Billard v. State*, 30 Tex. 367, 373.

Theft is a statutory crime and rules of pleading applicable to such offenses must prevail. *O'Brien v. State*, 27 Tex. Cr. App. 448, 11 S. W. 459.

Theft is an offense eo nomine against the law of Texas, the offense being fully described by name. *Vivian v. State*, 16 Cr. App. 262, 263.

Penal Code defined no such offense as larceny. *Montgomery v. State*, 33 Tex. 179, 180.

Synonymous Terms.—The term "theft" as used in the Texas code is synonymous with "larceny" as used in the English statutes and at common law. *Griffin v. State*, 4 Tex. Cr. App. 390, 411.

Under Pen. Code, art. 739, "stealing" and "theft" are synonymous terms. *Carr v. State*, 9 Tex. Cr. App. 463.

"Stealing" imports larceny without the words "take and carry away." *Gay v. State*, 20 Tex. 504.

The word "steal," "stolen," or "stealing," is not used in the statutory definition of theft. "Fraudulent taking" is the term used to characterize the offense. *Jorasco v. State*, 6 Tex. Cr. App. 238, 240.

By the word "steal," as used in a statute, a simple larceny is intended. *Alexander v. State*, 12 Tex. 540.

Theft Includes All Unlawful Acquisitions.—Under Pen. Code, art. 743, theft includes all unlawful acquisitions of personal property punishable by law. *Martin v. State*, 9 Tex. Cr. App. 293; *Simico v. State*, 8 Tex. Cr. App. 406; *Parchman v. State*, 2 Tex. Cr. App. 228, 229; *Counts v. State*, 37 Tex. 593; *Vincent v. State*, 10 Tex. Cr. App. 330, 332.

Intention Not Punishable.—On prosecution for theft by bailment, an instruction that if defendant hired a wagon and harness in H. county for the purpose of going to J. county, and thus obtained the property, and then, while in H. county, conceived the idea of going elsewhere, with no intention of paying for the use of the property, and with the intention of moving out of the country with same, and did so, without the consent of the owner, and with the intent before leaving H. county of depriving the owner of the value of the same and to convert it to his own use, he was guilty, was objectionable as declaring him guilty for merely conceiving the offense. *Pickrell v. State*, 60 Tex. Cr. App. 572, 132 S. W. 938.

Selling Same Property Twice.—One who sells and delivers an animal to one person, and then, without repurchasing, sells and delivers it to another, is guilty of theft. *Hooper v. State* (Cr. App.), 25 S. W. 966; *Doss v. State*, 21 Tex. Cr. App. 505, 2 S. W. 814.

Assimilation of Larceny and Robbery.—"The two offenses of robbery and larceny are more nearly assimilated under our Code than at common law." *Skipworth v. State*, 8 Tex. Cr. App. 135, 138.

Under Code, art. 714, § 6, a conviction may be had for theft of property of the value of more than \$20, although the evidence shows such a "putting in fear" as would have sufficed to sustain a prosecution for robbery. *Skipworth v. State*, 8 Tex. Cr. App. 135.

Trespass.—To constitute theft there must be an attempt to trespass on another's personal property and the further intent to deprive the owner of his ownership therein. *Williams v. State*, 34 Tex. 558; *Lott v. State*, 20 Tex. Cr. App. 230, 231.

Mere trespass does not constitute theft, and while the taking may be open, it is immaterial that fraud existed in connection therewith. *Parks v. State*, 29 Tex. Cr. App. 597, 16 S. W. 532.

Driving Stock from Accustomed Range.—The offense of willfully driving another's stock from its accustomed range includes every element of theft, and is but a lesser degree of crime of theft. *Foster v. State*, 21 Tex. Cr. App. 80, 85, 17 S. W. 548; *Bawcom v. State*, 41 Tex. 189, 192.

On the trial of an indictment for the theft of a cow under Act Nov. 12, 1866, § 1, the defendant may be convicted, under § 3 of the act, of willfully driving an animal not his own, and without the consent of the owner, out of its accustomed range. *Counts v. State*, 37 Tex. 593.

On trial for theft of cattle, where it is clear that defendant took the animal with intent to appropriate it to his own use, and did so appropriate it, the offense is theft, as defined by Pen. Code, arts. 724, 747; and a charge in relation to the offense defined by art. 749, of willfully taking possession,

driving, or removing live stock from its accustomed range, is properly refused. *Spoonemore v. State*, 25 Tex. Cr. App. 358, 8 S. W. 280.

Necessity of Knowing Owner of Property Stolen.—One may be guilty of theft, although he does not know the owner of the property stolen. *Lawrence v. State*, 20 Tex. Cr. App. 536.

Wagers Induced on Unfair Games.—A foot race was arranged between H. and defendant W., one T. being H.'s backer, and defendant G. being W.'s backer. Prosecutor gave T. a sum of money to bet on the race, on the latter's promise that it, or an equivalent sum, should be returned, whatever the outcome of the contest; prosecutor not intending to part with his money. The money was placed in a satchel, and after the race G. and W. claimed the same, and it was turned over to them. Held, that such acts constituted theft, as defined by White's Ann. Pen. Code, art. 858, and not swindling or fraudulent conversion by a bailee, though the money was obtained by fraudulent pretext. *Glasgow v. State*, 50 Tex. Cr. App. 635, 100 S. W. 933.

"The common law made no distinctions in larceny, except by its classification into petit and grand, and simple and mixed, or compound larceny. This classification has the advantage of simplicity and certainly facilitates the administration of criminal justices. But our criminal code makes a variety of distinctive differences in the crime of larceny or theft, depending upon the subject and manner of its commission, annexing different penalties to the crime, which complicate, in no small degree, the application of the law to the undefined methods of pleading tolerated in our system. Our code has theft in general, which may be said to find its classification into petit and grand larceny, in affixing different penalties to the offense, according to the

value of the personal property feloniously taken, stolen, and carried away. Then, specially, we have theft from the person, theft from the house, and theft of particular animals; to the offenses for which different penalties are annexed, and, consequently, to secure a conviction for these specific kinds of theft, appropriate allegations must be made in the prosecution or the charge by indictment." *De Gaultie v. State*, 31 Tex. 32, 35.

Common Law of Larceny and Theft under Texas Code.—For an elaborate discussion of the question, and for an elucidation of the difference between the common law of larceny and the law of theft under the Texas Codes, see *Littleton v. State*, 20 Tex. Cr. App. 168.

Driving Cattle from Accustomed Range and Theft.—"Willfully driving an animal not one's own, and without the consent of the owner, from its accustomed range, in contemplation of law is not only an acquisition, but an appropriation of the property, and not very clearly distinguishable from the ordinary definition of theft." *Counts v. State*, 37 Tex. 593, 594.

As to distinction by false pretense and fraudulent conversion by bailee, see post, "In General," V, A, 1. As to distinction between theft and larceny by bailee, see post, "In General," V, A. As to distinction between robbery and theft from the person, see post, "Nature of Offense," V, B, 2.

Theft and Embezzlement.—See the title EMBEZZLEMENT, vol. 2, p. 277.

Larceny and Swindling.—See the title FALSE PRETENSES, vol. 3, p. 239.

II. Statutory Provisions.

The provision of Rev. Code, art. 714, authorizing a conviction for embezzlement under an indictment for theft, is not retroactive. *Simco v. State*, 8 Tex. Cr. App. 406; *Whitworth v. State*, 11 Tex. Cr. App. 414, 428.

Presumption Arising from Possession of Property—Statute Not Retroactive.—Act Nov. 13, 1866 (Pamph.

Acts 1866, p. 223), provides that persons found in possession of certain property, including almost every species of live stock, without a written conveyance, in the manner described in the statute, when the same is charged to be stolen, the want of such evidence shall be "prima facie evidence of the illegal possession of such property." Held, that such statute was not retroactive, and did not apply to property obtained before the act was passed. *Espy v. State*, 32 Tex. 375.

Theft from a House.—"Theft from a house," is no longer a distinct offense, in Texas, much less a felony. *Simms v. State*, 2 Tex. Cr. App. 110, 112; *Sheppard v. State*, 2 Tex. Cr. App. 295; *Montgomery v. State*, 2 Tex. Cr. App. 618, 621; *Cottenham v. State*, 1 Tex. Cr. App. 463; *Tuton v. State*, 4 Tex. Cr. App. 472, 473.

"Theft from a house," having as a specific offense, been repealed by the Act of August 21, 1876, without any saving as to past offenses, it was error, after the passage of the repealing act, to put upon his trial for simple theft a party who stood indicted for theft from a house when the repealing act was enacted. The case should have been dismissed. *Thomas v. State*, 3 Tex. Cr. App. 112.

Defendant was convicted under Pasch. Dig., art. 2408, of theft from a house, and his punishment assessed at two years in the penitentiary. Pending his appeal from the judgment, the legislature repealed said article, without saving past offenses or pending prosecution. Held, under Pasch. Dig., art. 1617 (Pen. Code, art. 15), providing that the repeal of a penal law, where the repealing statute substitutes no other penalty, will exempt from punishment all persons who may have offended against the provisions of such repealed law, unless it be otherwise declared in the repealing statute that the repealing act exempts defendant from punish-

ment and necessitates a dismissal of the case. *Sheppard v. State*, 1 Tex. Cr. App. 522, 28 Am. Rep. 422.

Notwithstanding art. 2403, Paschal's Digest, is repealed, theft, whether from a house or not, is an offense against laws of Texas. *McGee v. State*, 11 Tex. Cr. App. 520, 524.

As the Act of August 21, 1876, repealed the law punishing theft from a house as a specific offense, and made no provision respecting cases pending, those who had violated the repealed law prior to its repeal can not be punished under it since its repeal. Furthermore, a conviction, under such circumstances, would have to be reversed, because the punishment for theft of property of the value of twenty dollars and over is greater than was that of theft from a house. *Montgomery v. State*, 2 Tex. Cr. App. 618, 621; *Hubbard v. State*, 2 Tex. Cr. App. 506, so far as it conflicts with the above rulings, is overruled.

Driving Cattle from Accustomed Range.—The offense of "driving cattle from their accustomed range" (described in Pen. Code, 766a; Pasch. Dig., art. 2410b) was not abolished by the act approved May 17, 1873, amending art. 766, Pen. Code, and enacting another article, numbered 766a, in which the penalty for the theft of sheep, goats, and hogs is prescribed. *Smith v. State*, 43 Tex. 433.

Under Pen. Code, art. 749, which declares that, if any person shall willfully remove from its accustomed range any live stock not his own, "he shall be deemed guilty of theft," a conviction may be had under an indictment for theft on proof that defendant willfully drove from their range the animals alleged to have been stolen. *Smith v. State*, 21 Tex. Cr. App. 133, 17 S. W. 558.

Statutes Prescribing Punishment.—Act Aug. 21, 1876, providing that theft of property under \$20 in value shall be punishable by confinement in the

county jail, etc., does not repeal Act May 17, 1873, amendatory of Pen. Code, art. 766, whereby theft of cattle, sheep, goats, or hogs is punishable by imprisonment in the penitentiary. *Kelly v. State*, 1 Tex. Cr. App. 628.

Pen. Code, art. 736, provides that theft of property under the value of \$20 shall be punished by imprisonment in the county jail, not exceeding one year, during which time the prisoner may be put to hard work, and by fine not exceeding \$500, or by such imprisonment without fine. Held, that where a defendant was convicted of theft of property the value of which was less than \$20, he could not be punished by fine alone without imprisonment. *Sager v. State*, 11 Tex. Cr. App. 110.

Pen. Code 1895, art. 527, is repealed by art. 529p, both relating to and prescribing punishments for theft of oysters from oyster beds, and being inconsistent, and the latter being the later statute. *Ragazine v. State*, 84 S. W. 832, 47 Tex. Cr. App. 46. See *Cain v. State*, 20 Tex. 355; *Chiles v. State*, 1 Tex. Cr. App. 27; *Holden v. State*, 1 Tex. Cr. App. 225; *Davis v. State*, 2 Tex. Cr. App. 425.

III. Property Subject of Larceny.

A. IN GENERAL.

Necessity That Property Have Some Specific Value.—Property to be the subject of theft, must be such as has some specific value capable of being ascertained, and it embraces every species of personal property capable of being taken. *Collins v. State*, 20 Tex. Cr. App. 197; *Lavarre v. State*, 1 Tex. Cr. App. 685, 688; *Ellison v. State*, 25 Tex. Cr. App. 328, 8 S. W. 462; *Sands v. State*, 30 Tex. Cr. App. 578, 18 S. W. 86.

Under Pen. Code 1895, art. 866, providing that "property" as used in relation to the crime of theft includes any writing containing evidence of existing debt, contract, liability, prom-

ise, or ownership of real, or personal property and any writing provided it possesses an ascertainable value. *Worsham v. State*, 56 Tex. Cr. App. 253, 120 S. W. 439. See *Calentine v. State*, 50 Tex. Cr. App. 154, 94 S. W. 1061.

Value of Twenty Dollars.—It must have been proved, in order to sustain a conviction under Act 1848 (Hart's Dig., art. 523) § 27, that the property stolen was of the value of \$20. *Langford v. State*, 8 Tex. 115.

The criterion of value of property stolen is a fair market value at the time and in the county where taken, if it has such, and, if not, the amount of cost to replace it. *Close v. State*, 55 Tex. Cr. App. 380, 117 S. W. 137; *Floyd v. State*, 55 Tex. Cr. App. 437, 117 S. W. 138; *Keipp v. State*, 51 Tex. Cr. App. 417, 103 S. W. 392.

Under Code Cr. Proc., art. 216, which allows a thief to be prosecuted in any county into which he carries the stolen property, the measure of the value to constitute the crime of felonious theft is the value of the property in the county of the forum at the time it was brought into that county, and not its value at the time of the taking in the county of the taking. *Clark v. State*, 23 Tex. Cr. App. 612, 5 S. W. 178.

Bank notes are considered as money, and the rule of their value as respects the graduation of the offense of stealing is the sum which, on their face, they promise to pay. *Bagley v. State*, 3 Tex. Cr. App. 163.

Necessity That Property Stolen Should Be of a Particular Kind.—It is not a statutory ingredient or essential element of theft that property stolen should be a particular kind of corporeal personal property. *Washington v. State*, 17 Tex. Cr. App. 197, 203.

B. CHOSSES IN ACTION OR OTHER DOCUMENTS.

Bank Notes.—At common law, it was not larceny to steal a bank note.

Kimbrough v. State, 28 Tex. Cr. App. 367, 368, 13 S. W. 218.

Under the statute regarding theft, bank bills are property and may be subject of theft. *Kimrough v. State*, 28 Tex. Cr. App. 367, 368, 13 S. W. 218; *Bagley v. State*, 3 Tex. Cr. App. 163.

The provision in Pasch. Dig., arts. 23, 90, concerning theft, that "property" includes money and bank bills, applies to United States treasury notes and national bank notes, although they were not in existence when the statute was passed. *Sansbury v. State*, 4 Tex. Cr. App. 99.

A pay check payable to order is the subject of theft, though it is not indorsed. *Fulshear v. State*, 59 Tex. Cr. App. 376, 128 S. W. 134.

An undelivered check is subject to larceny as "property," under Pen. Code 1895, art. 866. *Worsham v. State*, 56 Tex. Cr. App. 253, 120 S. W. 439.

Deeds.—A deed executed and acknowledged has a value, so as to be the subject of theft. *Roberts v. State*, 61 Tex. Cr. App. 434, 135 S. W. 144.

Railroad tickets, issued by a railroad company, and authorizing the owner to be transported between certain points on such railroad, are the subject of theft. *Patrick v. State*, 50 Tex. Cr. App. 496, 98 S. W. 840.

C. FIXTURES AND PROPERTY SEVERING OF REALTY.

The common-law rule that, to constitute theft of an article attached to the realty, there must be a severance prior to the asportation, does not obtain in this state, but the act of severance converts the article into a chattel, and however instantaneous its removal may be, the taking is theft, if done without the owner's consent and with a larcenous intent. *Harberger v. State*, 4 Tex. Cr. App. 26.

If property attached to a house as a part of the realty is detached and sold, the wrongdoer is liable to an ac-

tion for theft, although the two acts are continuous. *Ex parte Willke*, 34 Tex. 155.

Timber.—Wood suitable only as fuel does not come within Pen. Code, arts. 825, 826, providing a penalty for carrying away timber without the consent of the owner, and providing that "timber" includes rails or other articles manufactured from timber. *Wilson v. State*, 17 Tex. Cr. App. 393.

Fence Rails.—Severance of an article from the realty—as here, rails from a fence—without the owner's consent and with intent to steal the same, is larceny, however instantaneous the asportation. *Harberger v. State*, 4 Tex. Cr. App. 26, 30 Am. Rep. 157.

Parts of Machinery.—The stealing of parts of machinery severed by the thief from other machinery constituting a part of the freehold is theft. *Farris v. State* (Cr. App.), 69 S. W. 140.

Repairs. of themselves, are not the subject matter of theft. They are only an accretion of value to a thing which may be the subject matter of that offense. *State v. Stephens*, 32 Tex. 155.

D. ANIMALS.

Estray.—An estray or unmarked or unbranded animal is the subject of theft. *State v. Apel*, 14 Tex. 428; *Lawrence v. State*, 20 Tex. Cr. App. 536, overruling *Debbs v. State*, 43 Tex. 650. See, also, *Johnson v. State*, 36 Tex. 375.

The taking and appropriating to one's own use an animal known to be an estray, whose owner is unknown, without compliance with the law regulating estrays, constitutes theft. *Owens v. State*, 7 Tex. Cr. App. 470.

Cattle.—Theft of cattle is an offense against the laws of Texas under art. 766, Penal Code. *Arrington v. State*, 13 Tex. Cr. App. 551, 553.

The term "cattle," in Pen. Code, art.

747, defining cattle stealing, means domesticated animals of the bovine genus. *McIntosh v. State*, 18 Tex. Cr. App. 284.

The word "cattle," in its popular sense, as well as in the sense in which it is used in Cr. Code, art. 2410, as amended by Act Nov. 12, 1866, relating to the theft of specified animals, means a species of animals having an essential identity in qualities, to be taken and considered either collectively or individually. *Hubotter v. State*, 32 Tex. 479.

Cattle running at large, and not in their accustomed range, are the subject of theft. *Borer v. State* (Cr. App.), 28 S. W. 951.

All cattle are "neat" cattle within meaning of art. 766 of Penal Code regarding theft of cattle. *Arrington v. State*, 13 Tex. Cr. App. 551, 553.

Horse.—"Horse," as used in Pasch. Dig., art. 2409, punishing theft of a horse, is specific, and not generic, and does not include geldings, mares, etc. *Keesee v. State*, 1 Tex. Cr. App. 298; *Lunsford v. State*, 1 Tex. Cr. App. 448.

Dogs.—The nature of property in dogs is such as to make them a subject of larceny. *Hurley v. State*, 30 Tex. Cr. App. 333, 17 S. W. 455.

Pen. Code, art. 724, defines "theft" as "the fraudulent taking of corporeal personal property belonging to another." Article 725 declares that the property must have some specific ascertainable value, and that it embraces every species of property capable of being taken. Article 733 includes, within the meaning of "personal property," all domesticated animals, when of some specific value. Articles 735, 748, make theft of the value of \$20 or over punishable by imprisonment in the penitentiary, and provide particularly that the penalty shall attach to the theft of sheep, hogs, and goats. Article 679, punishing malicious mischief, makes it an offense to willfully kill, wound, poison, or disfigure any

dog or other domesticated animal. Held, that a dog may become the subject of theft, and that, where he is shown to be worth at least \$20, such theft is a felony. *Hurley v. State*, 30 Tex. Cr. App. 333, 17 S. W. 455, 28 Am. St. Rep. 916.

E. PROPERTY LOST OR MISLAID.

Lost or mislaid goods may be subject of theft. *Robinson v. State*, 11 Tex. Cr. App. 403, 406; *Martinez v. State*, 16 Tex. Cr. App. 122.

Two turbine water wheels, left by their owner on a railroad platform for one year, and then removed by him to the right of way, remaining there for nine years, can not be said to have been abandoned, so as not to be the subject of larceny. *Sikes v. State* (Cr. App.), 28 S. W. 688.

IV. Elements.

A. TAKING AND ASPORTATION.

1. Character of Act of Taking.

See post, "Taking and Asportation," XII, B, 1; "Taking and Asportation," XIII, C, 1, g; "Taking and Asportation," XIV, B, 4, g.

a. What Fraudulent Taking Implies.

A fraudulent taking of property of another implies that the taker knew it was not his own, and that it was taken to deprive the owner of its value. *Camplin v. State*, 1 Tex. Cr. App. 108.

b. Taking Necessary.

The factum probandum of theft, as that offense is defined by the Texas statute, is the taking of the property. *Taylor v. State*, 27 Tex. Cr. App. 463, 11 S. W. 462; *Crowell v. State*, 24 Tex. Cr. App. 404, 6 S. W. 318; *Hayes v. State*, 30 Tex. Cr. App. 404, 17 S. W. 940.

To make one guilty of theft, he must have taken the property, or have assisted in the taking. *Wright v. State*, 18 Tex. Cr. App. 358; *Smith v. State* (Cr. App.), 44 S. W. 520;

Harris v. State, 29 Tex. Cr. App. 101, 14 S. W. 390; *Parks v. State*, 29 Tex. Cr. App. 597, 16 S. W. 532; *Johnson v. State*, 34 Tex. Cr. App. 254, 30 S. W. 228; *Minter v. State*, 26 Tex. Cr. App. 217, 9 S. W. 561; *Ex parte Thrasher* (Cr. App.), 80 S. W. 1142; *Hardeman v. State*, 12 Tex. Cr. App. 207; *Thurman v. State*, 33 Tex. 684; *Mullins v. State*, 37 Tex. 337; *Billard v. State*, 30 Tex. 367; *Bray v. State*, 41 Tex. 203.

Where relator was attempting to steal a horse, but, before his detection, had not succeeded in obtaining possession of the animal, but had obtained possession only of the bridle and saddle, he could not be held for theft of the horse, but only for theft of the bridle and saddle. *Ex parte Thrasher* (Cr. App.), 80 S. W. 1142.

While there may be a taking of the property without actual, manual possession of it, still the property must in some manner have come into the possession of the party accused of the theft, either actually or constructively, or he can not be said to have taken it. *Minter v. State*, 26 Tex. Cr. App. 217, 9 S. W. 561.

c. The Taking Must Be Wrongful.

Every fraudulent taking of property is not theft. Hence a charge that "the crime of theft is complete by the act of fraudulent taking into possession property not his own" is erroneous. *Purtell v. State*, 43 Tex. 483.

As to distinction between theft by false pretext and the fraudulent conversion by bailee, see post, "In General," V, A, 1.

Original Lawful Possession.—Where possession of property has been acquired lawfully by the taker, that is, when the owner consents to part with the possession of the property, and the taker gains possession by virtue of such consent, the taker may be guilty of theft notwithstanding such lawful possession by one or the other of the two modes mentioned in Pen.

Code, art. 861; that is, first, by his having obtained such possession by any false pretext which induced the owner into surrendering the possession to him; or second, where he has obtained possession from the owner and at the very time intended to deprive him of the value thereof, and appropriate the property to his own use and benefit, and does thereafter so appropriate it. Either one of these modes of acquisition will separately constitute theft under the statute. *Williams v. State*, 30 Tex. Cr. App. 153, 16 S. W. 760; *Cunningham v. State*, 27 Tex. Cr. App. 479, 480, 11 S. W. 485; *Nichols v. State*, 28 Tex. Cr. App. 105, 12 S. W. 500; *Porter v. State*, 23 Tex. Cr. App. 295, 4 S. W. 889; *Wilson v. State*, 20 Tex. Cr. App. 662; *Harris v. State* (Cr. App.), 65 S. W. 921; *Lewis v. State*, 48 Tex. Cr. App. 309, 87 S. W. 831; *Pitts v. State*, 3 Tex. Cr. App. 210, 212; *Morrison v. State*, 17 Tex. Cr. App. 34, 37; *Hernandez v. State*, 20 Tex. Cr. App. 151, 153; *Wilson v. State*, 20 Tex. Cr. App. 662, 664; *Stokely v. State*, 24 Tex. Cr. App. 509, 510, 6 S. W. 538; *Lott v. State*, 24 Tex. Cr. App. 723, 14 S. W. 277; *Pitts v. State*, 5 Tex. Cr. App. 122; *Guest v. State*, 24 Tex. Cr. App. 235, 241, 5 S. W. 840; *McAfee v. State*, 14 Tex. Cr. App. 668; *Johnson v. State*, 1 Tex. Cr. App. 118; *Spinks v. State*, 8 Tex. Cr. App. 125; *Keonio v. State*, 4 Tex. Cr. App. 173, 175; *Owens v. State*, 7 Tex. Cr. App. 470, 471; *Hudson v. State*, 10 Tex. Cr. App. 215, 229; *Atterberry v. State*, 19 Tex. Cr. App. 401, 407; *Reed v. State*, 8 Tex. Cr. App. 40, 41; *Hornbeck v. State*, 10 Tex. Cr. App. 408, 409; *Quitow v. State*, 1 Tex. Cr. App. 47, 56; *Rumbo v. State*, 28 Tex. Cr. App. 30, 11 S. W. 680.

Though one has obtained special custody of property, with the consent of the owner, by means of fraud, theft is not committed unless he subsequently takes the property from such special custody, against the consent of

the owner, with intent to appropriate it to himself. *Williams v. State*, 34 Tex. 558.

The owner of a horse gave defendant permission to ride it to a certain point, and then to turn it loose. On his way defendant exchanged the horse for an overcoat. Held not larceny, as the taking was not wrongful, nor was possession obtained by any false pretext, or with intent to deprive the owner of his property. *Stokely v. State*, 24 Tex. Cr. App. 509, 6 S. W. 538.

Defendant, on moving into a store rented by him, found two "barber bottles" left there by a former occupant. He kept them on a shelf, in public view, for several months, and then sold them, and denied having done so. Held, that these facts did not show an original fraudulent taking and appropriation, and hence did not constitute theft, within White's Ann. Pen. Code, art. 861, §§ 1490, 1491, declaring that if the taking, though originally lawful, was obtained with an intent to deprive the owner of the value thereof, and appropriate the property to the taker's use, the offense of theft is complete. *Siemers v. State* (Cr. App.), 55 S. W. 334.

Necessity of Intention at the Time of Taking.—See post, "General Rule," IV, C, 3, a.

Under Pen. Code, art. 727, providing that if property comes into the hands of a person lawfully, the subsequent appropriation by him is not theft, unless the original taking was by false pretext, or with fraudulent intent, where a horse was delivered to defendant to use in the business of the prosecuting witness, defendant was not guilty of theft if he afterwards converted the horse to his own use, if he had no such intent when the horse was first delivered to him. *Rumbo v. State*, 28 Tex. Cr. App. 30, 11 S. W. 680.

Under Pen. Code 1895, art. 861, providing that the taking must be wrong-

ful, so that if the property came into the possession of the person accused of theft by lawful means the subsequent appropriation of it is not theft, but if the taking was with intent to deprive the owner of the value thereof and appropriate the property to the use and benefit of the person taking, and the same is so appropriated, the offense of theft is complete, where, in a prosecution for theft of a mule, which defendant took and sold, it appeared that he had the owner's consent to the taking of the mule, but not to the selling thereof, it was necessary to prove that he intended at the time of taking the mule to appropriate it, in order to convict him of theft. *Flagg v. State*, 51 Tex. Cr. App. 602, 103 S. W. 855.

Whenever property comes into the possession of a party by lawful means, no subsequent appropriation of it can be theft, under an indictment for larceny in the original taking, and in order to convict the state must prove beyond a reasonable doubt that the original taking by accused was fraudulent; hence, in a prosecution for larceny in the original taking of certain cattle, where it appeared that C. had been authorized to take up the cattle which had strayed, and put them in his mother's pasture, and that C. informed accused that he had a right to handle the cattle, and that accused assisted C. in driving them elsewhere, if accused believed that C. had the right to handle the cattle, or if C. did have the right to handle them and accused believed that C. had such a right, or if C. had taken up the cattle with the original intention of placing them in his mother's pasture, then accused would not be guilty, even if he subsequently had reason to believe that C. was committing theft by conversion after taking them up. *Warren v. State* (Cr. App.), 106 S. W. 382.

Necessity for Demand of Return of Money Obtained by False Pretext.—Where defendant accosted prosecutor

and solicited that he purchase liquor, and prosecutor gave defendant a dollar for a quart of alcohol, and defendant kept the money without delivering any alcohol, a demand for return of the money was not essential to defendant's conviction for theft thereof. *Hawkins v. State*, 58 Tex. Cr. App. 407, 126 S. W. 268.

Obtaining Money under Pretense of Changing It.—Where defendant induced the prosecutor to give him money with which to buy liquor on the pretext of changing it for him, and then appropriated it by not returning any change, he was guilty of theft, as defined by Pen. Code 1895, art. 861. *Flynn v. State*, 47 Tex. Cr. App. 26, 83 S. W. 206.

Taking Money from a Guest in a Boarding House under Pretense He Is Employed.—Under Pen. Code 1901, art. 861, providing that if a taking, though originally lawful, was obtained by any false pretext, or with intent to deprive the owner of the value of the property and appropriate the money to the use of the taker, and that is done, the offense of theft is complete, a defendant who, under pretense that he is an employee at a lodging house, obtains money from a guest to keep for him overnight, and who immediately decamps, is guilty of theft, and not of embezzlement. *Johnson v. State*, 80 S. W. 621, 46 Tex. Cr. App. 415.

Driving Horses Further and in Different Directions than That for Which They Were Hired.—A conviction for theft under Pen. Code 1895, art. 861, is warranted by evidence that defendant obtained possession of horses under the false pretext that he was going to drive them to a place eight miles distant; that he went in the opposite direction thirty miles, and the same day endeavored to dispose of them at a price far below their value—is not being necessary that there be a sale, to establish conversion. *Lewis v. State*, 87 S. W. 831, 48 Tex. Cr. App. 309.

d. Connection with Original Taking.

See post, "In General," IX, A, 1.

e. Second Taking as a Fresh Larceny.

Where stolen hogs, put in a pen, entirely escape from the control of their captors, a second taking in a fresh larceny; and this is the case though they do not go out of the pasture in which is the pen, the pasture fence being, however, such as to afford no bar to their escape. *Trimble v. State*, 33 Tex. Cr. App. 397, 26 S. W. 727.

f. Taking Several Articles at One Time.

The taking of several articles at the same time and place constitutes one offense, whether the several articles or animals belong to the same or to different persons. *Addison v. State*, 3 Tex. Cr. App. 40, 43. See, also, *Quit-zow v. State*, 1 Tex. Cr. App. 47, 48; *Wilson v. State*, 45 Tex. 76.

Where a defendant on two or three occasions within an hour and a half obtained from the prosecutor money with which to buy liquor, in all amounting to \$80, without returning any change, this was such a continuous transaction as to constitute one theft. *Flynn v. State*, 83 S. W. 206, 47 Tex. Cr. App. 26. See, also, *White v. State*, 33 Tex. Cr. App. 94, 25 S. W. 290; *Barnes v. State*, 43 Tex. Cr. App. 355, 65 S. W. 922.

Where one drives at night a wagon to the fence and carries cotton from a pile in the field to his wagon, 30 yards away, fills it and drives away, the taking of this cotton, though by successive basketfuls, was held to be theft of the whole; although there were different acts, still they were continuous, and the whole transaction was instigated by one impulse and purpose. Again, where one breaks into a store at night, and carries out by successive trips as much goods as he wished, the amount taken in the aggregate is the amount stolen, and, if this is sufficient to constitute a felony, the offense is a felony. *Harris v.*

State, 29 Tex. Cr. App. 101, 14 S. W. 390.

But upon trial for larceny of twenty sacks of meal, worth \$1 per sack where the defense is that the meal was taken on separate occasions, it is error to instruct the jury to the effect that they may convict if they are satisfied beyond a reasonable doubt that defendant took during one day meal to the value of \$20, since the meal might have been taken by successive petit larcenies during a single day. *Cody v. State*, 31 Tex. Cr. App. 183, 20 S. W. 398. See, also, *Larcey v. State*, 22 Tex. Cr. App. 657, 3 S. W. 343.

g. Taking an Animal.

Killing an animal constitutes a taking of it. *Minter v. State*, 26 Tex. Cr. App. 217, 9 S. W. 561; *Hall v. State*, 41 Tex. 287; *Coombes v. State*, 17 Tex. Cr. App. 258.

There may be a conviction for stealing a cow, on evidence of the killing of the cow, although the cow never actually passed into the possession of the slayer, where the intent to steal clearly appears. *Coombes v. State*, 17 Tex. Cr. App. 258, overruling *Martin v. State*, 44 Tex. 172.

Shooting and skinning another's cattle, with fraudulent intent to appropriate their hides, held to constitute theft of the cattle. *McPhail v. State*, 9 Tex. Cr. App. 164.

Animals Only Wounded.—Evidence that defendant shot and wounded another's hog, and pursued it some distance, but did not kill or catch it, and that the owner afterwards found the hog badly wounded, and killed it, and used the meat, does not show a "taking" warranting a conviction for theft. *Minter v. State*, 26 Tex. Cr. App. 217, 9 S. W. 561.

Identity Not Clearly Established.—The only evidence tending to connect the defendant with the crime was the fact that he had recently killed a beef, which was supposed to have been the animal stolen. Held, that an instruc-

tion that the killing of the animal constituted the offense was error. *Crowell v. State*, 24 Tex. Cr. App. 404, 6 S. W. 318.

h. Taking by Force.

On a prosecution for theft it appeared that defendant and a confederate sought to inveigle the prosecutor into betting on a "trick knife," but that he refused; that defendant then took hold of prosecutor's watch and again tried to make him bet, and, upon his refusal, they snatched the watch, twisting his money out of his hand, and fled. Held a conviction was proper. *Boyd v. State* (Cr. App.), 29 S. W. 157.

i. Sale by Employee of Cotton Stored in Employer's Name.

Where a person with whom cotton has been intrusted to deposit with a warehouseman, after depositing it in his employer's name, procures receipts and samples of cotton, with which he makes sales thereof, he does not acquire a sufficient possession of the property as to render him guilty of theft. *Johnson v. State*, 34 Tex. Cr. App. 254, 30 S. W. 228.

j. Concealing Overpayment and Returning Wrong Change.

Where the holder of a check is overpaid by mistake on presentation of the same at a bank and at the time of receiving the over payment he forms the design to appropriate it to his own use and did so appropriate it, he will be guilty of theft under Penal Code, art. 727. *Fulcher v. State*, 32 Tex. Cr. App. 621, 25 S. W. 625.

Where prosecutor delivered certain money, expecting a return of the same amount, with other money, as in making change, there is no intent to part with title, and a fraudulent inducement so to deliver would not warrant a charge that participation therein constitutes swindling, and not theft. *Braxton v. State*, 50 Tex. Cr. App. 632, 99 S. W. 994. See *Flynn v. State*, 47 Tex. Cr. App. 26, 83 S. W. 206; *Bink*

v. State, 50 Tex. Cr. App. 445, 98 S. W. 863.

The prosecutor handed the defendant a \$20 bill to change and he, pretending that he could not change it, fraudulently gave her a \$1 bill, instead of the \$20, and converted the \$20. Held a larceny of \$20. *Walters v. State*, 17 Tex. Cr. App. 226, 50 Am. Rep. 128.

k. Necessity That Property Pass into the Actual Manual Possession of Thief.

Under Ann. Pen. Code, §§ 1266, 1267, 1293, actual manual possession of the property is not necessary to constitute larceny. *Conner v. State*, 24 Tex. Cr. App. 245, 6 S. W. 138; *Harris v. State*, 29 Tex. Cr. App. 101, 14 S. W. 390; *Minter v. State*, 26 Tex. Cr. App. 217, 9 S. W. 561.

Manual possession, actual handling, does not appear to be essential in case of animals. *Coombes v. State*, 17 Tex. Cr. App. 258, 259; *Doss v. State*, 21 Tex. Cr. App. 505, 511, 2 S. W. 814.

l. Taking by Hand of Innocent Third Person.

One who procures the agent of a railroad company to send him property of another, left on the company's right of way, is guilty of larceny thereof. *Sikes v. State* (Cr. App.), 28 S. W. 688.

Where it is proven that defendant stole the horse in question, and took it to the house of P., who borrowed it and rode into another county, defendant accompanying him, such act of P. is the act of defendant, whether P. knew the horse was stolen or not. *Wampler v. State*, 28 Tex. Cr. App. 352, 13 S. W. 144.

There being evidence that defendant stated that he had ordered one who had taken a stolen mare to get the animal and bring it to him, it was reversible error to omit to instruct on the theory that defendant was guilty as principal, and the taker was merely an innocent agent. *Knowles v. State*, 27 Tex. Cr. App. 503, 11 S. W. 522.

Where Purchaser Takes Possession.

—Where one wrongfully sells property as his own, and the purchaser takes possession of it in good faith, the vendor is guilty of theft. *Dale v. State*, 32 Tex. Cr. App. 78, 22 S. W. 49; *Farris v. State*, 55 Tex. Cr. App. 481, 117 S. W. 798; *Doss v. State*, 21 Tex. Cr. App. 505, 2 S. W. 814; *Williams v. State*, 24 Tex. Cr. App. 17, 5 S. W. 655; *Lane v. State*, 41 Tex. Cr. App. 558, 55 S. W. 831; *Minter v. State*, 26 Tex. Cr. App. 217, 9 S. W. 561; *Harris v. State*, 29 Tex. Cr. App. 101, 14 S. W. 390; *Madison v. State*, 16 Tex. Cr. App. 435.

Still there must be a taking and the property must have been in possession of the thief, hence the sale of another's horse, of which the seller never had possession, is not theft. *Lott v. State*, 20 Tex. Cr. App. 230, 232.

Defendant sold a horse, which he did not own, to an innocent purchaser. The next day the purchaser went into the adjoining county, and took the horse. On trial of defendant in the latter county for larceny of the horse, the court charged that if defendant sold the horse, and pointed it out to the purchaser on the range, without taking possession, but authorized the purchaser to take possession of it, and the purchaser afterwards, in another county, did take and appropriate the horse by virtue of such sale, then the venue was sufficiently proved to be in the latter county. Held, the conviction, under such charge, should be sustained, since the theft occurred when the purchaser, as the innocent agent of defendant, took actual possession of the horse. *Walls v. State*, 63 S. W. 328, 43 Tex. Cr. App. 70.

Where a person executed a bill of sale of a steer belonging to another, the title passes to the buyer so as to render the seller liable for theft, although at the time the bill of sale was executed the steer was running at large upon the range. *Chowning v. State*, 51 S. W. 946, 41 Tex. Cr. App. 81.

Necessity for Bill of Sale Where Animals Sold on Range.

—In a prosecution for cattle theft, where accused was alleged to have sold the animal while it was running the range, it was not necessary to the transfer of title that a bill of sale was made out and acknowledged by him. *Farris v. State*, 55 Tex. Cr. App. 481, 117 S. W. 798.

Where Purchaser Never Took Possession.

—To constitute a theft, there must be a taking. Held, accordingly, that defendant, for selling, without taking possession of, a steer at large upon the range, to one who never took possession, was not guilty of larceny. *Hardeman v. State*, 12 Tex. Cr. App. 207.

m. Taking of Property More Valuable than Authorized.

One who, when authorized by the owner's agent to take up a certain steer, took up a much more valuable one, and disposed of it with fraudulent intent to deprive the owner of his property and appropriate it to his own use, held to be guilty of theft. *Peck v. State*, 9 Tex. Cr. App. 70.

2. Asportation.

The Penal Code, in defining theft, omits the words "carried away," and thereby dispenses with such proof of asportation as is required at common law. *Walker v. State*, 3 Tex. Cr. App. 70; *Conner v. State*, 6 Tex. Cr. App. 455; *Doss v. State*, 21 Tex. Cr. App. 505, 2 S. W. 814; *Coward v. State*, 24 Tex. Cr. App. 590, 7 S. W. 332; *Harris v. State*, 29 Tex. Cr. App. 101, 14 S. W. 390; *Austin v. State*, 42 Tex. 345; *Calvin v. State*, 25 Tex. 789, 793; *Prim v. State*, 32 Tex. 157; *Musquez v. State*, 41 Tex. 226, 228; *Hall v. State*, 41 Tex. 287, 288; *Coombes v. State*, 17 Tex. Cr. App. 258, 266; *Lott v. State*, 20 Tex. Cr. App. 230.

Necessity That Property Be Removed Any Distance from Place of Taking.—To constitute theft, it is not necessary that the property be removed any distance from the place of taking.

it is sufficient that it has been in the possession of the thief, though it may not be moved out of the presence of the person deprived of it. *Madison v. State*, 16 Tex. Cr. App. 435; *Jorasco v. State*, 6 Tex. Cr. App. 238, 240; *Harris v. State*, 29 Tex. Cr. App. 101, 14 S. W. 390.

Length of Possession Required to Constitute Theft.—It is not necessary that any definite length of time shall elapse between the taking and discovery of the theft; if but a moment elapse the offense is complete. *Madison v. State*, 16 Tex. Cr. App. 435.

A charge that a moment's possession of stolen property is enough to constitute theft is sufficient when the property consisted of a gun and pistol, taken by prisoners from a guard whom they overpowered in order to escape, which they afterwards directed to be returned to him. *Mahoney v. State*, 33 Tex. Cr. App. 388, 26 S. W. 622.

A momentary taking of money of another from a drawer, though immediately returned thereto voluntarily, held to be a sufficient asportation to constitute larceny. *Harris v. State*, 29 Tex. Cr. App. 101, 14 S. W. 390, 25 Am. St. Rep. 717.

Attempt to Remove Dress from Female Figure.—Defendant broke and entered a store containing a female figure on which was a dress and cloak. He had taken the cloak from the figure, rolled it up, and laid it on the floor, and was trying to take off the dress, but had not succeeded, having pulled it down to the bottom of the figure, by which method it could not be removed, and the storekeeper testified that it could only have been taken off over the head. Held, that there was no sufficient asportation of the dress to constitute theft thereof, and that defendant was therefore only guilty of the theft of the cloak. *Clark v. State*, 59 Tex. Cr. App. 246, 128 S. W. 131.

Partial Removal of Pocket Book from Person's Pocket.—On trial of an

indictment under Code, art. 762, for theft from the person, the evidence showed that defendant, while in a crowd at the door of a theater, placed his hand in the pocket of W., seized his pocketbook, and drew it partly out of the pocket, when, being detected by W., he released his hold upon it; the pocketbook never leaving W.'s person. Held a sufficient taking away from the person, and a sufficient possession of the pocketbook, if taken with felonious intent, to constitute the offense. *Flynn v. State*, 42 Tex. 301.

3. Ownership and Possession.

See post, Ownership and Possession XII, B, 8; Ownership and Possession XII, C, 2, e; Ownership and Possession XIII, C, 1, f.

a. In General.

Two Kinds of Ownership.—There are two kinds of ownership as to property which may be subject of theft, namely, a general, and a special ownership, both of which depend upon "possession" alone, so far as this offense is concerned. *Frazier v. State*, 18 Tex. Cr. App. 434, 441. See *Alexander v. State*, 4 Tex. Cr. App. 261, 262.

Ownership Must Repose in Some Person.—In order to constitute a theft, the ownership of the property stolen must repose in some person, though that ownership may be general or special. *Clark v. State*, 29 Tex. Cr. App. 437, 16 S. W. 171.

Necessity That Possession and Ownership Be in Same Person.—Under the express provisions of Penal Code, art. 728, it is not necessary, in order to constitute theft, that the possession and ownership of the property be in the same person at the time of the taking. *Wilson v. State*, 12 Tex. Cr. App. 481; *Thomas v. State*, 1 Tex. Cr. App. 289, 296; *Burt v. State*, 7 Tex. Cr. App. 578.

Previous Taking by Third Person Affecting Present Taking from Owner.—Theft of a cow is no less the taking

from the original owner because a third person has previously taken it and changed the brand where the cow returned to her accustomed range before the theft. *Taylor v. State*, 62 Tex. Cr. App. 611, 138 S. W. 615. See, also, *Trimble v. State*, 33 Tex. Cr. App. 397, 400, 26 S. W. 727.

b. Test of Ownership.

In a prosecution for theft, the test of ownership is not whether the person from whom the property was taken would be responsible for its loss to the real owner, but whether he had the actual care, control, and management of the property. *King v. State* (Cr. App.), 100 S. W. 387; *Pippin v. State*, 9 Tex. Cr. App. 269; *Crockett v. State*, 5 Tex. Cr. App. 526; *Gaines v. State*, 4 Tex. Cr. App. 330; *Alexander v. State*, 9 Tex. Cr. App. 48; *Bailey v. State*, 18 Tex. Cr. App. 426; *Frazier v. State*, 18 Tex. Cr. App. 434; *Littleton v. State*, 20 Tex. Cr. App. 168; *Williams v. State* (Cr. App.), 51 S. W. 904, 905; *Emmerson v. State*, 33 Tex. Cr. App. 89, 90, 25 S. W. 289; *Tinney v. State*, 24 Tex. Cr. App. 112, 5 S. W. 831; *Olibare v. State* (Cr. App.), 48 S. W. 69.

Actual Control and Possession.—A taking, to constitute theft, need not be a taking from the actual possession of the owner; but a taking of property without his consent, when not in his actual custody, with intent to deprive him thereof and to appropriate it to the use of the person taking, constitutes theft. *Rose v. State*, 52 Tex. Cr. App. 154, 106 S. W. 143.

In a trial for stealing a gun temporarily left on a lake shore by a fishing party embracing the owner and his son, defendant was not entitled to acquittal on the theory that the gun was not in the owner's possession, because the evidence showed the son used the gun on the way to the lake. *Crouch v. State*, 52 Tex. Cr. App. 460, 107 S. W. 859.

A pistol left in the owner's room

during his absence, but not in the possession of any particular person, remains in his constructive possession while in his room, and its theft therefrom is punishable, though the owner was in another state at the time of the theft. *Webb v. State* (Cr. App.), 44 S. W. 498.

A superintendent of a land and cattle company, who had charge and control of all their interests within the state, including the land and property of every sort, and horses and cattle, being thus in complete control of the property, was, for the purposes of the prosecution of another for theft of such cattle, their owner. *Barnes v. State*, 81 S. W. 735, 46 Tex. Cr. App. 513.

One who has the control and management of property for an infant, who lives with him, along with its natural guardian, has the possession, within the meaning of Pen. Code, art. 729, providing that possession of the person so unlawfully deprived of property is constituted by the exercise of actual control, care, or management. *Frazier v. State*, 18 Tex. Cr. App. 434.

Where, on a trial for theft, there was testimony that a person left his pocketbook, containing money and a drink check, in his trousers, which he had left at the place where defendant was at work to be repaired, and that on receiving his trousers he missed his pocketbook, and that he went back and made inquiry, and defendant denied any knowledge thereof, and the drink check was traced into defendant's possession, a charge that a fraudulent taking, to constitute theft, need not be the taking from the owner's actual possession, but that a taking of property without his consent, when not in his actual custody, with intent to deprive him thereof, constitutes theft, was correct. *Rose v. State*, 52 Tex. Cr. App. 154, 106 S. W. 143.

If a party wins money, and it is in

his exclusive possession, theft thereof may be committed by a third party. *Fay v. State* (Cr. App.), 70 S. W. 744.

One Employed to Gather and Deliver Stolen Stock.—On trial of an indictment for the theft of cattle, it appeared that defendant was employed and paid only for gathering and delivering the stolen cattle, the terms of his employment not being shown; but it was shown that the custom was to pay by the head for gathering stock. Held, that defendant had a sufficient interest in the stock to support the charge of theft, if in other respects the taking constituted theft. *Corn v. State*, 41 Tex. 301.

c. Custodian.

To constitute "possession" within the meaning of the Code relating to theft, the party must, at the time of the taking, have the actual care, control or management of the property. Possession and custody are not synonymous or convertible terms, and if the property at the time it is taken be in the mere temporary custody of a ward, servant or other person, the indictment need not allege the possession to be in such temporary custodian. *Bailey v. State*, 18 Tex. Cr. App. 426.

The possession by a servant of his master's property is the possession of the master. *Crook v. State*, 39 Tex. Cr. App. 252, 45 S. W. 720; *Graves v. State* (Cr. App.), 42 S. W. 300; *Willis v. State* (Cr. App.), 44 S. W. 826; *Livingston v. State*, 38 Tex. Cr. App. 535, 43 S. W. 1008; *Roeder v. State*, 39 Tex. Cr. App. 199, 45 S. W. 570.

Where a person borrows a horse to go to church, and while there the horse is stolen, such temporary custodian is not legally in possession of the horse, and it need not be shown that the taking was without his consent. *Emmerson v. State*, 33 Tex. Cr. App. 89, 25 S. W. 289.

On trial for larceny of a bond for title, it appeared that the owner of the bond had at the request of the obligor

handed him the bond, that he might inspect it, and that the obligor immediately put the bond into the fire, where it was destroyed. Held, that the bond must be regarded as being in the possession of the owner until its actual destruction. *Dignowitty v. State*, 17 Tex. 521, 67 Am. Dec. 670.

d. Agent.

A larceny may be committed by taking the property from the possession and without the consent of an agent of the owner. *Fore v. State*, 5 Tex. Cr. App. 251.

e. Consignees.

The rule that delivery to the carrier passes title to the consignee applied on a trial for theft from a freight car of horses of S. and F., consignees. *Walker v. State*, 9 Tex. Cr. App. 38.

f. Part Owners.

Under Pen. Code, art. 731, a part owner of property can not be convicted of stealing it, unless the person from whom it was taken was entitled to the exclusive possession of it. *Fairy v. State*, 18 Tex. Cr. App. 314.

Where the evidence shows the horse was owned by G., but was taken from possession of R., who was holding it for G., an instruction that if defendant fraudulently took the horse from the possession of G., and from the possession of R., without the consent of either, and with intent to deprive G. and R. of said horse, and appropriate it to his own benefit, he is guilty, is correct. *English v. State*, 29 Tex. Cr. App. 174, 15 S. W. 649.

g. Property of Husband or Wife.

Possession of stolen property, by husband and wife, is that of each, and of both. *Perkins v. State*, 32 Tex. 109, 110.

An unauthorized sale by the husband of his wife's personal property is invalid unless ratified by her, and when not ratified the buyer acquires no title; and a subsequent sale of the same property by the husband with the consent of the wife does not

make the husband guilty of stealing the property from the first buyer. *Hudspeth v. State*, 54 Tex. Cr. App. 371, 112 S. W. 1069.

An indictment for theft of cattle alleged that the property and possession was in H. The proof showed that the cattle belonged to the wife of H., but that the cattle were under the exclusive control of H., and were taken therefrom without his consent or that of his wife. Held, that under Code Cr. Proc., art. 728, providing that it is not necessary to constitute theft that the possession and ownership of property be in the same person at the time of the taking, a charge that to convict the jury must find that H. was the owner or had the management and control was proper. *Burt v. State*, 7 Tex. Cr. App. 578.

h. Property of Decedent's Estate.

Where defendant's brother died leaving some property which a half brother took and sold to witness, defendant, on taking the property from such purchaser, could not be convicted of theft by proof that the proceeds of the sale were applied in paying debts of the deceased brother as defendant was not thereby divested of his interest in the property. *Fairy v. State*, 18 Tex. Cr. App. 314.

i. Estray.

A person may constitute himself an owner, within the law of theft, by exercise of a continued and exclusive control over an estray, although he had not complied with the laws regulating estrays, and the animal habitually ran upon the range. *Moore v. State*, 8 Tex. Cr. App. 496.

j. Animals on Their Accustomed Range.

An animal stolen from its accustomed range is taken from the possession of its owner. *Jones v. State*, 3 Tex. Cr. App. 498; *Hucman v. State*, 28 Tex. Cr. App. 174, 12 S. W. 588; *McGrew v. State*, 31 Tex. Cr. App. 336, 20 S. W. 740; *Crockett v. State*,

5 Tex. Cr. App. 526, 528; *Deggs v. State*, 7 Tex. Cr. App. 359, 360; *Moore v. State*, 8 Tex. Cr. App. 496, 498; *Owens v. State*, 28 Tex. Cr. App. 122, 123, 12 S. W. 506; *Hayes v. State*, 30 Tex. Cr. App. 404, 406, 17 S. W. 940; *Mackey v. State*, 20 Tex. Cr. App. 603; *Bennett v. State*, 32 Tex. Cr. App. 216, 22 S. W. 684.

The temporary absence of the owner of cattle from the state, leaving his stock on their accustomed range and not in charge of any agent, is not an abandonment of the possession of such cattle. *Cameron v. State*, 44 Tex. 652.

Special Owner.—Under Pen. Code, art. 729, providing that possession of the person unlawfully deprived of property is constituted by the exercise of actual control, care, and management thereof, whether the same be lawful or not, one who has actual control and management of an animal on range has it in his possession as special owner within the statute. *Littleton v. State*, 20 Tex. Cr. App. 168.

4. Property Lost or Mislaid.

Theft of lost property is not specifically treated of in the Penal Code of this state, but is regulated by its general provisions and by the rules and principles established by judicial authority. *Reed v. State*, 8 Tex. Cr. App. 40; *Martin v. State*, 44 Tex. Cr. App. 538, 72 S. W. 386.

The doctrine that lost property may be subject of theft in no way contravenes the provision of art. 724 of Penal Code, that, to constitute theft, the thing stolen must be taken from the possession of the owner or some one holding for him. *Robinson v. State*, 11 Tex. Cr. App. 403, 407.

Ownership of Lost Property.—“While our statute does not treat of the subject of lost property, and as to its ownership and possession, still, under all of the authorities, the lost property belongs to the rightful owner, and he is entitled to the possession

thereof." *Martin v. State*, 44 Tex. Cr. App. 538, 72 S. W. 386.

Necessity That Intent Exist at Time of Finding.—To constitute theft of lost property, the fraudulent intent, which is the gist of the offense, must exist in the mind of the taker at the time of the taking; and in case of lost property, the time of the taking is the time of the finding of the property. If the fraudulent intent did not exist at the time of the taking, no subsequent fraudulent intent in relation to the property will constitute theft. *Martinez v. State*, 16 Tex. Cr. App. 122; *Wilson v. State*, 14 Tex. Cr. App. 205; *Billard v. State*, 30 Tex. Cr. App. 367; *Robinson v. State*, 11 Tex. Cr. App. 403; *Martin v. State*, 44 Tex. Cr. App. 538, 72 S. W. 386; *Warren v. State*, 17 Tex. Cr. App. 207; *Stepp v. State*, 31 Tex. Cr. App. 349, 351, 20 S. W. 753; *Reed v. State*, 8 Tex. Cr. App. 40, 41; *Wilson v. State*, 20 Tex. Cr. App. 662; *Worthington v. State*, 53 Tex. Cr. App. 178, 109 S. W. 187.

The accused procured his landlord to stray a horse, but at the expense, and for the benefit of, the accused, who was to retain the possession of the animal. Five months afterwards he sold the horse. Held, that in the absence of evidence to show any false pretext by the accused in obtaining possession of the horse, or that, when he obtained such possession, he intended to deprive the owner of its value and to appropriate it to his own use, a conviction for theft could not be sustained. *Pitts v. State*, 3 Tex. Cr. App. 210.

Goods Found without Clue to Ownership.—Taking a horse which had run astray for years without a known owner held not larceny, because there could have been no intent to deprive an owner of his property in the animal. *Johnson v. State*, 36 Tex. Cr. App. 375.

Possession of Goods Placed in a Receptacle.—If one buys a trunk of the owner's clerk, both ignorant of

its contents, and after taking it home discovers clothing therein which he fraudulently retains, he is guilty of theft, though the intent to appropriate did not exist when he received the trunk. Lost property may be the subject of theft. *Robinson v. State*, 11 Tex. Cr. App. 403, 40 Am. Rep. 790.

A purse accidentally left in a buggy kept at a livery stable was not lost, so as to require an instruction on a trial for its theft that if the purse was lost, and defendant found it, he could not be convicted, unless at the time he found it he took it with intent to deprive the owner thereof. *Moxie v. State*, 54 Tex. Cr. App. 529, 114 S. W. 375.

Reward for Return.—The finder of lost property is not guilty of theft, though he may expect a reward for the return thereof, if he makes no effort to withhold and conceal the property until he could get a reward for its restoration. *Martin v. State*, 44 Tex. Cr. App. 538, 72 S. W. 386.

Knowledge as to Owner.—Where the finder of cotton, knows, or has means of knowing who was the owner, and converts the cotton to his own use, such conversion constitutes larceny. *Williams v. State*, 4 Tex. Cr. App. 5, 10; *Statum v. State*, 9 Tex. Cr. App. 273.

Defendant found a lady's watch, marked with the family name of the owner. He also knew that certain ladies had lost a watch at or near the place where he found one. Held, that defendant was put on a fair notice of the ownership. *Stepp v. State*, 31 Tex. Cr. App. 349, 20 S. W. 753.

One who, when he found a pocket-book containing money, or obtained it from the finder, appropriated it with intent to take entire dominion over it, and at the same time reasonably believed that the owner could be found, held to be guilty of theft. *Reed v. State*, 8 Tex. Cr. App. 40, 34 Am. Rep. 732; *Neeley v. State*, 8 Tex. Cr. App. 64.

Where defendant found a satchel on the street, and took it home, and there discovered that it contained money, and she withheld the money from the owner, although his card was in the satchel, she was guilty of theft. *Rhodes v. State*, 11 Tex. Cr. App. 563.

B. CONSENT OF OWNER.

1. Necessity of Taking against Owner's Consent.

a. In General.

An essential ingredient of theft is the taking without the owner's consent; and, unless the want of consent is proved, an indictment therefor is not sustained. *Garcia v. State*, 26 Tex. 209, 82 Am. Dec. 605; *Marshall v. State*, 31 Tex. 471, 473; *Thurmond v. State*, 30 Tex. Cr. App. 539, 540, 17 S. W. 1098; *Lindley v. State*, 8 Tex. Cr. App. 445, 446; *Graves v. State*, 25 Tex. Cr. App. 333, 339, 8 S. W. 471; *Bailey v. State*, 18 Tex. Cr. App. 426.

Delegation of Consent.—Where an owner or joint owner of property in the possession of another is disqualified by any of the provisions of art. 730, Penal Code, from taking possession of the same, he can not, by consent, delegate to another person the right to take the property, and the consent of such owner or joint owner can not affect the amenability of the taker for theft of the property from the person in possession. *Duren v. State*, 15 Tex. Cr. App. 624.

Where Owner Gave Defendant's Father Permission to Take Possession.—

In a prosecution for theft of cotton it appeared that the alleged owner had taken possession of it by nailing it up in a house, but subsequently told defendant's father that he could take it if he would haul it to a certain gin. Defendant derived his right of possession from his father, and requested an instruction that, if he took the cotton after the owner gave defendant's father permission to take possession, to acquit. Held, that this instruction

was erroneously refused. *Tyler v. State* (Cr. App.), 70 S. W. 750.

b. Joint Owners.

In a prosecution for taking property alleged to belong to one of several joint owners, defendant could show that he took it with the consent of the others, and thereby defeat the prosecution. *Lockett v. State*, 59 Tex. Cr. App. 531, 129 S. W. 627; *Taylor v. State*, 18 Tex. Cr. App. 489, 490; *Towles v. State* (Cr. App.), 26 S. W. 990; *Schwen v. State*, 37 Tex. Cr. App. 368, 35 S. W. 172. See *Bailey v. State*, 18 Tex. Cr. App. 426; *Frazier v. State*, 18 Tex. Cr. App. 434.

An indictment for larceny connected A, B, and C with the ownership and possession of the property, two of whom were special owners. The court charged that the jury should convict if they believed, etc., that the taking was without the consent of A, B, or C, "or either of them." Held error as authorizing conviction if any one of the three failed to consent. *Woods v. State*, 26 Tex. Cr. App. 490, 10 S. W. 108.

Husband and Wife.—Though a cow which was the subject matter of a theft, was the separate property of the wife of the person alleged to be the owner of the cow, the state could not be required to prove the want of the wife's consent to the taking where the husband had the sole management of the animal, since in such case the wife could not legally consent to the taking without being joined in such consent by her husband. *Coombes v. State*, 17 Tex. Cr. App. 258.

c. Special Owner.

On a trial for theft of cattle, which are in the exclusive care, control and management of the special owner, it is not necessary for the state to prove the want of consent to the taking of the real or general owner. When the general owner is a nonresident, or one who is not exercising care, management or control over the cattle, if de-

fendant has his consent, it is for him to prove it. *Wilson v. State*, 37 Tex. Cr. App. 373, 35 S. W. 390, 38 S. W. 624, 39 S. W. 373

2. Possession Obtained by Trick or Device.

The obtaining of a parcel from a carrier by falsely pretending to be the owner, if done with intent to deprive the owner of the same and to appropriate it, is theft. *Madden v. State*, 1 Tex. Cr. App. 204.

3. Entrapment.

Where Owner Takes Step to Facilitate the Taking.—A defendant charged with the larceny of a horse, which the owner loaned to another, who placed the horse out for the purpose of catching defendant in the theft, can not set up the consent of the owner in defense, where he did not, directly or through another, suggest the theft to him, or induce him to commit it. *Conner v. State*, 24 Tex. Cr. App. 245, 6 S. W. 138; *Johnson v. State*, 3 Tex. Cr. App. 590; *Allison v. State*, 14 Tex. Cr. App. 122.

An employee in a store missed articles therefrom and suspected accused. He found a box of socks in the basement which did not belong there, and he suspected that accused had placed it there. He opened the box, and counted the socks, and found none missing. Later he found part of them taken. There was no one in the store but himself and accused. The employee sent for a policeman, who, when told what had occurred, stated that the employee should say nothing to accused, who left the store without objection. The officer then arrested him and found the socks on his person. Held, not to show consent to the taking. *Price v. State*, 55 Tex. Cr. App. 157, 115 S. W. 586.

Where Agent of Owner Acts as Supposed Confederate.—If the owner, in order to detect a thief, directs a servant to appear to encourage the design, and lead him on until the offense

is complete, not inducing the original intent, but only providing for discovery, the thief will still be guilty. *Alexander v. State*, 12 Tex. 540.

Where Detective Acts with the Thief.—It is not consent to the taking for the owner to obtain the aid of a detective, who, for the purpose of detection, joins the defendant in a criminal act designed by the defendant, and carried into execution by actual theft. *Pigg v. State*, 43 Tex. 108.

Where a merchant employed a detective to discover who entered and robbed his store, and the detective at his instance consorted with two persons whom the merchant suspected were guilty, and they agreed with each other and the detective to break in and rob it, and the merchant afterwards furnished the detective with a key to get in, and prepared to arrest them when it was done, the conspiracy was complete when the agreement was made; and hence their amenability for the conspiracy was not affected by the merchant's subsequent consent, and the co-operation of the detective in affecting the entry, unless the merchant or the detective suggested the offense or instigated the agreement. *Johnson v. State*, 3 Tex. Cr. App. 590.

Solicitation of the Thief.—A person induced by a detective to join in the taking of certain cattle, who knows that such detective has the express or implied consent of the owner to such taking, or who reasonably believes that the consent has been given, is not guilty of larceny. *McGee v. State* (Cr. App.), 66 S. W. 562.

C. INTENT.

1. In General.

To constitute the crime of theft, the taking must be an actual and intended fraud upon the rights of another. The taking must include the purpose and intent to defraud. It must be an intentional taking without the consent of the owner, an intentional fraud, and an intentional appropriation. *Mullins*

v. State, 37 Tex. 337; *Williams v. State*, 22 Tex. Cr. App. 332, 3 S. W. 226; *Alexander v. State*, 12 Tex. 540, 542; *Womack v. State*, 48 Tex. Cr. App. 148, 86 S. W. 1015; *Young v. State*, 47 Tex. Cr. App. 468, 83 S. W. 808; *Smith v. State* (Cr. App.), 43 S. W. 794; *State v. Sherlock*, 26 Tex. 106; *Garner v. State*, 36 Tex. 693; *Gadson v. State*, 36 Tex. 350; *Wilson v. State*, 59 Tex. Cr. App. 623, 129 S. W. 836; *Bray v. State*, 41 Tex. 203, 205; *Long v. State*, 1 Tex. Cr. App. 466, 475; *Cameron v. State*, 9 Tex. Cr. App. 332, 334; *Robinson v. State*, 11 Tex. Cr. App. 403, 408; *Ainsworth v. State*, 11 Tex. Cr. App. 339, 344; *Holsey v. State*, 24 Tex. Cr. App. 35, 42, 5 S. W. 523; *Guest v. State*, 24 Tex. Cr. App. 235, 241, 5 S. W. 840; S. C., 24 Tex. Cr. App. 530, 534, 7 S. W. 242; *Billard v. State*, 30 Tex. 367, 374; *Isaacs v. State*, 30 Tex. 450, 451; *Pitts v. State*, 3 Tex. Cr. App. 210, 212; *Hudson v. State*, 10 Tex. Cr. App. 215, 229; *Morrison v. State*, 17 Tex. Cr. App. 34, 37; *Harris v. State*, 29 Tex. Cr. App. 101, 103, 14 S. W. 390; *Parks v. State*, 29 Tex. Cr. App. 597, 599, 16 S. W. 532; *Sloan v. State*, 18 Tex. Cr. App. 225, 226; *Parchman v. State*, 2 Tex. Cr. App. 228; *Logan v. State*, 2 Tex. Cr. App. 408; *Landin v. State*, 10 Tex. Cr. App. 63; *Dreyer v. State*, 11 Tex. Cr. App. 631; *Johnson v. State*, 1 Tex. Cr. App. 118, 120; *Loza v. State*, 1 Tex. Cr. App. 488, 492; *Madison v. State*, 16 Tex. Cr. App. 435, 440; *Cunningham v. State*, 27 Tex. Cr. App. 479, 11 S. W. 485; *Wilson v. State*, 18 Tex. Cr. App. 270, 273; *Neeley v. State*, 8 Tex. Cr. App. 64, 66; *Purcell v. State*, 29 Tex. Cr. App. 1, 4, 13 S. W. 993; *Taylor v. State*, 12 Tex. Cr. App. 489; *Knutson v. State*, 14 Tex. Cr. App. 570; *Deering v. State*, 14 Tex. Cr. App. 599; *Fletcher v. State*, 16 Tex. Cr. App. 635; *Lott v. State*, 20 Tex. Cr. App. 230.

Circumstances from Which Intent Deduced.—In a prosecution for theft, a charge, that the intent in all criminal cases is judged of from the act,

was erroneous, since the intent is to be deduced from all the circumstances remotely or immediately attending the taking. *McNair v. State*, 14 Tex. Cr. App. 78.

Appropriating Property to Use of Third Person.—One is guilty of theft although it is not his purpose to appropriate the property stolen to his own use, but to divest the owner of his property and place the ownership in another. *Lopez v. State*, 80 S. W. 1016, 46 Tex. Cr. App. 473; S. C., 80 S. W. 1197.

Where property was taken by mistake, mere negligence by which such property was lost does not establish felonious intent so as to render the act larceny. *Billard v. State*, 30 Tex. 367.

To constitute the offense of enticing away a negro from his owner, there must be the felonious intent wholly to deprive the owner of his property; and this intent must be averred in the indictment. *Cain v. State*, 18 Tex. 387.

As to existence of felonious intent being a question for the jury, see post, "Questions for Jury," XIV, A.

2. Nature of Intent.

a. Deprivation of Rightful Owner.

(1) Necessity.

In order to constitute the crime of larceny, the taking of the property must be with the felonious intent of permanently depriving the owner of his property. *Johnson v. State*, 36 Tex. 375; *Camplin v. State*, 1 Tex. Cr. App. 108; *Dunham v. State*, 3 Tex. Cr. App. 465; *Loza v. State*, 1 Tex. Cr. App. 488; *Knutson v. State*, 14 Tex. Cr. App. 570; *Tallant v. State*, 14 Tex. Cr. App. 234; *Hall v. State*, 41 Tex. 287; *Blackburn v. State*, 44 Tex. 457; *Ainsworth v. State*, 11 Tex. Cr. App. 339.

It devolves upon the prosecution to prove, beyond a reasonable doubt, that the property was taken with the intent to deprive the owner thereof. *Reed v. State*, 8 Tex. Cr. App. 40;

Knutson v. State, 14 Tex. Cr. App. 570.

Intent to Trespass.—In a prosecution for theft, the felonious intent must be to permanently deprive the owner of the value of the property; an intent to trespass on it not being sufficient to make the taking a theft. *Loza v. State*, 1 Tex. Cr. App. 488, 28 Am. Rep. 416.

(2) What Constitutes Deprivation.

(a) To Claim Reward.

To be theft, the taking must have been with intent to deprive the owner of the value of the property, and to appropriate the same to the use of the person taking; and the fact that defendant took property from its owner with the purpose of holding it for a reward is evidence of such intent. *Dunn v. State*, 34 Tex. Cr. App. 257, 30 S. W. 227, 53 Am. St. Rep. 714.

On a trial for the theft of a horse which had strayed away, where it appears that defendant delivered the horse to the owner, and there is evidence that defendant caught the animal for the purpose of receiving the reward offered, the court should charge that, if defendant took the horse with the intent to return him to the owner in order that he might receive the reward, he should be acquitted. *Micheaux v. State*, 30 Tex. Cr. App. 660, 18 S. W. 550.

(b) To Return or Account for Property.

A person taking an article, without the consent of the owner, but with the intent of allowing him the value of the article on settlement of their accounts, is not guilty of larceny. *Young v. State*, 37 Tex. Cr. App. 457, 36 S. W. 272.

On a trial for larceny, the evidence showed that the accused took his neighbor's horse publicly, in the street of a town, leaving word that he had done so, and manifesting an intention to return him after riding him a few miles. Held, that the facts re-

pelled a felonious intent, and under such proof a conviction could not be sustained. *McDaniel v. State*, 33 Tex. 419.

Where defendant, who wished to leave the neighborhood to avoid a difficulty, took his cousin's saddle on the pretense of borrowing it to go hunting, but left with him more than sufficient property to pay for it, with a letter directing him to take such property in payment, such taking did not constitute theft. *Beckham v. State* (Cr. App.), 22 S. W. 411.

Reimbursement for Debt.—Taking property without the owner's consent in order to reimburse one's self for debt, is not theft, fraudulent intent being absent. *Wolf v. State*, 14 Tex. Cr. App. 210; *Young v. State*, 34 Tex. Cr. App. 290, 292, 30 S. W. 238.

On a trial for theft of flour, accused was not entitled to an instruction for an acquittal, if he took the flour in daytime and in the presence of other persons, telling them that the owner of the flour owed him for certain work, and that he would take the flour in payment. *Butler v. State*, 3 Tex. Cr. App. 403.

(c) To Use and Abandon.

Where defendant took the property with the intent at the time of appropriating it temporarily but not permanently he should be acquitted. *Johnson v. State*, 36 Tex. 375; *Dunn v. State*, 34 Tex. Cr. App. 257, 259, 30 S. W. 227; *Schultz v. State*, 30 Tex. Cr. App. 94, 16 S. W. 756; *Loza v. State*, 1 Tex. Cr. App. 488; *Blackburn v. State*, 44 Tex. 457; *Hyatt v. State*, 32 Tex. Cr. App. 580, 25 S. W. 291; *Banks v. State*, 7 Tex. Cr. App. 591; *Dunham v. State*, 3 Tex. Cr. App. 465.

Thus if a person steals property, and takes other property, not with intent to steal it, but only to get off more conveniently with that stolen, the taking of such other property is not a felony. *Wilson v. State*, 18 Tex. Cr. App. 270, 273.

To take another's horse off the range to ride to a town in order to catch a train, and there turn it loose, is not theft, as there is no fraudulent intent to appropriate it. *Lucas v. State*, 33 Tex. Cr. App. 290, 26 S. W. 213.

Where one tried for stealing a horse testified that he only took it for the purpose of riding to his brother's, twenty-one miles away, and did not intend to steal it, the jury should have been instructed as to the distinction between trespass and theft, and that if defendant took the horse with the intent of appropriating it temporarily, but not permanently, they should acquit him. *Schultz v. State*, 30 Tex. Cr. App. 94, 16 S. W. 756.

(d) To Injure and Destroy.

Destruction of Property to Conceal a Previous Taking Thereof.—Where a person steals property and sells it, and afterwards, and to prevent a detection of his theft and a repayment of its value by himself to the rightful owner, destroys such property, without the knowledge or consent of the person to whom he sold it, such act constitutes a theft. *Stegall v. State*, 32 Tex. Cr. App. 100, 22 S. W. 146, 40 Am. St. Rep. 761, following *Dignowitty v. State*, 17 Tex. 521, 530, which holds that to constitute the felonious intent it is not necessary that the taking should be done *lucri causa*; taking with an intention to destroy will be sufficient to constitute the offense, if done to serve the offender or another person, though not in a pecuniary way.

(e) Taking from Drunken Companion.

On a prosecution for theft of money from W., taken from a lunch counter where he had put it while sitting there drunk, though defendant denied the taking, an instruction to acquit if he took it for the purpose of keeping it for W., and afterwards formed the intention of converting it to his own use, should have been given; witnesses hav-

ing testified that defendant took it without any concealment, and, while standing beside W., said that W. was "full," and he would take it, and take care of it for him. *Brownfield v. State* (Cr. App.), 25 S. W. 1120.

b. Appropriation to Taker's Own Use.

In order to constitute the crime of larceny, the taking of the property must be with the intent to appropriate the same to the use of benefit of the taker. *Wilson v. State*, 18 Tex. Cr. App. 270, 273; *State v. Sherlock*, 26 Tex. 106; *Camplin v. State*, 1 Tex. Cr. App. 108; *Knutson v. State*, 14 Tex. Cr. App. 570.

A person who obtains a horse from the owner's father, with intent to appropriate the horse to his own use at all events, whether he complied with an agreement made with the owner or not, commits theft. *Shell v. State*, 32 Tex. Cr. App. 512, 24 S. W. 646.

Larceny of a slave is the taking of a slave with felonious intent; that is, the possession must be acquired *animo furandi*, or, as the civil law expresses it, *lucri causa*, with intent to apply the slave to the taker's use. *Alexander v. State*, 12 Tex. 540.

c. Claim of Title or Right.

There must be an acquittal where the evidence shows the property to have been taken under a fair color of title and claim of right. *Harris v. State*, 17 Tex. Cr. App. 177; *Meerschatt v. State* (Cr. App.), 57 S. W. 955; *Seymore v. State*, 12 Tex. Cr. App. 391; *Lewis v. State*, 29 Tex. Cr. App. 105, 14 S. W. 1008; *Smith v. State*, 42 Tex. 444; *Evans v. State*, 15 Tex. Cr. App. 31; *Lawrence v. State*, 11 Tex. Cr. App. 306; *Huffman v. State*, 28 Tex. Cr. App. 174, 12 S. W. 588; *Small v. State*, 18 Tex. Cr. App. 336; *Boyd v. State*, 18 Tex. Cr. App. 339; *Dismuke v. State* (Cr. App.), 20 S. W. 562; *Donahoe v. State*, 23 Tex. Cr. App. 457, 5 S. W. 245; *Simms v. State* (Cr. App.), 25 S. W. 771; *Reese v. State*, 44 Tex. Cr. App. 34, 68 S. W. 283; *Grogan*

v. State (Cr. App.), 65 S. W. 376; *Wilson v. State* (Cr. App.), 76 S. W. 434; *Vance v. State*, 34 Tex. Cr. App. 395, 30 S. W. 792; *Hull v. State* (Cr. App.), 80 S. W. 380; *Darnell v. State*, 43 Tex. Cr. App. 86, 63 S. W. 631; *Fields v. State*, 57 Tex. Cr. App. 613, 124 S. W. 652; *Varas v. State*, 41 Tex. 527; *Isaacs v. State*, 30 Tex. 450; *Smith v. State*, 24 Tex. 547, 549; *Herber v. State*, 7 Tex. 69, 71; *Kay v. State*, 40 Tex. 29, 31; *Bray v. State*, 41 Tex. 203, 205; *Camplin v. State*, 1 Tex. Cr. App. 108.

Defendant's mother authorized S. to sell a cow to P., which he did, taking the pay. Subsequently defendant demanded that the cow be delivered to him by P., he informing P. that he was coming after it; and thereafter he went to P.'s house, demanded possession of the cow, and it was turned over to him, or he got possession of it, claiming he owned it. Held that, though it was shown that the cow belonged to defendant's mother, a conviction of theft was unauthorized; there being no evidence to show a fraudulent intent. *Matura v. State*, 89 S. W. 648, 48 Tex. Cr. App. 530.

A boy, being directed by his mother to find and recover her horse, found and took up a horse which much resembled his mother's. Without inquiry, he took the horse home to his mother, who was unable to say whether it was her horse or not; but the boy still claiming him as such, used and hitched him publicly in the streets of a large town, loaned him to a friend to ride to an adjoining county, and in no respect concealed his possession. Held, irrespective of the youth of the accused, that the evidence was not sufficient to show a felonious intent, or to sustain a conviction for theft. *Gardiner v. State*, 33 Tex. 692.

On indictment for larceny of fence rails the evidence showed that defendant took the rails from a cow pen openly, in the daytime, in the presence of several witnesses; that defend-

ant had the previous year leased and occupied the place from which he took the rails, and had repaired the pen, using more rails than he was charged with taking. Held, that a requested instruction that if defendant placed his own rails in the pen for a temporary purpose they remained his property, and he did not commit larceny in taking them, should have been given. *Wilson v. State*, 27 Tex. Cr. App. 577, 11 S. W. 638.

In a prosecution for theft it appeared that the owner of the property gave defendant permission to use it if he needed it, and that defendant took the property in daylight, getting several other men to assist in loading it in a dray, and drove away with it through the business section of the town. Held, that instructions that if defendant did not take the property with intent to steal it at the time, and took it under the belief that he had authority to do so, there could be no theft, were improperly refused. *Grogan v. State* (Cr. App.), 63 S. W. 376.

Right Existing by Virtue of a Written Contract.—A taking of lightning rods openly, and under a claim of right existing by virtue of the provisions of a written contract by which the rods were put up, does not constitute a theft. *Brokaw v. State* (Cr. App.), 85 S. W. 801.

Taking by Authority of One Believed to Be Owner.—A person is not guilty of theft where he takes property by authority of one whom he believes to be the owner. *Miles v. State*, 1 Tex. Cr. App. 510, 513; *Cameron v. State*, 9 Tex. Cr. App. 332, 334; *Melton v. State* (Cr. App.), 56 S. W. 67.

To take property belonging to another under a mistaken belief that it belongs to a third person, who has authorized the taker to remove similar property belonging to him, is not theft. *Donahoe v. State*, 23 Tex. Cr. App. 457, 5 S. W. 245.

A person who kills certain hogs un-

der authority of one claiming to be the owner is not guilty of theft, if he acted in good faith, though the person authorizing the killing was not in fact the owner. *Lawrence v. State* (Cr. App.), 30 S. W. 668.

The test of the guilt of one who took an article with the leave of one asserted to be the owner's agent is, not whether such a one was in fact the owner's agent, but whether defendant believed him to be such. *Heskeu v. State*, 18 Tex. Cr. App. 275.

Taking from Officer.—Theft being the "fraudulent taking" of personalty, one who takes property under the belief that he has a right to take it, and that it is his, is not guilty thereof, though he takes it from the possession of an officer who has levied thereon as the property of another. *Bullard v. State*, 53 S. W. 637, 41 Tex. Cr. App. 225.

Using Authority of One Person as Means of Taking Property of Another.—One who uses an authority given him by another to take her cattle as a subterfuge for taking his brother's, knowing them to be such, is guilty of cattle theft. *High v. State* (Cr. App.), 24 S. W. 284.

3. Existence or Time of Taking.

a. General Rule.

To constitute "theft," the fraudulent intent to convert to the taker's own use must exist at the time of taking; for, if the original taking is not fraudulent, no subsequent appropriation of the property would constitute theft. *Richards v. State*, 55 Tex. Cr. App. 278, 116 S. W. 587; *Burdett v. State*, 51 Tex. Cr. App. 345, 101 S. W. 988; *Billard v. State*, 30 Tex. 367, 368; *Quit-zow v. State*, 1 Tex. Cr. App. 65; *Johnson v. State*, 1 Tex. Cr. App. 118; *Dow v. State*, 12 Tex. Cr. App. 343; *Morrison v. State*, 17 Tex. Cr. App. 34, 37; *Lott v. State*, 24 Tex. Cr. App. 723, 14 S. W. 277; *Dignowitty v. State*, 17 Tex. 521, 527; *Wilson v. State*, 20 Tex. Cr. App. 662; *Lopez v. State*, 37 Tex.

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Cr. App. 649, 40 S. W. 972; *Loza v. State*, 1 Tex. Cr. App. 488, 491; *Keonio v. State*, 4 Tex. Cr. App. 173, 175; *Alexander v. State*, 9 Tex. Cr. App. 48, 51; *Cunningham v. State*, 27 Tex. Cr. App. 479, 482, 11 S. W. 485; *Nichols v. State*, 28 Tex. Cr. App. 105, 107, 12 S. W. 500; *Phillips v. State* (Cr. App.), 42 S. W. 557; *Rochell v. State*, 55 Tex. Cr. App. 152, 115 S. W. 583; *Dunham v. State*, 3 Tex. Cr. App. 465, 468; *Spinks v. State*, 8 Tex. Cr. App. 125; *McAffee v. State*, 14 Tex. Cr. App. 668; *Atterberry v. State*, 19 Tex. Cr. App. 401; *Hernandez v. State*, 20 Tex. Cr. App. 151; *Guest v. State*, 24 Tex. Cr. App. 235, 5 S. W. 840; *Leak v. State* (Cr. App.), 97 S. W. 476; *Jemerson v. State* (Cr. App.), 68 S. W. 275; *Veasly v. State* (Cr. App.), 85 S. W. 274; *Pyles v. State*, 62 Tex. Cr. App. 49, 136 S. W. 464; *Young v. State*, 37 Tex. Cr. App. 457, 36 S. W. 272; *Ainsworth v. State*, 11 Tex. Cr. App. 339, 342; *McLaughlin v. State*, 10 Tex. Cr. App. 340; *Schultz v. State*, 30 Tex. Cr. App. 94, 16 S. W. 756; *Smith v. State*, 7 Tex. Cr. App. 382, 383; *Wolf v. State*, 14 Tex. Cr. App. 210; *Roberts v. State*, 21 Tex. Cr. App. 460, 1 S. W. 452; *McMahan v. State*, 50 Tex. Cr. App. 244, 96 S. W. 17; *Green v. State* (Cr. App.), 33 S. W. 120.

b. Illustrations.

Where a person receives a bailment of cattle from the owner, and, after having an incorrect record made of the owner's brand, sells the cattle without the owner's consent, he is not guilty of theft unless he intended at the very time he obtained possession to deprive the owner of their value. *Spinks v. State*, 8 Tex. Cr. App. 125.

Where accused took money from prosecutor's person while prosecutor was intoxicated, as accused believed prosecutor had previously directed, and did not form an intent to appropriate any part of the money to his own use until later, he was not guilty of theft. *McMahan v. State*, 96 S. W. 17, 50 Tex. Cr. App. 244.

Where the evidence shows that the alleged owner of the property stolen (a locket and chain) was the accused's mistress; that he took the property to keep her from going to a place called "Pressler's Garden;" that the prosecuting witness did not consent to the taking; that some time afterwards accused sold the articles to a pawnbroker—a conviction for larceny can not be sustained in the absence of larcenous intent at the time of taking. *Cain v. State*, 21 Tex. Cr. App. 662, 2 S. W. 888.

In a prosecution for theft in which the defense was that defendant found the gun and took possession of it, believing it that of a friend who owned a similar gun, instructions defining theft and fraudulent taking, applying the law to the facts, authorizing a conviction if the gun was taken with fraudulent intent, etc., and instructions that intent was the gist of the offense, and that, if intent to steal did not exist at the time of the taking, no felonious taking would make the previous taking felonious, and that, if the evidence failed to show beyond a reasonable doubt that when defendant got the gun he at once intended to deprive the owner of the value thereof and to appropriate it to his own use, he should be acquitted, and that if when he got the gun he thought the gun was lost by the owner, and then intended to return it, or if the jury had reasonable doubt as to whether he so thought, or whether he fraudulently intended to appropriate it to his own use, he should be acquitted, sufficiently presented the merits of the case. *Crouch v. State*, 52 Tex. Cr. App. 460, 107 S. W. 859.

Where defendant took a calf, erroneously believing it belonged to his employer, whose cattle he had charge of, and took it to his employer's farm, and there branded it with his employer's brand, and afterwards sold it as his own, he was not guilty of theft,

though before selling it he discovered his mistake. For him to be guilty, there must have been fraud in the original taking. *Leak v. State* (Cr. App.), 97 S. W. 476.

One taking property while temporarily insane from drunkenness, without intent to steal, is not guilty of theft by appropriating it with such intent when he comes to himself. *Cady v. State*, 45 S. W. 568, 39 Tex. Cr. App. 236.

Selling Hired Horse before Completion of Journey.—A well settled rule under Pen. Code, art. 727, is, that where a horse is delivered and hired alone, and such delivery was obtained bona fide, no subsequent unlawful conversion pending the contract would render it a felony or make the offense felonious; and further, if one hired a horse and sold it before the journey was performed, no subsequent unlawful conversion pending the contract would make it a felony or make the offense felonious; and further, if one hired a horse and sold it before the journey was performed or sold it afterward before it was returned, he would not commit theft in case the false intent came upon him subsequently to receiving it into his possession. *Williams v. State*, 30 Tex. Cr. App. 153, 16 S. W. 760.

Taking up an Estray.—Where a person takes up a horse as an estray, without the present intention of committing theft thereof, his appropriation of the horse thereafter, without a compliance with the estray laws, does not constitute theft of the horse, but merely a violation of the estray laws. *McCarty v. State*, 36 Tex. Cr. App. 135, 35 S. W. 994.

Defendant took up a stray horse, using him openly for several months, and then moved to another county, taking the horse with him, and later returned with it. The horse was known in the neighborhood as an estray, and defendant claimed him for a

while as such, but subsequently stated that he had bought him. Held, that the appropriation of the horse to defendant's own use occurred some time after he took it up, and hence he was not guilty of theft. *Gosler v. State* (Cr. App.), 56 S. W. 51.

c. Exceptions.

Though, as a general rule, a fraudulent intent must exist at the time of the taking of the property of another to constitute the offense of theft, if the taking, though originally lawful, was obtained by false pretext, or with the intent to deprive the owner of the value of the property and to appropriate it to the taker's own use, its subsequent appropriation constitutes a theft. *Reed v. State*, 8 Tex. Cr. App. 40. See ante, "The Taking Must Be Wrongful," IV, A, 1, c.

4. Evidence of Intent.

"A fraudulent taking of the property of another embraces the idea that the taker knew that it was not his own, and also that it was done to deprive the true owner of it. This is usually evidenced by its being done in such manner and under such circumstances as to avoid detection or responsibility to the true owner." *Smith v. State*, 42 Tex. 444. *Ainsworth v. State*, 11 Tex. Cr. App. 339, 343.

A felonious intent is an essential ingredient of the crime of theft, and must exist at the time of the taking. It is usually evidenced by clandestine or covert action, or by concealment or denial; but these are not the only tests of the intent. *Loza v. State*, 1 Tex. Cr. App. 488, 28 Am. Rep. 416. See, also, *Billard v. State*, 30 Tex. 367; *Dignowitty v. State*, 17 Tex. 521, 527; *Smith v. State*, 42 Tex. 444, 447; *Herber v. State*, 7 Tex. 69, 71; *Terrell v. State*, 41 Tex. 463; *Isaacs v. State*, 30 Tex. 450.

The fact that property is taken publicly before witnesses can not excuse or in any way lessen the offense if taken with intent to steal it. *Billard v. State*, 30 Tex. 367, 370.

When the recent possession by accused of the cattle stolen was relied on as proof of guilt, and the testimony showed that the cattle were butchered by the accused at a public pen, and the hides, heads, and other evidence of their identity left exposed for a week or two, held, that the testimony was inconsistent with the guilt of the accused. *Wafford v. State*, 44 Tex. 439.

V. Elements of Special Statutory Offenses.

See post, "Acquisition of Special Statutory Offenses," XII, B, 9.

A. LARCENY BY BAILEE.

See, generally, the titles EMBEZZLEMENT, vol. 2, p. 277; FALSE PRETENSES, vol. 3, p. 239.

1. In General.

To sustain a conviction for the theft of a borrowed horse, under art. 877, providing that any person having possession of personal property of another by contract of hiring or borrowing, or other bailment, who shall, without the consent of the owner, fraudulently convert such property to his own use with the intent to deprive the owner of the value of same, shall be guilty of theft, it must be proved that the defendant had possession of the horse by virtue of a contract of borrowing and that he did, without the consent of the owner, fraudulently convert such property to his own use with intent to deprive the owner of the value of the same. *Abbey v. State*, 35 Tex. Cr. App. 589, 34 S. W. 930; *Purcell v. State*, 29 Tex. Cr. App. 1, 4, 13 S. W. 993; *Piper v. State*, 56 Tex. Cr. App. 121, 119 S. W. 869; *Fulcher v. State*, 32 Tex. Cr. App. 621, 25 S. W. 625.

Distinction between Theft and Larceny by Bailee.—In a conversion under bailment, the fraudulent matters occur after obtaining lawful possession of the property. If the fraudulent purpose existed at the time of getting the property, and false pretenses were employed to get possession, with the then

existing purpose of appropriating the property, and appropriation did occur, it would be "theft" under the general statute, and not under the statute with reference to conversion under a contract of hiring or borrowing. *Pickell v. State*, 60 Tex. Cr. App. 572, 132 S. W. 938.

Distinction between Theft by False Pretext and the Fraudulent Conversion by Bailee.—A conviction for theft, by means of a false pretext, under art. 861, Penal Code, can only be sustained upon proof that the property appropriated was acquired by means of some false pretext used to deprive the owner of the value thereof, and appropriate it to the use of the person taking and that it was so appropriated. The fraudulent intent must be shown to have existed at the very time defendant acquired the property by the means of the false pretext. Such offense requires proof of conversion, proof of false pretenses, and proof of the present fraudulent intent. Fraudulent conversion by a bailee, under art. 877, Penal Code, is established by proof that, though defendant may have acquired the property in good faith and without any false pretense, or any intention, at the time, to appropriate it, he, after having lawfully acquired it by borrowing it from the owner, subsequently converted it to his own use with intent to deprive the owner of the value of the same. In the first case, the fraudulent intent must have existed at the time the possession of the property was acquired; in the second case, it is only necessary that it should have existed at the time the property was converted or appropriated with intent to deprive the owner of it. *Abbey v. State*, 35 Tex. Cr. App. 589, 34 S. W. 930; *Taylor v. State*, 25 Tex. Cr. App. 98, 7 S. W. 861; *Brooks v. State*, 26 Tex. Cr. App. 184, 9 S. W. 562; *Rumbo v. State*, 28 Tex. Cr. App. 30, 11 S. W. 680; *Nichols v. State*, 28 Tex. Cr. App. 105, 12 S. W. 500; *Purcell v. State*, 29 Tex. Cr. App. 1, 13 S. W. 993; *Williams v.*

State, 30 Tex. Cr. App. 153, 16 S. W. 760; *Lewis v. State*, 48 Tex. Cr. App. 309, 87 S. W. 831.

As to Defense of Theft by Bailee.—See post, "Failure to Pay Charges on Property Left for Repairs," VIII, G.

2. What Constitutes a Bailment.

See, generally, the title BAILMENT, vol. 1, p. 650.

"Bailment" is a transfer of the possession of personal property from one person to another without a transfer of the ownership of it upon a contract in trust express or implied, that the purpose of the contract shall be carried out. *Malz v. State*, 36 Tex. Cr. App. 447, 34 S. W. 267, 37 S. W. 748.

Article 877, Penal Code, in denouncing the offense of conversion by a bailee, by hiring or borrowing, uses the expression "or other bailments." Held, the meaning of "bailment" is so well understood that it is not necessary that it should be defined in the statute. *Malz v. State*, 36 Tex. Cr. App. 447, 34 S. W. 267, 37 S. W. 748.

In a prosecution for theft of a horse by a bailee, where it was originally taken without any absolute consent, but leave was granted by the owner to the accused to keep charge of it after he was seen going off with it, this was sufficient to create a bailment, and a conversion of it thereafter would constitute theft. *Harding v. State*, 95 S. W. 528, 49 Tex. Cr. App. 601.

Defendant was convicted under a general indictment for the theft of a horse. It appeared that the owner of the horse loaned it to defendant for use in working his crop, and defendant afterwards took the horse out of the county, and sold it. There was no evidence of an intention to convert the horse to defendant's own use when he acquired possession of it. Held, that the conviction could not be sustained, since the prosecution should have been under Pen. Code 1895, art. 877, for conversion of the property while in defendant's possession under a con-

tract of borrowing. *Mangum v. State*, 42 S. W. 291, 38 Tex. Cr. App. 231.

Defendant pretended to hire a mule for a day or two, and promised to return it at the expiration of that time, and, as he rode away, said to the owner, "What if I trade this mule off?" to which the owner replied that it would take a mighty good horse to get his mule. Defendant instead of returning the mule exchanged it for a horse, and falsely represented to the owner that the mule had broken away from him and escaped. Held, that the evidence was sufficient to sustain a conviction for theft of the mule. *Smith v. State*, 35 Tex. 738.

It is larceny in a person to borrow a chattel for a limited time and then convert it to his own use, if he had the secret intention at the time of borrowing thus to convert it. In such case the conversion must be proved. The mere proof of failure to return the chattel is not enough. *White v. State*, 11 Tex. 769.

Evidence that defendant, while in possession of several cattle borrowed by him, killed and appropriated one of them to his own use, does not sustain a conviction on an indictment framed under Pen. Code, art. 724, relating to theft generally. *Torres v. State*, 33 Tex. Cr. App. 125, 25 S. W. 128.

Where the taking was not unlawful, but was procured with intent to appropriate the property unlawfully, larceny is not established by showing the taking and the intent, but an unlawful appropriation must be proved. Thus, proof that one who hired a horse, under pretense of wanting him for a specified short ride only, rode him much further, and left him in a livery stable, does not warrant a conviction for larceny. *Berg v. State*, 2 Tex. Cr. App. 148.

Where the purchaser of land moved into possession, and the seller left certain harvester canvases on the land, because not ready to move them, and there was no false pretext used by the

purchaser to obtain possession of them, his subsequent theft of these canvases is the crime defined by Pen. Code 1895, art. 877, making a fraudulent conversion by bailee theft, and in a prosecution for such conversion the defendant should be tried under the bailment statute, and charges presenting the issue of theft by a bailee should be given. *Whitaker v. State*, 62 Tex. Cr. App. 36, 136 S. W. 1072. See Penal Code, art. 877; *Nichols v. State*, 28 Tex. Cr. App. 105, 12 S. W. 500; *Taylor v. State*, 25 Tex. Cr. App. 96, 7 S. W. 861; *Cunningham v. State*, 27 Tex. Cr. App. 479, 11 S. W. 485; *Fulcher v. State*, 32 Tex. Cr. App. 621, 25 S. W. 625; *Williams v. State*, 30 Tex. Cr. App. 153, 155, 16 S. W. 760; *Long v. State*, 39 Tex. Cr. App. 461, 464, 46 S. W. 821; *Malz v. State*, 36 Tex. Cr. App. 447, 34 S. W. 267, 37 S. W. 748.

Where the tenant is bound under his lease to pick the cotton crop, have it ginned and sold, and deposit in a bank a certain per cent of the proceeds as rent, and he retains the entire money, he is not guilty of larceny as a bailee, because the landlord has neither delivered to him this specific property, nor has he such an ownership that the tenant by converting the money is guilty of larceny. *Northcutt v. State*, 60 Tex. Cr. App. 259, 131 S. W. 1128, distinguished from *Livingston v. State*, 38 Tex. Cr. App. 535, 537, 43 S. W. 1008, where it was held that a servant or an employee who is in temporary custody or control of the property of his employer does not have such possession, as in any sense, to constitute him the owner or possessor as against the ownership or possession of his employer, or master, and that the ownership and possession remains in the employer or master, and that a fraudulent taking of the property by such employee or servant without the consent of the master or employer is theft, and that in such case his indictment charging theft by bailee could not be maintained.

Where defendant, a peace officer, mistakenly arrested prosecutor 'for being drunk, and on searching him at the jail in accordance with custom took from him \$155 in United States currency, and later denied that he had received the money and converted it to his own use, and there was no evidence to show that defendant had a fraudulent intent to deprive prosecutor of the money at the time it was taken, he was properly convicted of theft by a bailee. *Leonard v. State*, 56 Tex. Cr. App. 307, 120 S. W. 183.

3. Object of Statute.

"Article 877 of the Penal Code of 1895 was designed to meet the facts of special cases where under the decisions and provisions of our Code no conviction for theft could otherwise be had, and was not intended to constitute a departure or change the rule with reference to allegations or proof in respect to possession of property. In other words, this statute was intended to meet cases where there was not a felonious taking of the property, nor where possession of it was obtained by some deceit or false representation, but where the possession of property was obtained lawfully in the sense that such possession was not criminal or covinous." *Piper v. State*, 56 Tex. Cr. App. 121, 119 S. W. 869.

4. Statutes Construed.

The language by virtue of a contract of "hiring or borrowing" (as found in art. 877 of the Penal Code) is not meant such a contract as would give the borrower the right of possession against the real owner, but as fixing the nature and character of the possession. *Piper v. State*, 56 Tex. Cr. App. 121, 119 S. W. 869, following *Butler v. State*, 49 Tex. Cr. App. 159, 93 S. W. 743.

Pledge or Pawn.—Where the evidence establishes a conversion of a pledge or pawn by a bailee. Held: Within the purview of the statute; and

it does not matter that the employer of the accused received the proceeds of his conversion. *Malz v. State*, 36 Tex. Cr. App. 447, 34 S. W. 267, 37 S. W. 748.

5. Fraudulent Conversions.

A fraudulent conversion is the essential element where defendant is charged as bailee with theft by conversion, and, unless the court so charged the jury, the omission to do so is fatal error which will require reversal. *Smith v. State*, 45 Tex. Cr. App. 251, 76 S. W. 434.

The fraudulent intent required to constitute this offense relates to and must concur with the fact of conversion, and need not exist at the time of obtaining possession of the property. It is the fraudulent conversion and not the fraudulent taking that forms the gist of this offense. *Taylor v. State*, 25 Tex. Cr. App. 96, 7 S. W. 861; *Lopez v. State*, 37 Tex. Cr. App. 649, 40 S. W. 972.

Question for Jury.—See post, "In General," IX, A, 1.

6. Hiring or Borrowing.

See ante, "Statutes Construed," V, A, 4.

Where accused was indicted for theft by conversion under Pen. code, art. 877, authorizing the punishment of any person converting personal property acquired by hiring or borrowing, and the evidence showed that he had hired mules of prosecuting witness, to be returned at a certain day, a conviction based on an instruction restricting the jury to that portion of the statute which denounces a punishment for the conversion of borrowed property will be set aside. *Harrison v. State*, 60 S. W. 963, 42 Tex. Cr. App. 509. See, also, *Neel v. State*, 33 Tex. Cr. App. 408, 26 S. W. 726.

B. LARCENY FROM THE PERSON.

1. General Rule.

"Now to constitute a complete offense of theft from the person it must

be alleged in the indictment and be sustained by the proof that: 1. The theft was from the person. 2. It must have been committed without the knowledge of the person from whom the property was taken, or so suddenly as not to allow time to make resistance before the property is carried away. (*Kerry v. State*, 17 Tex. Cr. App. 178, 180.)" *Gage v. State*, 22 Tex. Cr. App. 123, 128, 2 S. W. 638; *Green v. State*, 28 Tex. Cr. App. 493, 13 S. W. 784.

2. Nature of Offense.

Theft from the person is per se a felony, without regard to the value of the property stolen, if it is of any value whatsoever. It is not necessary to allege or prove the value, and the court is not required to instruct the jury upon the question of value. *Chitwood v. State*, 44 Tex. Cr. App. 439, 71 S. W. 973; *Shaw v. State*, 23 Tex. Cr. App. 493, 5 S. W. 317; *Bennett v. State*, 16 Tex. Cr. App. 236, 237; *Harris v. State*, 17 Tex. Cr. App. 132, 134; *Green v. State*, 28 Tex. Cr. App. 493, 496, 13 S. W. 784.

Theft from the person is a compound offense, including both trespass and theft. *Gage v. State*, 22 Tex. Cr. App. 123, 126, 2 S. W. 638.

Theft from the person is a distinct offense from any other theft, and punishment prescribed therefor is not graded the same as in other thefts. *Harris v. State*, 17 Tex. Cr. App. 132, 134.

Distinction between Robbery and Theft from the Person.—If force or violence be used, or the assaulted party is put in fear of life or bodily injury, and his property is thus taken, it is robbery, while theft from the person is constituted by taking the property from his person, without his privilege or so suddenly as not to allow him time to take resistance. *Gallagher v. State*, 34 Tex. Cr. App. 306, 30 S. W. 557.

Ordinary Theft and Theft from the Person.—"Our statutes unquestionably

make a marked distinction between the crimes of ordinary theft and theft from the person. 'Theft from the person' is sui generis; is an offense distinct from any other theft, and the punishment prescribed therefor is not graded the same as in other thefts; it is a felony without regard to the value of the property stolen; under an ordinary indictment for theft, a party can not be convicted for privately stealing from the person; the indictment, to warrant a conviction, must state every thing which is essential to the proof of the crime; that is, that the offense was 'committed without the knowledge of the person from whom the property was taken, or so suddenly as not to allow time to make resistance before the property is carried away;' and the proof must correspond with the allegation. (Penal Code, Arts. 744, 745; *Harris v. State*, 17 Tex. Cr. App. 132; *Kerry v. State*, 17 Tex. Cr. App. 178, 180.) As known to our Code, the offense is more nearly akin to robbery than any other crime; the difference being mainly in the aggravating circumstances accompanying the larceny—larceny being a common basis of both offenses. Like robbery, it may be said to be a compound offense—a trespass and a theft." *Gage v. State*, 22 Tex. Cr. App. 123, 126, 2 S. W. 638.

3. Taking and Asportation.

a. Taking.

Nature of Taking.—"Theft from the person" may be committed either by taking without the knowledge of the person from whom the property is taken, or by taking so suddenly as not to allow time to make resistance before the property is taken. *Grant v. State*, 59 Tex. Cr. App. 123, 127 S. W. 173; *Gallagher v. State*, 34 Tex. Cr. App. 306, 307, 30 S. W. 557; *Johnson v. State*, 55 Tex. Cr. App. 411, 117 S. W. 964; *Clemmons v. State*, 39 Tex. Cr. App. 279, 45 S. W. 911; *McLin v. State*, 29 Tex. Cr. App. 171, 172, 15 S. W. 600.

Knowledge of Taking.—Where

prosecutor knew that defendant was attempting to privately slip his hand in his pocket before he had secured the purse, and he submitted to the same without resistance he would not have been guilty of theft. *Files v. State*, 36 Tex. Cr. App. 206, 36 S. W. 93. See, also, *McLin v. State*, 29 Tex. Cr. App. 171, 15 S. W. 600; *Green v. State*, 28 Tex. Cr. App. 493, 13 S. W. 784; *Flynn v. State*, 42 Tex. 301.

Sudden Taking.—Upon a trial of theft from the person by a sudden taking, the evidence must show that the taking was so sudden as to constitute theft from the person, otherwise the accused is not guilty even if he had a fraudulent intent. *Herr v. State*, 52 Tex. Cr. App. 53, 105 S. W. 190.

Goods Must Be Taken from the Person.—Guest at a hotel, on retiring placed his pants, in a pocket of which was his pocketbook, with \$72 in money, under his head. The proprietor during the night entered his room, secured the pants, and stole the money. Held not to show a theft from the person. *Gibson v. State* (Cr. App.), 100 S. W. 776.

Effect in Resistance of Drunkenness or Stupor.—If a person knows that he is being robbed, but is incapable of making resistance on account of drunkenness or stupor, his knowledge, though he was incapable of making resistance, will prevent a conviction under Pen. Code 1895, art. 880, subd. 2, which requires theft from the person to be committed without the knowledge of the person or so suddenly as not to allow time for him to make resistance. *Roquemore v. State*, 50 Tex. Cr. App. 542, 99 S. W. 547.

Private Taking.—A private taking is one in which a party deprived of his property does not know of the theft. *Kerry v. State*, 17 Tex. Cr. App. 178, 187.

To constitute theft from the person, it is not essential that it occur in a concealed manner and out of the

observation of others; and where money was taken without the victim's knowledge and while he was asleep or stupefied, the spectators being misled by accused's statement that the victim was his brother, the theft was privately done, within the statute. *Black v. State*, 52 Tex. Cr. App. 8, 104 S. W. 897.

Theft from the person may be committed by taking property from the possession of another in a public place; the statute requiring a private taking having reference to the manner, and not the place, of taking. *Clemmons v. State*, 45 S. W. 911, 39 Tex. Cr. App. 279, 73 Am. St. Rep. 923.

b. Asportation Not Necessary.

Under Pen. Code 1895, art. 880, subd. 3, providing that, to constitute theft from the person, the property need only have gone from the possession of the owner, and need not be carried away, it is not necessary, to complete the offense, that the property stolen be carried from the presence of the owner. *Clemmons v. State*, 45 S. W. 911, 39 Tex. Cr. App. 279, 73 Am. St. Rep. 923; *Dukes v. State*, 22 Tex. Cr. App. 192, 2 S. W. 590; *Green v. State*, 28 Tex. Cr. App. 493, 13 S. W. 784.

4. Possession.

Possession Necessary.—"In order to constitute theft from the person, the evidence must show that the property or money has come into the possession of the accused." *Tarrango v. State*, 44 Tex. Cr. App. 385, 71 S. W. 597; *Green v. State*, 28 Tex. Cr. App. 493, 13 S. W. 784.

Merely Touching of Money.—Merely inserting the hand in the pocket of another far enough to touch money contained therein, but not securing it, will not constitute a theft from the person. *Tarrango v. State*, 71 S. W. 597, 44 Tex. Cr. App. 385.

Necessity of Servance before Possession Absolute in Taker.—Where, in a prosecution for theft from the per-

son, there was evidence that defendant took prosecuting witness' watch from the latter's pocket, but did not sever it from the chain, which was attached to witness' vest, the failure to charge that if defendant intended to take the watch fraudulently, but had not severed the chain from the vest, it was not reduced to such possession as constituted theft, was error. *Herr v. State*, 52 Tex. Cr. App. 53, 105 S. W. 190; *McLin v. State*, 29 Tex. Cr. App. 171, 15 S. W. 600; *Thomas v. State*, 51 Tex. Cr. App. 329, 101 S. W. 797; *Tarrango v. State*, 44 Tex. Cr. App. 385, 71 S. W. 597; *Files v. State*, 36 Tex. Cr. App. 206, 36 S. W. 93.

Where defendant grasped a diamond stud in the shirt bosom of prosecuting witness, and attempted to unscrew it, but was captured before he obtained possession of it, he was not guilty of theft from the person. *Rodriquez v. State* (Cr. App.), 71 S. W. 596. See *Files v. State*, 36 Tex. Cr. App. 206, 36 S. W. 93.

5. Value of Property.

See ante, "Nature of Offense," V, B, 2.

6. Charge.

In a prosecution for a theft from the person, a charge defining theft in general is necessary to enable the jury to properly comprehend and understand the meaning of theft from the person. *Still v. State* (Cr. App.), 50 S. W. 355.

A charge, in a prosecution for theft from the person, which defines ordinary theft, and then follows the indictment, which charges theft from the person, is not erroneous as failing to conform to the offense charged. *Still v. State* (Cr. App.), 50 S. W. 355.

A charge, in a prosecution for theft from the person, that a conviction may be had, if the taking was from the person or possession of the prosecuting witness, is not prejudicial, where the evidence shows a taking

from the person. *Still v. State* (Cr. App.), 50 S. W. 355.

C. LARCENY FROM DWELLING HOUSE.

1. In General.

Where the owner lets some rooms to lodgers, the whole house is considered a dwelling house of the owner. *Ullman v. State*, 1 Tex. Cr. App. 220, 222.

A portion of a house occupied by separate families is regarded as a mansion house of each. *Ullman v. State*, 1 Tex. Cr. App. 220, 222.

Boarders in a boarding house are not inhabitants within the provisions of art. 739, Penal Code; wherefore if one boarder commits theft from another's room his offense is not mitigated by provisions of that article. *Ullman v. State*, 1 Tex. Cr. App. 220, 221.

2. Taking by Domestic Servant.

Theft from a house by a domestic servant therein is punishable, under Pen. Code, art. 764, only as simple theft. *Taylor v. State*, 42 Tex. 387; *Wakefield v. State*, 41 Tex. 556, 558; *Ullman v. State*, 1 Tex. Cr. App. 220, 221; *White v. State*, 10 Tex. Cr. App. 167, 170; *Alston v. State*, 41 Tex. 39.

Who Are Domestic Servants.—Domestics are those who reside in the same house with the master they serve; the term does not include workmen and laborers employed out of doors. *Wakefield v. State*, 41 Tex. 556, 558; *Ullman v. State*, 1 Tex. Cr. App. 220.

Where the nature of employment is such as to give a person free access to a house during one day, she is a domestic servant, and can not be convicted for theft from the house, but only for simple theft. *Coleman v. State*, 44 Tex. 109, 112.

A person hired for an hour to carry wood from the street to the back yard, and passing through the house in such labor, is not a domestic servant, so

as to relieve him from the penalty of "theft from a house" for stealing from the house through which he passed in his employment. *Williams v. State*, 41 Tex. 649.

A party hired for one day "to butcher and cut up beef" is not a domestic servant, within the meaning of the code; and theft from the shop, committed by him, of his employer's property, pending such employment, is theft from a house, under the law. *Richardson v. State*, 43 Tex. 456.

3. Statute Repealed.

See ante, "Statutory Provisions," II.

D. BRINGING INTO STATE PROPERTY STOLEN ELSEWHERE.

General Rule.—Elements of offense of bringing stolen property into state are: that acts and intent must constitute theft under laws of country where property was taken, as well as under laws of state, and that property be brought within state. *McKenzie v. State*, 32 Tex. Cr. App. 568, 576, 25 S. W. 426; *Edwards v. State*, 29 Tex. Cr. App. 452, 453, 16 S. W. 98; *Carter v. State*, 37 Tex. 362, 363; *Williams v. State*, 27 Tex. Cr. App. 466, 11 S. W. 481; *State v. Morales*, 21 Tex. 298; *Cummins v. State*, 12 Tex. Cr. App. 121; *Fernandez v. State*, 25 Tex. Cr. App. 538, 8 S. W. 667; *Clark v. State*, 27 Tex. Cr. App. 405, 11 S. W. 374.

Principal.—If one charged with theft aided in taking the stolen property in another state, furnished the means for bringing it into Texas, and there received his portion of its proceeds, he is a principal in the crime, although, under the letter of Pen. Code, arts. 798, 799, the law might seem to be otherwise. *Sutton v. State*, 16 Tex. Cr. App. 490.

After their retirement, the jury returned into court and requested further instructions as to whether or not they were authorized to consider facts proved to have transpired in Texas, in determining whether or not the ac-

cused was present when the property was stolen in the Chickasaw Nation. The court charged as follows: "In order to determine whether or not the defendant was present at the commission of the alleged offense, the jury are authorized to take into consideration all the facts and circumstances proven in the case in so far as the same have any bearing on the question, without reference to which side of the river (State line) they may have occurred." Held, correct. *Sutton v. State*, 16 Tex. Cr. App. 490.

Difference in Race as a Defense.—

A white person bringing a stolen horse into Texas from the Indian Nation may be convicted of theft. *Green v. State* (Cr. App.), 34 S. W. 283.

The laws of the Cherokee Nation prescribe a punishment for "every person who shall willfully take and steal a horse." Under the United States laws a white person can not be punished under such law, but is punishable only by federal courts. Pen. Code, arts. 798, 799, prescribes a punishment for theft and bringing the stolen goods into the state, but requires that the theft must also have been a theft under the laws of the state or territory from which the goods are brought. Held, that one may be convicted in this state, though he were a white person, and took the property from the Cherokee Nation. *Clark v. State*, 27 Tex. Cr. App. 405, 11 S. W. 374.

Property Acquired in Another State by Swindling.—Pen. Code, arts. 951, 952, providing that, if any person, having committed an offense in a foreign country or state which, under the laws of the country or state, would be robbery, theft, embezzlement, or receiving stolen goods or property, or receiving or concealing property acquired by another by embezzlement, shall bring the property so acquired into this state, he shall be guilty of the same offense, does not make it an offense to bring

into this state property acquired in another state by swindling. *Bink v. State*, 50 Tex. Cr. App. 450, 98 S. W. 249.

Evidence — Recorded Marks and Brands.—Rev. St., art. 4560, provides that it shall be the duty of the clerks of the county court in their respective counties to keep a book in which to record the marks or brands of each individual who may apply to them for that purpose, noting in every instance the date on which the brand or mark is recorded. Article 4561 provides that no brand except such as is recorded by the officer named shall be recognized in law as any evidence of ownership of cattle, horses, or mules upon which the same may be used. Held, in a prosecution for stealing cattle in New Mexico and bringing the same into this state, that whether New Mexico has such a statute is immaterial for unless recorded as required by the Texas statutes the brand on the animal will not be recognized by our law as any evidence of title, and the common law has no application to the situation. *McKenzie v. State*, 32 Tex. Cr. App. 568, 25 S. W. 426.

VI. By Whom Larceny May Be Committed.

A. SERVANTS AND EMPLOYEES.

An employee or servant in temporary custody of goods of his employer may be guilty of theft thereof as one not in possession, except as a servant, possession being in his employer. *Livingston v. State*, 38 Tex. Cr. App. 535, 43 S. W. 1008. See, also, *Graves v. State* (Cr. App.), 42 S. W. 300; *Willis v. State* (Cr. App.), 44 S. W. 826; *Roeder v. State*, 39 Tex. Cr. App. 199, 45 S. W. 570; *Duncan v. State*, 49 Tex. Cr. App. 150, 91 S. W. 572, 574.

Where a master directed his servant to get a horse from the master's pasture, with which the servant was to do hauling, and the servant caught

the horse, and left, and subsequently endeavored to sell it, the possession of the servant was the possession of the master, so that the servant's subsequent conversion by his attempted sale rendered him guilty of theft. *Crock v. State*, 45 S. W. 720, 39 Tex. Cr. App. 252.

Where a clerk, employed by a merchant, slept in the store at night, took money and goods therefrom, the offense was theft and not embezzlement. *Cobletz v. State*, 36 Tex. 353, 356.

Where accused was employed as agent or clerk of the witness, and had control of his shop part of the time during the absence of the witness, but was all the while under his direction and supervision, accused, in taking property therefrom without the consent of the witness, was guilty of theft, and not of embezzlement. *Zysman v. State*, 60 S. W. 669, 42 Tex. Cr. App. 432.

Where one had charge of a store belonging to another, with full authority to sell goods out of it, and to receive money therefor, and to draw checks, and carried the key, and knew the combination of the safe, he was not a mere servant; and hence an entry of the store by him, and taking therefrom of goods, could not amount to a theft, but was a mere breach of trust. *Bismarck v. State*, 73 S. W. 965, 45 Tex. Cr. App. 54.

B. PART OWNERS.

Under Pasch. Dig., art. 2389, whereby a part owner's taking of property is not theft, unless the person from whom it was taken was wholly entitled to the possession at the time, a cropper entitled to half the crop when gathered is not guilty of theft for pulling up and taking a portion before the division, although the contract binds the whole crop to the other for advances. *Bell v. State*, 7 Tex. Cr. App. 25; *Connell v. State*, 2 Tex. Cr. App. 422; *Duren v. State*,

15 Tex. Cr. App. 624; *Fairy v. State*, 18 Tex. Cr. App. 314.

Where cotton in the open boll, alleged to have been stolen, was the joint property of defendant and his lessor under a contract to share the crops, and defendant, after having moved off the place, later returned to finish gathering the crop, a conviction of the defendant for theft could not be sustained, since the lessor could not divest defendant of his ownership and possession by having the cotton picked, and there was no such severance of defendant's relation to the cotton as would make his possession of it unlawful or his sale of it theft. *Gipson v. State*, 57 Tex. Cr. App. 290, 122 S. W. 557.

Husband and Wife.—Unless there has been a distinct and definite separation, and the husband has expressly or by direct implication abandoned possession of the wife's property, and recognized her right to its exclusive possession while undivorced, he can not be convicted of stealing it. *Overton v. State*, 43 Tex. 616.

C. LARCENY BY CUSTODIAN.

The obligor in a bond for title asked the obligee to let him see the bond that he might inspect it. She let him take it and he threw it into the fire, where it was consumed. Held, that the obligor was guilty of larceny. *Dignowitty v. State*, 17 Tex. 521, 67 Am. Dec. 670.

As to larceny by person receiving money to change, see ante, "Concealing Overpayment and Returning Wrong Change," IV, A, 1, j.

D. LARCENY BY BAILEE.

See ante, "Larceny by Bailee," V, A.

E. LARCENY BY OWNER FROM BAILEE.

One may be indicted for theft in taking goods of which he is the general owner, feloniously, from the possession of one who has a special prop-

erty by virtue of a lien for advances. *Connell v. State*, 2 Tex. Cr. App. 422.

Where, in a prosecution for theft of a pistol, the state proved that the pistol was pawned by defendant to complainant as security for a debt and was in his possession at the time of the taking, such proof was sufficient to sustain a conviction for theft, under Pen. Code 1895, art. 864, subd. 1, providing that no person can be guilty of theft by taking property belonging to him, except where the property has been deposited with the person in possession as a pledge or security for debt. *Lewis v. State*, 50 Tex. Cr. App. 331, 97 S. W. 481; *Taylor v. State*, 7 Tex. Cr. App. 659, 662.

The taking of a watch away from a person with whom it has been left for repairs, for the purpose of depriving such person of his lien upon the watch for the repairs, is a "fraudulent taking," within the meaning of Pasch. Dig., art. 2388, and the person so taking the watch is liable under an indictment for theft. *State v. Stephens*, 32 Tex. 155.

VII. Degrees.

Theft is an offense including different degrees. *Parchman v. State*, 2 Tex. Cr. App. 228, 243; *Mathews v. State*, 10 Tex. Cr. App. 279, 284; *Cohea v. State*, 11 Tex. Cr. App. 153, 158; *Griffin v. State*, 4 Tex. Cr. App. 390; *Peeler v. State*, 3 Tex. Cr. App. 533.

Theft of property over the value of twenty dollars is a felony. *Peters v. State*, 10 Tex. Cr. App. 302, 304; *Cunningham v. State*, 27 Tex. Cr. App. 479, 482, 11 S. W. 485; *Blount v. State*, 34 Tex. Cr. App. 640, 31 S. W. 652.

On a trial for theft of jewelry, where several articles of jewelry, of the value of more than \$20 are traced to defendant's possession, but two of them only are identified as the property of the person named in the indictment, and their value is shown to be \$16, and there is no evidence of the value of

the other articles, there can be no conviction for felony; theft of property of the value of \$20 being a felony, by Pen. Code, arts. 54, 735. *Clark v. State*, 26 Tex. Cr. App. 486, 9 S. W. 767.

But under Pen. Code 1895, art. 869, makes the theft of property of the value of \$50 or over punishable by imprisonment in the penitentiary. *Johnson v. State*, 57 Tex. Cr. App. 308, 122 S. W. 877.

As to taking several articles at one time, see ante, "Taking Several Articles at One Time," IV, A, 1, f.

Property Must Be Estimated as Market Value.—In a prosecution for theft, the property alleged to have been stolen must be estimated at the market value, and not by the original cost. *Smith v. State* (Cr. App.), 44 S. W. 520.

Value Estimated in County of Prosecution.—Where a theft is prosecuted in the county to which the stolen property has been taken, although the value of the property stolen is sufficient to make the offense a felony, yet, if the value of that taken to the county in which the prosecution is had is of less amount, the defendant can be convicted for a misdemeanor only. *Roth v. State*, 10 Tex. Cr. App. 27.

By the act of 1873, stealing cattle is made a felony irrespective of the value. *Davis v. State*, 40 Tex. 134, 135; *Spence v. State*, 1 Tex. Cr. App. 541, 548; *Shoefercater v. State*, 5 Tex. Cr. App. 207, 211.

VIII. Defenses.

See post, "Matters of Defense," XIII, B, 14.

A. IN GENERAL.

Where, in a prosecution for hog theft, defendant claimed that he obtained the hog from prosecutor's son in exchange for a stove, and it appeared that the son's mother had been dead for many years prior to the prosecution, and that the hogs had

been acquired by prosecutor after his wife's death, the son had no interest in the hogs on the ground that they were community property of his father and deceased mother. *Pollard v. State* (Cr. App.), 79 S. W. 26.

Animal Vested in County as an Estray.—It is no defense to a charge of cattle theft that the animal had become vested in the county, under Sayles' Civ. St., art. 4580, as an estray animal, where the evidence shows that twelve months had not elapsed, and the animal estrayed therefore could not have been vested in the county for the purpose of sale, as provided by the statute. *Williams v. State* (Cr. App.), 34 S. W. 123.

B. CUSTOM.

In a prosecution for theft of a load of wood, the custom of people to go into pastures and take wood from the parties owning the pasture was no defense. *Vick v. State* (Cr. App.), 69 S. W. 156.

A custom of killing all unmarked hogs over twelve months old and taking the carcass is no defense to a prosecution for larceny for so doing. *Lawrence v. State*, 20 Tex. Cr. App. 536.

It is no defense to the theft of oysters from the oyster bed of T. that prior to T.'s acquisition of title the public took oysters from the bed without objection; T.'s title papers being duly recorded, its acquisition of title being notoriously published, it having fenced the property and planted oyster beds thereon, and defendant, when informed that he was trespassing, having refused to desist. *Ragazine v. State*, 84 S. W. 832. 47 Tex. Cr. App. 46.

C. PURCHASE.

See post, "In General," IX, A, 1.

Purchase is a valid defense to larceny, and if such defense is supported by evidence, it is the right of the accused to have that question of fact

submitted to the jury. *Bond v. State*, 23 Tex. Cr. App. 180, 4 S. W. 580; *Smith v. State*, 7 Tex. Cr. App. 382; *Morrow v. State*, 22 Tex. Cr. App. 239, 250, 2 S. W. 624; *McDaniel v. State*, 24 Tex. Cr. App. 552, 558, 7 S. W. 249; *Wilkerson v. State*, 21 Tex. Cr. App. 501, 505, 2 S. W. 857; *Roy v. State*, 24 Tex. Cr. App. 369, 377, 6 S. W. 186; *Ruston v. State*, 10 Tex. Cr. App. 644, 645; *Lackey v. State*, 14 Tex. Cr. App. 164, 165; *Dreyer v. State*, 11 Tex. Cr. App. 631, 643; *Wilson v. State*, 59 Tex. Cr. App. 623, 129 S. W. 836.

Purchase Subsequent to Taking.—

In a prosecution for horse theft, a purchase of the animal by accused subsequent to taking her from the range and reducing her to possession is not a defense. *Landreth v. State*, 70 S. W. 758, 44 Tex. Cr. App. 239.

On a trial for theft of a cow, a charge that, if defendant be found guilty of theft of the cow, it would not be a defense that he afterwards paid the owner for it and took a bill of sale from him, but if he took the bill of sale for and paid for the cow, such facts should be weighed in connection with all other facts and circumstances going to show an innocent or guilty intent was erroneous, where the sale referred to took place two months after the taking and was therefore too remote to have any legitimate bearing upon that act. *McCall v. State*, 14 Tex. Cr. App. 353.

Purchase at Private Sale.—A purchase of goods in good faith at a private sale will protect a person accused of their theft as amply as a public purchase. *Yates v. State*, 37 Tex. 202.

Branded Cattle.—Purchase in good faith is no defense to an indictment for larceny of branded cattle. *Morrow v. State*, 22 Tex. Cr. App. 239, 2 S. W. 624.

D. KLEPTOMANIA.

Kleptomania is a species of mania—an irresistible impulse to steal. This

doctrine of irresistible impulse as a defense has been repudiated in this state, and in cases of theft the court is not required to give a special charge on kleptomania, the "right and wrong" test, as applicable to theft, being sufficient. *Lowe v. State*, 44 Tex. Cr. App. 224, 70 S. W. 206, overruling *Harris v. State*, 18 Tex. Cr. App. 287; *Looney v. State*, 10 Tex. Cr. App. 520. See, also, *Hurst v. State*, 40 Tex. Cr. App. 378, 46 S. W. 635, 50 S. W. 719; *Cannon v. State*, 41 Tex. Cr. App. 467, 56 S. W. 351.

E. PAYMENT.

Payment for stolen property constitutes no atonement or defense. *Trafton v. State*, 5 Tex. Cr. App. 480; *Shultz v. State*, 5 Tex. Cr. App. 390, 396.

F. HIRED HAND.

On the trial of an indictment for the theft of cattle, the defense was that defendant acted in good faith for a supposed bona fide owner. Held, that an instruction that if the jury believed that defendant was acting in the capacity of an employee to a person who claimed to own the stolen stock, and acted under his employer's orders, believing honestly that the latter did in fact own the stock, he should be acquitted, but if, on the other hand, though he was in fact a hired hand, he acted for the employer, knowing that the cattle were not his, and that his intent was to steal the same, he was guilty of the crime charged, correctly presented the law applicable to the case. *Taylor v. State*, 5 Tex. Cr. App. 529; *Ivey v. State*, 43 Tex. 425; *Burdett v. State*, 51 Tex. Cr. App. 345, 101 S. W. 988; *Knowles v. State*, 27 Tex. Cr. App. 503, 11 S. W. 522.

On trial of an indictment under Act Nov. 12, 1866, for unlawfully removing from their accustomed range cattle belonging to some person unknown, it is error to charge that one acting under authority from another

must know that the other had the right to give it, and that A. can not give B. authority over stock in more than one brand. *Wills v. State*, 40 Tex. 69.

G. FAILURE TO PAY CHARGES ON PROPERTY LEFT FOR REPAIRS.

Where, on a prosecution under Pen. Code 1895, art. 877, making the fraudulent conversion of property under bailment theft, defendant was charged with the conversion of a gun left with him to be repaired, and his defense was that prosecutor failed to pay charges, and that when defendant removed from the county he took the gun with him to secure his charges, it was error to refuse to instruct that if such was the case defendant could not be convicted. *Simpson v. State* (Cr. App.), 96 S. W. 925.

IX. Persons Liable.

See, generally, the title ACCOMPLICES, ACCESSORIES, AIDERS AND ABETTORS, vol. 1, p. 8.

A. PRINCIPALS.

1. In General.

A mere concurrence in the minds of the parties, in pursuance of a previously formed design to commit a theft, does not constitute them principals, but the party must be present and participating, or, if not present, he must be doing some act in execution of the common design. *Criner v. State*, 53 S. W. 873, 41 Tex. Cr. App. 290; *Fruger v. State*, 50 Tex. Cr. App. 621, 99 S. W. 1014; *Robinson v. State*, 37 Tex. Cr. App. 195, 39 S. W. 107; *Gentry v. State*, 24 Tex. Cr. App. 478, 6 S. W. 321; *McAlister v. State*, 45 Tex. Cr. App. 258, 76 S. W. 760; *Corn v. State*, 41 Tex. 301; *Sessions v. State*, 37 Tex. Cr. App. 58, 38 S. W. 605; *McIver v. State* (Cr. App.), 37 S. W. 745; *Bell v. State*, 39 Tex. Cr. App. 677, 47 S. W. 1010; *Yates v. State* (Cr. App.), 42 S. W. 296; *Wright v. State*,

40 Tex. Cr. App. 45, 48 S. W. 191; *Joy v. State*, 41 Tex. Cr. App. 46, 51 S. W. 933; *Walton v. State*, 41 Tex. Cr. App. 454, 55 S. W. 566; *Barnett v. State*, 46 Tex. Cr. App. 459, 80 S. W. 1013; *McDonald v. State*, 46 Tex. Cr. App. 4, 79 S. W. 542; *Holmes v. State*, 49 Tex. Cr. App. 348, 91 S. W. 588; *Davis v. State*, 55 Tex. Cr. App. 495, 117 S. W. 159; *Jones v. State*, 57 Tex. Cr. App. 144, 122 S. W. 31, 34, overruling *Smith v. State*, 21 Tex. Cr. App. 96, 17 S. W. 560; *Bean v. State*, 17 Tex. Cr. App. 60.

Connection with Original Taking.—

One is not guilty of theft unless he was the original taker of the property within the contemplation of the statute and he can not be convicted of theft on a mere showing that he was an accomplice, an accessory or a receiver of stolen property. *Guinn v. State*, 39 Tex. Cr. App. 257, 45 S. W. 694; *Willis v. State*, 24 Tex. Cr. App. 586, 6 S. W. 857; *Jones v. State*, 57 Tex. Cr. App. 144, 122 S. W. 31; *Goode v. State*, 56 Tex. Cr. App. 418, 120 S. W. 199; *Moore v. State*, 28 Tex. Cr. App. 377, 13 S. W. 152; *Tucker v. State*, 21 Tex. Cr. App. 699, 2 S. W. 893; *Cohea v. State*, 9 Tex. Cr. App. 173; *Boyd v. State*, 24 Tex. Cr. App. 570, 6 S. W. 853; *Davis v. State* (Cr. App.), 19 S. W. 251; *Lee v. State*, 57 Tex. Cr. App. 177, 122 S. W. 389; *Curlin v. State*, 23 Tex. Cr. App. 681, 5 S. W. 186; *Clayton v. State*, 15 Tex. Cr. App. 348; *McAffee v. State*, 14 Tex. Cr. App. 668; *Herron v. State*, 20 Tex. Cr. App. 296; *Rosson v. State*, 37 Tex. Cr. App. 87, 38 S. W. 788; *Hankins v. State* (Cr. App.), 47 S. W. 992; *Prator v. State*, 15 Tex. Cr. App. 363; *Trimble v. State*, 18 Tex. Cr. App. 632; *Hardeman v. State*, 12 Tex. Cr. App. 207; *Martin v. State*, 44 Tex. 172; *Taylor v. State*, 27 Tex. Cr. App. 463, 11 S. W. 462; *Minter v. State*, 26 Tex. Cr. App. 217, 9 S. W. 561; *Madison v. State*, 16 Tex. Cr. App. 435.

One may be convicted of theft of

a hog, although his connection with the animal did not commence before it was killed. *Walker v. State*, 3 Tex. Cr. App. 70.

One can not be inculpated as principal thief by proof that without complicity in the taking, but with knowledge that the property had been stolen, he aided the taker to dispose of it. *Cohea v. State*, 9 Tex. Cr. App. 173.

On a trial for theft, the person who took the goods was described by a witness for the state as "a dudish looking negro," wearing "a reddish coat." A witness with whom defendant lived testified that on the day of the alleged theft defendant wore "a blue-black coat; that he had "no red coat;" and that a brown coat owned by him was ragged and torn, and did not give him the appearance of "a dude" when wearing it. There was evidence that on the night of the day on which the theft was committed defendant was seen at the place where the goods had been deposited by the thief. Held, that it was error to refuse an instruction that "the gist of the offense" was "the original taking of the property;" that there could be no conviction unless "defendant took the property;" and that any "subsequent connection" of defendant with the property "was not sufficient to constitute theft, unless * * * he was the original taker." *Davis v. State* (Cr. App.), 19 S. W. 251.

Purchase.—See ante, "Purchase," VIII, C.

One can not be convicted of theft for purchasing stolen property from the thief, the purchaser being in no way connected with the original theft. *McAfee v. State*, 14 Tex. Cr. App. 668.

Good or Bad Faith of Purchase.—If defendant did not participate in the original taking of the stolen property, the good or bad faith of a purchase subsequently made by him is immaterial. *Phillips v. State*, 19 Tex. Cr. App. 158; *Clayton v. State*, 15 Tex. Cr.

App. 348; *McAfee v. State*, 14 Tex. Cr. App. 668; *Hart v. State*, 22 Tex. Cr. App. 563, 3 S. W. 741; *Prator v. State*, 15 Tex. Cr. App. 363; *Lynch v. State*, 32 Tex. Cr. App. 45, 22 S. W. 47, 26 S. W. 409; *Faulkner v. State*, 15 Tex. Cr. App. 115, 118.

But if the evidence shows or tends to show that, at the time of the original taking, defendant was conspiring, participating and acting with the party taking the property, he would be guilty as a principal; and if under such circumstances he seeks immunity by means of a bill of sale as evidence of a purchase by him, then indeed it would not only be right but highly proper for the court to submit the question of the bona fides of the purchase or bill of sale, so that the jury might ascertain and find whether or not such pretended purchase or bill of sale was a sham or device to cover up and avoid the crime of theft. *Prator v. State*, 15 Tex. Cr. App. 363; *Roberts v. State*, 17 Tex. Cr. App. 82; *Phillips v. State*, 19 Tex. Cr. App. 158, 166.

Where Possession Obtained Directly from Prosecuting Witness.—

On prosecution for larceny of a horse, where defendant sets up a purchase from a third person, it is proper to charge that if said purchase was not made in good faith, but accused knew said third person was not the owner and had no right to sell it, and the horse was not delivered to accused, but was originally taken by him from the possession of the prosecuting witness, then such purchase would be no defense. *Jameson v. State*, 32 Tex. Cr. App. 385, 24 S. W. 508; *Hart v. State*, 22 Tex. Cr. App. 563, 3 S. W. 741; *McAfee v. State*, 17 Tex. Cr. App. 135.

Instances Where Accused Was Not a Party to the Original Taking.—If accused's son and grandson took possession of another's cow from the range, and drove her away, with the

intention of appropriating her to their own use, and accused was not present, he would not be guilty of the theft as a "principal," though he may have agreed that the animal should be stolen and subsequently butchered, and that he would participate in the butchering and would conceal the meat. *Jones v. State*, 57 Tex. Cr. App. 144, 122 S. W. 31.

The mule defendant was charged with stealing had been taken up by defendant's father in his lifetime as an estray in the spring of 1903, and was worked by the father on the farm occupied by him during that year, and was kept there until the father's death in the fall, after which it was traded or sold either by defendant or his mother, or both, in payment of a debt. The father also claimed to have bought the mule after he had taken it up. Held, that defendant, being no party to the original taking of the mule by his father could not be guilty of larceny thereof, though such taking had been illegal. *Havard v. State*, 92 S. W. 804, 49 Tex. Cr. App. 290.

In a prosecution for the theft of a cow, there was evidence that a certain person had employed defendant to sell several head of cattle and to collect the money. Defendant made arrangements with a butcher, who was to buy the cattle, and, on the morning following the theft, the stolen cow was in the butcher's pen, and defendant informed him of the fact, and demanded the money. The court instructed that, if the only connection defendant had with the offense was to conceal the cow and collect the money, then he would not be guilty as a principal, but would be an accomplice. Held erroneous, as on such a state of facts he would not be guilty of theft, though he might be of concealing stolen goods. *Criner v. State*, 53 S. W. 873, 41 Tex. Cr. App. 290.

Defendant and C. agreed to steal a hog, and defendant furnished C. a

gun, and told him to go and shoot the hog, which he did. C. then hid the hog. Held, that the theft was then completed, and defendant was only an accomplice, which status was not changed by the subsequent removal of the hog by him and C. *Mitchell v. State*, 70 S. W. 208, 44 Tex. Cr. App. 228.

Defendant, on a prosecution for theft of cotton, giving evidence that his connection therewith was merely as a hired hand to haul it, and that he did not participate in the original taking, is entitled to a charge that, if such merely was his connection therewith, he could not be convicted. *Burdett v. State*, 51 Tex. Cr. App. 345, 101 S. W. 988. See, also, *Tucker v. State*, 21 Tex. Cr. App. 699, 2 S. W. 893.

Principals Acting in Different Counties.—The rule that all are principals who are guilty of acting together in the commission of an offense applies, in case of a theft of horses in Wise county, on the trial of one who joined others in Clay county in taking away and disposing of the animals; he having been confederate in the original taking. *Scales v. State*, 7 Tex. Cr. App. 361.

Where defendant made preparations for killing and dressing hogs while his confederates were stealing them, he is guilty as principal in the theft. *Watson v. State*, 21 Tex. Cr. App. 598, 1 S. W. 451, 17 S. W. 550; *Montgomery v. State* (Cr. App.), 23 S. W. 693.

Building Pen in Which to Put Stolen Animals.—One who, in pursuance of an agreement with others, builds a pen in which to put stolen animals, while they go after them, is a principal in the theft. *Trimble v. State*, 33 Tex. Cr. App. 397, 26 S. W. 727.

Necessity of Immediate Presence.—Where defendant entered into a conspiracy for, and aided in, the capture and theft of a hog, it was immaterial

that he was not immediately present when the hog was caught. *Newberry v. State* (Cr. App.), 74 S. W. 774.

Where Defendant Present It Is Not Necessary That He Advised or Encouraged the Taking.—Where defendant assisted in taking certain mules as a principal, and went twenty-five or thirty miles for that purpose, and was present at the taking, he was guilty of larceny as a principal, whether he advised and encouraged the taking at the time or not. *Bynum v. State* (Cr. App.), 72 S. W. 844.

Necessity of Proving Which Party Took the Property.—Where cotton is stolen by one of two men traveling together, and by them taken to another county and sold, it is immaterial which took the cotton, as, if either took it, the other was a principal offender. *Thom v. State* (Cr. App.), 22 S. W. 877.

If, on the trial of one jointly indicted with others for theft, it appears that the value of the property taken by all was sufficient to make the theft a felony, the state need not show how much in value was taken by either one of the individuals jointly indicted. *Clay v. State*, 40 Tex. 67.

Effect of Withdrawal before Commission of Act.—One of several persons who enter into an agreement to steal horses generally can not be convicted as a principal in the theft of a horse taken by other parties to the agreement, he having refused to have anything to do with it. *Sessions v. State*, 38 S. W. 605, 37 Tex. Cr. App. 58.

The mere presence of an accused at the time and place of the commission of a felony, if he takes no part by word or act in the crime, will not implicate him as a principal offender, even though he makes no effort to prevent the perpetration of the offense. *Jackson v. State*, 20 Tex. Cr. App. 190; *Golden v. State*, 18 Tex. Cr. App. 637; *Sharp v. State*, 29 Tex. Cr. App. 211, 15 S. W. 176.

Case Distinguished.—"This is a companion case to *Jackson v. State*, decided at the present term with a reversal of the judgment. (Ante, p. 190.) The parties were jointly indicted for theft of the gun. In the *Jackson* case he was never seen in possession of the gun, and the law upon that aspect of the case was not sufficiently explained to the jury, nor was any instruction given them relative to crime dependent for proof upon circumstantial evidence. In this case the charge of the court cures the defects pointed out in the charge in the former case in all the essential particulars. *Saddler*, this appellant, was seen in possession of the gun just after it was taken, and he had possession, and it was recovered from his possession by the owner, some four hours afterwards. There is, therefore, a material and plainly marked distinction between the attitude of the parties with reference to the theft." *Saddler v. State*, 20 Tex. Cr. App. 195.

Employee of Principal Not Liable for Theft of Cattle.—Where the defendant, in a prosecution for cattle theft, was engaged by H. to deliver such cattle to another, defendant's connection with the cattle was not fraudulent, so as to warrant a conviction for cattle theft, though he knew the cattle to have been stolen. *Eastland v. State* (Cr. App.), 59 S. W. 267.

2. Larceny by Hand of Innocent Third Party.

See ante, "Taking by Hand of Innocent Third Party," IV, A, 1, 1.

3. Larceny Through Guilty Agent.

Where the evidence showed that about one o'clock at night defendant went to a house with, and as employee of, a stranger, after being warned by a friend that such stranger was a "crook," removed a window, and carried away goods, a conviction of theft is justified. *Conners v. State*, 31 Tex. Cr. App. 453, 20 S. W. 981.

If defendant, in an indictment for larceny, was a hired hand, and aided his employer in stealing the horse, having knowledge of his guilty intent and that it was not his property, he is guilty. *English v. State*, 29 Tex. Cr. App. 174, 15 S. W. 649.

On an indictment for larceny, it appeared that a power of attorney was given by the owner to defendant's brother, about two years before the theft, and filed for record after the indictment was found, empowering him to gather up the owner's horses, and sell the same, the brands on the horses being described. The brand on the stolen animal had been changed to correspond with those in the power of attorney. Defendant claimed to be hired by his brother to look after the horses, and signed a bill of sale of the stolen animal at the direction of his brother, he being sick. Held, that if the power of attorney was executed to protect the parties to it from a criminal prosecution, and the brother, aware of such purpose, took the animal with intent to steal, and with the knowledge and aid of defendant, defendant is guilty as a principal with his brother. *English v. State*, 29 Tex. Cr. App. 174, 15 S. W. 649.

B. ACCESSORIES.

A wife can not be the accomplice of one stealing community property of the wife and her husband. *Warren v. State*, 51 Tex. Cr. App. 616, 103 S. W. 853.

Accessory after the Fact.—Under Pen. Code, art. 798, making persons who have committed theft in another state under the law of that state, and have brought the property into Texas, guilty of theft in Texas, one who aids the thief after the property is brought into Texas, is guilty as an accessory. *West v. State*, 27 Tex. Cr. App. 472, 11 S. W. 482.

C. RECEIVERS OF STOLEN PROPERTY.

See ante, "In General," IX, A, 1.

And see, generally, the title RECEIVING STOLEN GOODS.

X. Restitution of Stolen Property.

See post, "Mitigation or Restitution or Recovery of Property Stolen," XV, C.

XI. Jurisdiction and Venue.

See, generally, the title JURISDICTION AND VENUE, ante, p. 60.

In General.—After one has done what amounts to a complete theft, if he continues carrying away the stolen things, each step he takes with them may be treated as a new trespass, and, the intent to steal not being abandoned, a fresh larceny; the consequence of which is that he may be indicted either in the county where he first took the goods, or in any other into which, the intent to steal continuing, he carries them. *Dixon v. State*, 15 Tex. Cr. App. 480.

Where, in a prosecution for horse theft, it was proved that defendant sold the animal which ranged in two counties to P., that P. purchased the horse in D. County and the next morning, went into H. County and appropriated the animal, the venue was properly laid in H. County. *Walls v. State*, 43 Tex. Cr. App. 70, 63 S. W. 328.

Under Code Cr. Proc. 1895, art. 235, making the venue, in case of theft, either in the county where the offense was committed, or in any county through or into which defendant might have carried the property, evidence that property was stolen in one county, and brought into the county of trial, authorized a charge that, if the jury believed such evidence, they should convict, although it also appeared that, in transferring the property from one county to another, defendant acted with another person. *Thurman v. State* (Cr. App.), 40 S. W. 502.

Taking Cattle in One County and Selling It in Another.—In a prosecution for cattle theft, an instruction that if the animal was killed in another county, and belonged to the person alleged to be the owner thereof, and was brought into the county in which the prosecution took place, the jury could not convict, although defendant was connected with the taking, and that, if the jury had a reasonable doubt as to whose animal was killed in the county in which the prosecution took place, they must acquit, was improperly refused. *Steed v. State*, 67 S. W. 328, 43 Tex. Cr. App. 567.

Bringing into State Property Stolen Elsewhere.—By provisions of Code Cr. Proc., art. 205, and Pen. Code, arts. 798, 799, one who steals property in another state, and brings it into Texas, may be tried and punished in Texas. *McKenzie v. State*, 32 Tex. Cr. App. 568, 25 S. W. 426.

Theft from the Person.—"Theft from the person" can transpire only in the county where the actual overt act of the taking was committed, and can be prosecuted only in the county where the act was committed. It can not, like ordinary theft, be prosecuted in any county through or into which the thief may carry the property. *Gage v. State*, 22 Tex. Cr. App. 123, 2 S. W. 638; *Clark v. State*, 23 Tex. Cr. App. 612, 5 S. W. 178; *Willson's Crim. Stats.*, § 1312; *West v. State*, 28 Tex. Cr. App. 1, 11 S. W. 635." *Nichols v. State*, 28 Tex. Cr. App. 105, 108, 12 S. W. 500.

Larceny by Bailee.—Under art. 877 Penal Code, the venue of the offense can be laid in any county where the conversion takes place. *Piper v. State*, 56 Tex. Cr. App. 121, 119 S. W. 869.

On a trial for horse theft, where the evidence showed that the possession of the horse was acquired from the owner in B. County, and afterwards sold by defendant in D. County, it

was held, the venue of the prosecution, charging him with conversion as a bailee, would be in D. County, and not in B. County, because the offense of conversion was consummated in D. County, and he could not be thus prosecuted and convicted in B. County. *Lopez v. State*, 37 Tex. Cr. App. 649, 40 S. W. 972.

On a trial for fraudulent conversion by a bailee of a horse, and where it appeared that the defendant borrowed the horse in H. County, and sold it in the county of P. Held, there being no conversion in H. County, the venue of the prosecution was properly in P. County, in which the conversion took place, and where the offense was committed. *Abbey v. State*, 35 Tex. Cr. App. 589, 34 S. W. 930.

XII. Indictment and Information.

See, generally, the title INDICTMENT AND INFORMATION, vol. 4, p. 239.

A. CERTAINTY AND SUFFICIENCY IN GENERAL.

"An indictment for theft 'must charge explicitly all that is essential to constitute the offense, and can not be aided by intendments.' *Williams v. State*, 12 Tex. Cr. App. 395; *Jones v. State*, 12 Tex. Cr. App. 424; *Tallant v. State*, 14 Tex. Cr. App. 234; *Peralto v. State*, 17 Tex. Cr. App. 578; *State v. Sherlock*, 26 Tex. 106; *Ridgeway v. State*, 41 Tex. 231." *Jones v. State*, 25 Tex. Cr. App. 621, 8 S. W. 801; *Spence v. State*, 1 Tex. Cr. App. 541; *Marshall v. State*, 31 Tex. 471; *Watts v. State*, 6 Tex. Cr. App. 263.

Indictment for theft of a hog held sufficiently certain when it charged the accused with fraudulently taking a certain hog of a designated value of the property of a named person from his possession, without his consent, with intent to deprive him of the value of it, and to appropriate the hog to the use of the taker. *State v. Mansfield*, 33 Tex. 129.

An indictment for theft from a per-

son, which is in the language of the statute and conforms strictly to No. 473 of Willson's Criminal Forms, is sufficient. *McCollum v. State*, 29 Tex. Cr. App. 162, 14 S. W. 1020.

An indictment for theft of two horses referring to horses by pronoun "it," was held sufficient; the pronoun "it," referring to the horses as property. *Goodson v. State*, 32 Tex. 121.

Where Defendant and Owner Same Name.—An indictment for theft, where defendant and the owner of the stolen property were of the same name, alleged that "M. B., on or about * * * did * * * take from the possession of M. B. five head of cattle, the same being the property of the said M. B., without the consent of the said M. B., and with the intent to deprive the said M. B. of the value of the same, and to appropriate them to the use and benefit of him, the said M. B.," etc. Held, that the words "him, the said M. B.," in the appropriation clause, refer to defendant, and not to the alleged owner of the cattle. *Brown v. State*, 28 Tex. Cr. App. 379, 13 S. W. 150.

"Steal" and "Feloniously Take" Synonymous.—Pen. Code, art. 740, imposing a penalty on one who shall "steal" or "feloniously take" certain agricultural products, uses these terms synonymously, so that an indictment charging a "fraudulent taking" is sufficient, since this sufficiently charges stealing. *McKinney v. State* (Cr. App.), 28 S. W. 816.

Erroneous Use of Language—Language Circuitous.—Pen. Code, art. 724, defines theft as appropriating "property," etc. Held, that an indictment was not defective in charging the appropriation of "the value" of certain property. *Thompson v. State*, 16 Tex. Cr. App. 74.

An indictment for theft from a house alleged that the accused, "eight dollars in gold coin of the United States, the property of R. P., then and there being in the possession of J. W., without

the consent of the said R. P. and without the consent of the said J. W., and from a house belonging to the said R. P., with intent to deprive the owner of the value of the same and to appropriate the same to his, the accused's, own use, feloniously and fraudulently did take, steal and carry away, contrary," etc. Held, that though this language be circuitous, yet it sufficiently charges the offense. *Morgan v. State*, 34 Tex. 677.

Common Sense Indictment Bill.—The form of an indictment for theft prescribed by the common sense indictment bill (Gen. Laws 1881, p. 60, c. 57) is fatally defective and is invalid. *Flores v. State*, 13 Tex. Cr. App. 337; *Brown v. State*, 13 Tex. Cr. App. 347; *Williams v. State*, 12 Tex. Cr. App. 395.

B. PARTICULAR ALLEGATIONS AND AVERMENTS.

1. Taking and Asportation.

An indictment for theft held to sufficiently charge a taking without the consent of joint owners. *Taylor v. State*, 62 Tex. Cr. App. 611, 138 S. W. 615.

An information for theft, which does not charge that the property taken was taken from the possession of the owner, or of some one holding for him, is insufficient under the same statute defining theft. *Henley v. State*, 61 Tex. Cr. App. 428, 135 S. W. 133; *Watt v. State*, 61 Tex. Cr. App. 662, 136 S. W. 56.

Under the laws, an indictment for theft need not allege the asportation of the property stolen. The offense is complete without the removal of the property. *Prim v. State*, 32 Tex. 157; *Austin v. State*, 42 Tex. 345; *Jorasco v. State*, 6 Tex. Cr. App. 238; *Conner v. State*, 6 Tex. Cr. App. 455.

2. Negating Consent of Owner.

a. In General.

Under the Penal Code, the consent of the person from whose possession property is alleged to have been stolen

must be negated in the indictment. *Bland v. State*, 18 Tex. Cr. App. 12; *Bailey v. State*, 18 Tex. Cr. App. 426; *Frazier v. State*, 18 Tex. Cr. App. 434; *Marshall v. State*, 31 Tex. 471. See *Burns v. State*, 35 Tex. 724; *Johnson v. State*, 39 Tex. 393, 394; *Treadwell v. State*, 16 Tex. Cr. App. 643; *Long v. State* (Cr. App.), 39 S. W. 674.

Ownership in One Person and Possession in Another.—An indictment for theft which alleges ownership of the property in one person, and possession in another, must negative the consent of both to the taking. *Swink v. State*, 32 Tex. Cr. App. 530, 24 S. W. 893; *Bowling v. State*, 13 Tex. Cr. App. 338.

An indictment for theft alleging that the property taken was the property of J. and was taken from the possession of W., the agent and employee of the "Farmer Cotton Company Wharf," who was holding the same for J., without the consent of J. and W., or either of them, was sufficient, though it did not allege want of consent by the "Farmer Cotton Company Wharf." *Johnson v. State*, 34 Tex. Cr. App. 254, 30 S. W. 228.

b. Joint Owners.

An indictment for larceny which alleges a joint ownership must negative the consent of each owner. It is not enough to negative merely their joint consent. *Taylor v. State*, 18 Tex. Cr. App. 489; *Arseneaux v. State* (Cr. App.), 140 S. W. 776. See *McIntosh v. State*, 18 Tex. Cr. App. 284; *Williams v. State*, 23 Tex. Cr. App. 619, 620, 5 S. W. 129; *Taylor v. State*, 23 Tex. Cr. App. 639, 5 S. W. 141; *Young v. State*, 42 Tex. Cr. App. 301, 59 S. W. 890; *Williams v. State*, 23 Tex. Cr. App. 619, 5 S. W. 129; *Scott v. State* (Cr. App.), 68 S. W. 680.

An indictment for theft alleged that defendant took five cattle from the possession of E., their owner, and eight cattle from the possession of W., their owner, "without the consent of the

said owners." Held, that the indictment was sufficient, though it did not allege want of consent as to each owner, joint ownership and possession not being alleged. *Smith v. State*, 21 Tex. Cr. App. 133, 17 S. W. 558; *S. C.*, 21 Tex. Cr. App. 96, 17 S. W. 560.

Partnership.—An indictment for theft charging generally that the property was taken without the consent of the owners (a partnership) is sufficient, and need not specifically negative the consent of each owner. *Wesley v. State*, 73 S. W. 960, 45 Tex. Cr. App. 64; *Williams v. State*, 19 Tex. Cr. App. 276.

c. Special Owners.

Where property is stolen from special owner, his want of consent only need be alleged. *Frazier v. State*, 18 Tex. Cr. App. 434; *Otero v. State*, 30 Tex. Cr. App. 450, 17 S. W. 1081; *Barrett v. State*, 18 Tex. Cr. App. 64; *Phillips v. State*, 17 Tex. Cr. App. 169; *Terry v. State*, 15 Tex. Cr. App. 66; *Atterberry v. State*, 19 Tex. Cr. App. 401.

Under Code Cr. Proc., art. 426, providing if one person owns the property, and another has possession, charge, or control of the same the ownership thereof, may be alleged, in an indictment for larceny of the same, to be in either, an indictment which alleges the ownership and non-consent of the actual owner should also allege the nonconsent of the special owner, but if it alleges only the special owner, and that the property was taken from his possession without his consent, it need not allege the possession of the actual owner nor negative his consent to the taking. *Bailey v. State*, 18 Tex. Cr. App. 426.

3. Wrongful or Felonious Nature of Act.

The Penal Code has dispensed with the word "feloniously" in prosecutions for theft, and has substituted the word "fraudulently;" wherefore an indictment for theft need not charge that

the property was feloniously taken. *Conner v. State*, 6 Tex. Cr. App. 455; *Doxey v. State* (Cr. App.), 12 S. W. 412; *Prim v. State*, 32 Tex. 157; *Musquez v. State*, 41 Tex. 226; *Austin v. State*, 42 Tex. 345; *Jorasco v. State*, 6 Tex. Cr. App. 238.

An indictment which fails to charge that the property was fraudulently taken is defective. *Spain v. State*, 19 Tex. Cr. App. 469; *McPherson v. State*, 20 Tex. Cr. App. 194.

Under Pen. Code, art. 724, defining "theft" as "the fraudulent taking of corporal personal property," etc., an indictment or information therefor must charge directly that the taking was fraudulent. It is not sufficient to allege that the taking was with fraudulent intent to deprive the owner and to appropriate, etc. *Chance v. State*, 27 Tex. Cr. App. 441, 11 S. W. 457; *Muldrew v. State*, 12 Tex. Cr. App. 617; *Ware v. State*, 19 Tex. Cr. App. 13; *Sloan v. State*, 18 Tex. Cr. App. 225; *Ortis v. State*, 18 Tex. Cr. App. 282; *Spain v. State*, 19 Tex. Cr. App. 469; *McPherson v. State*, 20 Tex. Cr. App. 194.

"Unlawful" and "Felonious" Not Synonymous with "Fraudulent."—Where, as in the Code, the term "fraudulent" is used in characterizing theft, this word may not be omitted in an indictment. The terms "unlawful" and "felonious" will not supply its place. *Sloan v. State*, 18 Tex. Cr. App. 225; *Ortis v. State*, 18 Tex. Cr. App. 282; *Ware v. State*, 19 Tex. Cr. App. 13, 14, overruling *Musquez v. State*, 41 Tex. 226, and *Austin v. State*, 42 Tex. 345, holding that "feloniously" is equivalent to "fraudulently."

4. Intent.

If an indictment for theft fails to charge that the property was stolen with intent to deprive the owner of its value, it is fatally defective in omitting one of the statutory elements in the definition of the crime. *Tallant v. State*, 14 Tex. Cr. App. 234; *Keef v.*

State, 44 Tex. 582; *Nourse v. State*, 2 Tex. Cr. App. 304; *Ridgeway v. State*, 41 Tex. 231; *Peralto v. State*, 17 Tex. Cr. App. 578; *Johnson v. State*, 1 Tex. Cr. App. 146; *Robinson v. State*, 17 Tex. Cr. App. 589; *State v. Sherlock*, 26 Tex. 106; *Jones v. State*, 12 Tex. Cr. App. 424; S. C., 25 Tex. Cr. App. 621, 8 S. W. 801; *Lawless v. State* (Cr. App.), 19 S. W. 676; *Eaton v. State* (Cr. App.), 41 S. W. 604; *Thompson v. State*, 16 Tex. Cr. App. 74.

Variation of Form.—An indictment for cattle theft was not insufficient because it failed to allege that the animal was taken with intent to appropriate it to the use of defendant, where it stated that defendant took the animal with intent to "appropriate it to the use and benefit of him, the said J. H." (naming defendant). *Hendricks v. State* (Cr. App.), 56 S. W. 55.

An indictment under Pen. Code, art. 749, for driving an animal from its accustomed range, is not defective because the word "deprive" is used, instead of the statutory word "defraud," in stating the intent with which the animal was taken from the owner; it being alleged that the animal was fraudulently taken. *Shubert v. State*, 20 Tex. Cr. App. 320.

5. Time and Place.

An indictment for theft is quashable unless it contains allegations both of the time and of the place at which the offense is charged to have been committed. *State v. Johnson*, 32 Tex. 96.

Indictment alleging that accused stole property in A. county and brought it into W. county, where the indictment was found, sufficiently charges theft in W. county. *Connell v. State*, 2 Tex. Cr. App. 422.

Since the statute authorizes a prosecution for theft of cattle in the county where taken, or into or through which they may be carried, it was not necessary to allege in an indictment for stealing cattle that the cattle were

taken in one county and carried into the county where the prosecution was instituted; it being immaterial whether defendant went with the cattle in person from the one county to the other, or not. *Warren v. State*, 51 Tex. Cr. App. 616, 103 S. W. 853.

"Accustomed Range."—Pen. Code, art. 766a, declares a person guilty of theft who shall "willfully take into possession and drive, use or remove from its accustomed range" any live stock belonging to another without consent of the owner. Held, that the term "accustomed range" is a matter of local description, and unlike a generic term, requiring the species to be stated, it admits of proof under the general allegation without defining by averment the limits of the range. *State v. Thompson*, 40 Tex. 515.

6. Value.

a. General Rule.

It is a general rule both of pleading and evidence that whenever the value of a stolen article affects the penalty for the offense, such value must be alleged and proved. *Collins v. State*, 20 Tex. Cr. App. 197; *Bawcom v. State*, 41 Tex. 189; *Watts v. State*, 6 Tex. Cr. App. 263; *Cook v. State*, 2 Tex. Cr. App. 290; *Martinez v. State*, 41 Tex. 164; *State v. McCormack*, 22 Tex. 297; *Sheppard v. State*, 1 Tex. Cr. App. 522; *Pittman v. State*, 14 Tex. Cr. App. 576; *Hall v. State*, 15 Tex. Cr. App. 40; *Simpson v. State*, 10 Tex. Cr. App. 681; *Meyer v. State*, 4 Tex. Cr. App. 121; *Johnson v. State*, 57 Tex. Cr. App. 308, 122 S. W. 877.

Value of Repairs Stolen by Owner from Bailee.—On an indictment for the theft of a watch, by the owner, left with a bailee for repairs, the value of the repairs need not be alleged. *State v. Stephens*, 32 Tex. 155.

b. Statutes Making Value Immaterial.

When a statute makes the theft of any particular kind of property an offense per se, its value is immaterial, and need not be alleged or proved.

Watts v. State, 6 Tex. Cr. App. 263; *Wills v. State*, 40 Tex. 69; *Davis v. State*, 40 Tex. 134; *Johnson v. State*, 29 Tex. 492; *Lopez v. State*, 20 Tex. 780.

Thus, theft of a horse is, in Texas, per se a felony, regardless of its value, and hence an indictment for the theft of a horse under Pen. Code 1895, art. 951, authorizing the prosecution and punishment of theft in another state or territory as if it had been committed in the state, where the stolen property is brought into the state, need not state its value. *Beard v. State*, 78 S. W. 348, 45 Tex. Cr. App. 522.

In charging larceny from the person, it is not necessary to allege the value of the thing taken as any theft from the person is a felony. *Campbell v. State*, 61 Tex. Cr. App. 504, 135 S. W. 548. See *Shaw v. State*, 23 Tex. Cr. App. 493, 5 S. W. 317; *Bennett v. State*, 16 Tex. Cr. App. 236; *Harris v. State*, 17 Tex. Cr. App. 132; *Green v. State*, 28 Tex. Cr. App. 493, 13 S. W. 784.

Punishment Same Irrespective of Value.—Where the same punishment is prescribed by the statute for the theft of various articles of property irrespective of their value, an allegation of value in the indictment is unnecessary. *Lopez v. State*, 20 Tex. 780.

c. Larceny of Several Articles.

An indictment for the theft of several articles may allege an aggregate value to the whole without alleging a separate value to each of the articles, but to convict under such an indictment, the proof must show the theft of all the articles. *Ware v. State*, 2 Tex. Cr. App. 547; *Thompson v. State*, 43 Tex. 268.

Better Practice.—In an indictment for theft, the better practice is to allege the value of each article stolen, and not the aggregate value. *Meyer v. State*, 4 Tex. Cr. App. 121; *Doyle v. State*, 4 Tex. Cr. App. 253.

d. Money.

An indictment for theft is insuffi-

cient which fails to allege the value of the money stolen, or the country of which the money is the current coin. *Boyle v. State*, 37 Tex. 359.

In an indictment for the theft of gold dollars, allegation of value is material, and, unless alleged, can not be proved. *Lavarre v. State*, 1 Tex. Cr. App. 685.

As used in Penal Code, art. 732, defining theft, the term "property" includes money, bank bills, etc. Act, 17th Leg., p. 61, § 9, provides that an indictment for theft or embezzlement of any coin or paper current as money, or of any checks, bills of exchange, or other security, it shall be sufficient to describe the property in general terms as "money," "checks," "bills of exchange," or other evidence of debt of or about a certain amount. Held, that an indictment charging the theft of four one-half dollar silver pieces. United States silver coin, of the denomination and value of fifty cents each, sufficiently described the money alleged to have been stolen. *Davison v. State*, 12 Tex. Cr. App. 214.

An indictment for theft of "\$40 in silver, current money of the United States," sufficiently alleges the value to be \$40. *Kelley v. State*, 34 Tex. Cr. App. 412, 31 S. W. 174. See, also, *Warren v. State*, 29 Tex. 369.

7. Description of Property.

a. In General.

Only such a description of stolen property should be alleged as the proof suffices to sustain. If that be indefinite, it should be alleged that a better one can not be given. *Statum v. State*, 9 Tex. Cr. App. 273.

It is an ingredient of theft that property taken be corporeal personal property of some value; hence, an indictment for theft which fails to allege that the property taken was of that character is bad. *Washington v. State*, 17 Tex. Cr. App. 197.

Name Usually Applied to Article.—A particular description of the article

stolen is not necessary. If described by the name usually applied to it, that is sufficient. *Dignowitty v. State*, 17 Tex. 521.

An indictment describing property stolen by both a generic and a specific name is sufficient. *Grant v. State*, 3 Tex. Cr. App. 1.

Manner Prescribed by Statute.—An indictment for theft must, for the purpose of identity, name and describe the particular stolen property in the manner prescribed by the statute. *Washington v. State*, 17 Tex. Cr. App. 197.

An indictment charging the fraudulent driving of cattle from their range, and followed by a charge of theft, but in such charge not describing the property taken, will not be considered as a separate count, but only as a summation of the preceding acts into one charge. *Long v. State*, 43 Tex. 467.

In an indictment for the theft of money and jewelry by a bailee, a description of the property as two diamond rings, of the value of \$200, one diamond brooch, of the value of \$50, and "one hundred dollars in money, the same being current money of the United States, of the value of one hundred dollars," was sufficient. *Butler v. State*, 93 S. W. 743, 49 Tex. Cr. App. 159.

That an indictment charges theft of three different animals belonging to three different persons does not vitiate it, where it appears that the taking was "one and the same act, done at the same time and place" and consequently constituted but one offense. *Addison v. State*, 3 Tex. Cr. App. 40.

An indictment for larceny from the person described the property taken as "corporeal personal property, * * * to wit, \$4 in money, two knives, and one ring." Held, that the description was sufficient. *Campbell v. State*, 61 Tex. Cr. App. 504, 135 S. W. 548.

b. Animals.

(1) Cattle.

The word "cattle," as used in an in-

dictment for theft which describes the stolen property as "one head of neat cattle," must be construed as understood in common parlance, and limited in its application to animals of the bovine genus. *State v. Murphy*, 39 Tex. 46; *State v. Mansfield*, 33 Tex. 129.

The word "beef" as used in an indictment charging the larceny of "one beef then and there being cattle" means an animal of the cow species and not beef prepared for market or use as meat and is embraced by the general word "cattle" as used in Gen. Laws of 1873, p. 80. *Davis v. State*, 40 Tex. 134; *Duval v. State*, 8 Tex. Cr. App. 370; *Moore v. State*, 2 Tex. Cr. App. 350; *Short v. State*, 36 Tex. 644; *Hubotter v. State*, 32 Tex. 479.

Necessity for Specifying Number.—An indictment for stealing cattle without specifying the number is insufficient. *Matthews v. State*, 48 S. W. 189, 39 Tex. Cr. App. 553, on rehearing, reversing judgment in 47 S. W. 647.

Necessity for Stating Animal to Be "Corporeal" Personal Property.—An indictment for cattle theft was not insufficient, in that it did not state the animal to have been the "corporeal" personal property of complainant. *Hendricks v. State* (Cr. App.), 56 S. W. 55.

Use of General Term "Cattle" Not Necessary.—In an indictment for the theft of cattle, a designation of the species in sufficient—as cow, steer, ox, and the like—without use of the generic term "cattle," and it was not error to overrule a motion to quash an indictment for theft of a "beef steer," on the ground that the indictment failed to allege that the animal was of the "species of cattle." *Robertson v. State*, 1 Tex. Cr. App. 311; *Lunsford v. State*, 1 Tex. Cr. App. 448.

Thus an indictment charging the theft of an "ox" is good, under the statute against the theft of "cattle." *Parchman v. State*, 44 Tex. 192.

An indictment for stealing two certain "oxen" is sufficient, under a statute punishing the theft of "cattle." *Henry v. State*, 45 Tex. 84.

An indictment charging defendant with stealing a "yearling" is sufficient, under a statute punishing the theft of "cattle." *Berryman v. State*, 45 Tex. 1.

An indictment for theft describing the property as "one cow" was a sufficient description. *Johnson v. State*, 1 Tex. Cr. App. 118.

An indictment charging the defendant with theft of a steer, designating the species of cattle stolen, is not defective. *State v. Lange*, 22 Tex. 591.

An indictment for theft described the stolen property as "two work-oxen, the property of one T. A. J." Held, that the description is sufficiently certain. *Camplin v. State*, 1 Tex. Cr. App. 108.

An indictment for the theft of "twenty head of cattle" sufficiently describes the property stolen. *Walton v. State*, 55 S. W. 566, 41 Tex. Cr. App. 454.

A description of the stolen property, in an indictment for theft of cattle, as "one head of cattle," is sufficient. *Matthews v. State*, 51 S. W. 915, 41 Tex. Cr. App. 98; *Warren v. State* (Cr. App.), 105 S. W. 817.

An indictment, charging a theft of "certain neat cattle, to wit, one beef of the value of \$15, the property of" a person named, describes the property with sufficient certainty. *State v. Garrett*, 34 Tex. 674. See, also, *Grant v. State*, 3 Tex. Cr. App. 1; *State v. Murphy*, 39 Tex. 46.

An indictment under a statute punishing the stealing of cattle, which charged a theft of "three head of neat stock or beeves," is uncertain, as all neat stock are not beeves. *Castello v. State*, 36 Tex. 324.

An indictment under Cr. Code, art. 2410, as amended by act Nov. 12, 1866, which punishes the offense of stealing "any neat cattle," etc., is not defective

for omitting the word "neat" in the description of the cattle stolen. *Hubbott v. State*, 32 Tex. 479.

Estray.—In an indictment for theft of an estray, the animal stolen need not be described as "coming within the meaning of an estray." *McGee v. State*, 43 Tex. 662.

(2) Horses.

An indictment charging the theft of "an animal of the horse species" sufficiently charges the offense of stealing a horse. *Smythe v. State*, 17 Tex. Cr. App. 244.

An indictment describing stolen property as "a certain mare, to wit, a certain sorrel mare (filly), three years old," etc., sufficiently charges the theft of a mare. *Soria v. State*, 2 Tex. Cr. App. 297.

Alleging Horse as Corporeal Personal Property.—An indictment for horse stealing need not allege that the horse was "corporeal personal property," as the court will take notice of the fact. *Damron v. State* (Cr. App.), 27 S. W. 7.

Brand as Surplusage.—A brand can not be treated as surplusage when set out in indictment as part of the description of a stolen gelding. *Ranjel v. State*, 1 Tex. Cr. App. 461.

(3) Swine.

An indictment charging the theft of "one head of hogs" is a sufficient designation of the property. *Guerrero v. State*, 80 S. W. 1001, 46 Tex. Cr. App. 445.

Under a statute making it an offense to steal a hog, an indictment charging that defendant stole a certain hog is sufficient in the description of the property. Identifying the individual hog stolen is matter of evidence. *Grant v. State*, 2 Tex. Cr. App. 163; *Moore v. State*, 2 Tex. Cr. App. 350; *Lunn v. State*, 44 Tex. 85.

c. Clothing, Jewelry, etc.

An indictment charging theft of "one certain trunk or chest, containing various articles of clothing, jewelry,"

etc., is bad for uncertainty in description of the property stolen. *Potter v. State*, 39 Tex. 388.

An indictment sufficiently describes the stolen property as "one watch, of the value of \$55; one pair of shoes, of the value of \$1; and one razor, of the value of \$2." *Johnson v. State*, 58 S. W. 69, 42 Tex. Cr. App. 103. See, also, *Grissom v. State*, 40 Tex. Cr. App. 146, 49 S. W. 93.

An indictment charged the theft of sundry different articles of clothing and household goods, describing them only by number and kind, and alleging an aggregate value of the whole, with a statement that a more specific description was to the grand jurors unknown. Held sufficiently certain to enable the accused to plead the judgment in bar of another prosecution for the same offense, which is the statutory criterion of certainty in an indictment. *Ware v. State*, 2 Tex. Cr. App. 547.

Bolt of Domestics.—An indictment for stealing domestics, the property is sufficiently described, without alleging that they were "goods" or "chattels." *State v. Odum*, 11 Tex. 12.

d. Money.

(1) In General.

Meaning of "Lawful Money of United States."—The allegation "lawful money of the United States" in an indictment for theft means coin or treasury notes made legal tender by the act of congress. *Perry v. State*, 42 Tex. Cr. App. 540, 61 S. W. 400.

Allegation Must Show Money in Current Coin of United States.—A description of the stolen money, in an indictment for larceny, held to be insufficient for not showing that the money was the current coin of the United States or any other government. *Williams v. State*, 5 Tex. Cr. App. 116.

Description Insufficient for Certain Money but Good as to Other.—That "fifteen dollars in paper money" was

not a sufficient description in an information for theft of money does not vitiate it as to the description of other money alleged. *Caskey v. State* (Cr. App.), 50 S. W. 703.

Sufficiency.—An indictment which alleges that defendant did take from the person of one M. \$80 in money, of the value of \$80, the same being then and there the corporeal personal property of M., without the knowledge and consent of M., was not objectionable for insufficiency in the description of the stolen property. *Jasper v. State* (Cr. App.), 61 S. W. 392.

An indictment for the theft of money should, so far as may be practicable, describe the kind and denomination of the money taken, so as to identify it reasonably; and an indictment describing the money only, as "\$162 in the current coin of the country" is insufficient. *Ridgeway v. State*, 41 Tex. 231.

(2) Bank Notes.

Where an information charges the theft of money consisting of bank bills, the character, number and denomination of the bills should be stated when practicable, and when not there should be an allegation giving an excuse for want of such particularity. *Perry v. State*, 42 Tex. Cr. App. 540, 61 S. W. 400.

(3) Coin.

An indictment for the theft of coin should, if practicable, give a particular description of the coin; and, if that be not practicable, should so allege, after giving such description as is practicable. *Lavarre v. State*, 1 Tex. Cr. App. 685.

The denomination of pieces of stolen coin need not be alleged if the indictment states their value; and, if the description identifies the stolen property with reasonable certainty, the indictment will be deemed good, although the description might have been made more definite. *Bravo v. State*, 20 Tex. Cr. App. 177.

An indictment, describing the property stolen as "300 gold dollars, the property of" the alleged owner, without alleging the value of the dollars, or that they were of the lawful money or current coin of the United States or other country, is defective for want of a sufficient description. *Lavarre v. State*, 1 Tex. Cr. App. 685.

(4) Paper Currency of United States.

"United States paper currency money" includes treasury notes, commonly called "greenbacks," silver certificates, and gold certificates. *Rucker v. State* (Cr. App.), 26 S. W. 65.

An indictment for theft, which describes the property stolen as "one \$20 bill, United States paper currency money, of the value of \$20, a more particular description of which the grand jury are unable to give," is a sufficient description of the money, and it is immaterial whether the evidence showed the money to be United States treasury notes or national bank notes. *Cook v. State*, 4 Tex. Cr. App. 265.

Alleging Currency or Money Not Necessary.—Under Pen. Code 1895, art. 866, an indictment for theft of "\$50 in paper currency" held not fatally defective for failure to allege that the currency was money, and, if not money, for failure to describe it more specially. *Diaz v. State*, 62 Tex. Cr. App. 317, 137 S. W. 377; *Dukes v. State*, 22 Tex. Cr. App. 192, 2 S. W. 590, contra.

Allegations Sufficient.—An information charging the theft of money, describing it as \$10 in money, which passed current as money of the United States of America, of the value of \$10, sufficiently described the money alleged to have been stolen. *Longardy v. State*, 60 Tex. Cr. App. 511, 132 S. W. 766. See, also, *Dalton v. State*, 50 Tex. Cr. App. 523, 98 S. W. 855; *Lewis v. State*, 28 Tex. Cr. App. 140, 12 S. W. 736; *Wofford v. State*, 29 Tex. Cr. App. 536, 16 S. W. 535; *Otero v. State*, 30 Tex. Cr. App. 450, 17 S. W. 1081;

Kelley v. State, 34 Tex. Cr. App. 412, 31 S. W. 174; *Colter v. State*, 37 Tex. Cr. App. 284, 39 S. W. 576; *Brewin v. State*, 49 Tex. Cr. App. 296, 92 S. W. 420; *Goldstein v. State* (Cr. App.), 23 S. W. 686; *Green v. State*, 28 Tex. Cr. App. 493, 13 S. W. 784; *Bryant v. State*, 16 Tex. Cr. App. 144; *Bell v. State* (Cr. App.), 62 S. W. 567; *McCue v. State* (Cr. App.), 103 S. W. 883; *Kimbrough v. State*, 28 Tex. Cr. App. 367, 13 S. W. 218; *Menear v. State*, 30 Tex. Cr. App. 475, 17 S. W. 1082; *Thompson v. State*, 35 Tex. Cr. App. 511, 34 S. W. 629; *Perry v. State*, 42 Tex. Cr. App. 540, 61 S. W. 400; *White v. State* (Cr. App.), 57 S. W. 100; *Summers v. State*, 45 Tex. Cr. App. 423, 76 S. W. 762; *Berry v. State*, 46 Tex. Cr. App. 420, 80 S. W. 630; *Wills v. State*, 4 Tex. Cr. App. 613; *Spencer v. State* (Cr. App.), 55 S. W. 58; *Morris v. State* (Cr. App.), 20 S. W. 979.

An indictment for theft, describing the property as "five \$10 bills, of the value of \$10 each," is insufficient. *Jackson v. State*, 34 Tex. Cr. App. 90, 29 S. W. 265.

An indictment for theft of "\$182 in United States currency" is defective for want of sufficient description of the property stolen and of averment of its value. *Martinez v. State*, 41 Tex. 164.

Description Unintelligible.—An indictment for theft charging the taking of "(20) twenty ten (10) dollar paper currency money of the United States of America, of the denomination and value of twenty dollars each," will not sustain a conviction, since the description is unintelligible. *Jones v. State*, 46 S. W. 250, 39 Tex. Cr. App. 387.

e. Written Instruments.

"A certain instrument in writing containing evidence of an existing contract for the conveyance of real estate, to wit, a lot in A., of the value," etc., was held sufficient on motion to arrest. *Dignowitty v. State*, 17 Tex. 521.

Indictment charging theft of particularly described legal tender notes of given value, the property of the person named, is sufficient. *Chester v. State*, 1 Tex. Cr. App. 702.

Pay Check.—An indictment for theft, which described the article stolen as "one International and Great Northern Railroad Company pay check, number 4,892, of October, 1902, for the sum of \$34.25, issued to B. M., the same being of the value of \$34.25," sufficiently describes the property. *Gaines v. State* (Cr. App.), 77 S. W. 10.

An indictment for theft of a pay check which describes the check by giving its number, the name of the person drawing it, the person to whom it is payable, and the amount of the check, is sufficient, and it is not necessary to set out the check in *hæc verba*. *Fulshear v. State*, 59 Tex. Cr. App. 376, 128 S. W. 134.

8. Ownership and Possession.

a. Necessity of Alleging Ownership.

The ownership of the property alleged to have been stolen must be averred in the indictment, or a sufficient reason stated for its omission. *Culberson v. State*, 2 Tex. Cr. App. 324; *Anderson v. State*, 14 Tex. Cr. App. 49, 52; *Maddox v. State*, 14 Tex. Cr. App. 447; *Williams v. State*, 19 Tex. Cr. App. 276; *Washington v. State*, 41 Tex. 583; *Stone v. State*, 12 Tex. Cr. App. 193; *Castello v. State*, 36 Tex. 324; *Long v. State* (Cr. App.), 20 S. W. 576; *Frazier v. State*, 18 Tex. Cr. App. 434; *Littleton v. State*, 20 Tex. Cr. App. 168.

Ownership Must Be Alleged in True Ownership.—Defendant, having been deputized by K. as Masonic grand master to organize a Masonic lodge, did so and elected R. treasurer. R. received the fees and dues, which he paid to defendant, who was authorized to receive them; he claiming that the money belonged to himself and K., and that he had paid K.'s part to him.

Held, that defendant could not be convicted of theft of the money as the property of R., as it did not belong to him in any event. *Mosbey v. State*, 54 Tex. Cr. App. 433, 113 S. W. 276.

Clerical Mistake in Name of Owner.

—An indictment for hog theft is not fatally defective because in the concluding part charging the accused with intent to deprive the owner of the value of the hog, etc., the name of the accused is erroneously given as the owner, where the rest of the indictment sufficiently avers the elements of the offense, and the clause in question might be eliminated as surplusage. *Bolton v. State*, 57 S. W. 813, 41 Tex. Cr. App. 642.

Omission of Christian Name of Owner.—If an indictment for theft fails to state the first name of the owner of the property, the reason for the omission should appear. *Brewer v. State*, 18 Tex. Cr. App. 456; *Stone v. State*, 12 Tex. Cr. App. 193; *Riley v. State*, 27 Tex. Cr. App. 606, 11 S. W. 642; *Collins v. State*, 43 Tex. 577.

Live Stock Driven from Accustomed Range.—It may not be necessary to allege the ownership of the live stock driven from its range, yet, if the ownership is alleged in the indictment, the allegation must be proved. *Smith v. State*, 43 Tex. 433.

b. Sufficiency of Allegation.

Ownership is sufficiently alleged by an averment that the property was taken from the possession of A., "the owner thereof." *Mathews v. State*, 17 Tex. Cr. App. 472.

An indictment for theft from a house, of sundry articles, "the corporal, personal property of said H.," though not otherwise alleging ownership to be in H., sufficiently avers ownership. *Williams v. State*, 33 Tex. 345.

Allegation of Ownership in an Attorney in Fact.—Indictment for the theft of cattle alleged the ownership to be in one F., who testified that the

animals, though the property of his sister, were, when taken, in his possession and care, and under his control, with full authority to sell them, and that he held a power of attorney from his sister; but the power of attorney was not produced. Held, that the ownership was well alleged to be in F., and his testimony, irrespective of the power of attorney, was admissible in support of the allegation. *Turner v. State*, 7 Tex. Cr. App. 596.

Allegation of Possession Not Allegation of Ownership.—An allegation in an indictment for theft that defendant "did fraudulently take and steal a horse from the possession of A." is not an allegation of ownership. *Mad-dox v. State*, 14 Tex. Cr. App. 447.

c. Negation of Defendant's Ownership.

In an indictment for the unlawful driving of cattle out of the county, an allegation that the accused willfully and fraudulently drove the cattle without the written authority of the owner is not tantamount to an allegation that the cattle driven were not the property of the accused. *Long v. State*, 6 Tex. Cr. App. 642.

The defendant's ownership is sufficiently negated by an allegation that the stolen property belonged to an unknown owner. *Thompson v. State*, 9 Tex. Cr. App. 301.

d. Possession or Custody.

An indictment for larceny must charge that the property stolen was taken from the possession of the owner, or from that of some person holding the same for him. *Gadson v. State*, 36 Tex. 350; *Garner v. State*, 36 Tex. 693; *Garcia v. State*, 26 Tex. 209; *Watts v. State*, 6 Tex. Cr. App. 263; *Case v. State*, 12 Tex. Cr. App. 228; *Thomas v. State*, 1 Tex. Cr. App. 289.

No objection can be taken to an indictment charging the possession of property stolen to have been in "A. B. C. D.," A. B. and C. D. being dif-

ferent persons, and the indictment further averring it to be "the property of said A. B. and C. D. without the consent of the owner or either of them." *Dodd v. State*, 10 Tex. Cr. App. 370.

One in Custody of Property.—An information on a prosecution for larceny properly charged the possession as being in the one who had the custody of the property, although he was not the owner. *Cain v. State*, 92 S. W. 808, 49 Tex. Cr. App. 360.

Constructive Possession.—An indictment for the theft of lost money properly charges the ownership and possession in the owner of such money, though he did not have the control and custody at the time of the theft; he being in constructive possession. *Martin v. State*, 72 S. W. 386, 44 Tex. Cr. App. 538.

It is an established principle in Texas and other large grazing countries that an animal running at large upon its accustomed range shall be deemed to be in the constructive possession of its owner; and under Pen. Code, art. 729, a person having the "actual control" of the animals of a nonresident may be properly alleged, in an indictment for theft, to be the possessor thereof. *Moore v. State*, 8 Tex. Cr. App. 496.

Agent.—Where, in a prosecution for theft of railroad tickets, the tickets were charged to be the property of an agent of the railroad company in possession, it was not necessary that the indictment should also allege that the tickets were in the physical custody of another, who was a mere servant of such agent. *Kush v. State*, 77 S. W. 790, 45 Tex. Cr. App. 451; *Emmerson v. State*, 33 Tex. Cr. App. 89, 25 S. W. 289; *Graves v. State* (Cr. App.), 42 S. W. 300.

Agency Revoked.—Where cattle had been removed from the possession of a person, and his agency revoked, except that he was to take charge of

any strays he might find, an indictment for theft of a stray steer, never so found and taken charge of, laying the possession in him, is bad. *Massey v. State*, 31 Tex. Cr. App. 91, 19 S. W. 908.

Person Holding Property for Corporation.—Where an indictment for theft alleges the property to have been owned by a corporation, it must, after giving the true corporate name, and setting out the fact of incorporation aver that the property was taken from the possession of some one who was holding the same for the corporation, without the consent of such person, and with the intent to deprive the owner of the value of the property. *Thurmond v. State*, 30 Tex. Cr. App. 539, 17 S. W. 1098.

e. In Whom Ownership Should Be Alleged.

(1) General and Special Ownership.

Where one person has the general and another a special property in the thing stolen, the indictment may allege the property to be in either. *Langford v. State*, 8 Tex. 115; *Dignowitty v. State*, 17 Tex. 521; *Billard v. State*, 30 Tex. 367; *Gatlin v. State*, 39 Tex. 130; *Moseley v. State*, 42 Tex. 78; *Cox v. State*, 43 Tex. 101; *Blackburn v. State*, 44 Tex. 457; *Gaines v. State*, 4 Tex. Cr. App. 330; *Jinks v. State*, 5 Tex. Cr. App. 68; *Duren v. State*, 15 Tex. Cr. App. 624; *Fore v. State*, 5 Tex. Cr. App. 251; *Wilson v. State*, 12 Tex. Cr. App. 481; *Frazier v. State*, 18 Tex. Cr. App. 434; *Littleton v. State*, 20 Tex. Cr. App. 168; *Price v. State*, 55 Tex. Cr. App. 157, 115 S. W. 586; *Trafton v. State*, 5 Tex. Cr. App. 480; *Calloway v. State*, 7 Tex. Cr. App. 585, 587; *Moore v. State*, 8 Tex. Cr. App. 496; *Hill v. State*, 11 Tex. Cr. App. 132; *Lowe v. State*, 11 Tex. Cr. App. 253; *Dreyer v. State*, 11 Tex. Cr. App. 503; *Bailey v. State*, 18 Tex. Cr. App. 426; *Henry v. State*, 45 Tex. 84; *Wilson v. State*, 3 Tex. Cr. App. 206; *Samora v. State*, 4 Tex. Cr. App. 508;

Pasc. Dig., arts. 2386, 2387; *West v. State*, 6 Tex. Cr. App. 485.

An indictment for the theft of lost money properly charges the ownership and possession in the owner of such money, though he did not have the control and custody at the time of the theft; he being in constructive possession. *Martin v. State*, 72 S. W. 386, 44 Tex. Cr. App. 538.

Necessity to Allege That Special Owner Held Property for General Owner.—Where possession is alleged in the person having special ownership it need not be alleged that he held the property for the general owner. *Price v. State*, 55 Tex. Cr. App. 157, 115 S. W. 586; *Alexander v. State*, 4 Tex. Cr. App. 261.

(2) Joint Ownership.

Under the express provisions of Code Cr. Proc., art. 426, where property is owned in common or jointly by two or more persons the ownership may be alleged to be in all or either of them. *Terry v. State*, 15 Tex. Cr. App. 66; *Duncan v. State*, 49 Tex. Cr. App. 150, 91 S. W. 572; *Tidwell v. State* (Cr. App.), 45 S. W. 1015; *Coates v. State*, 31 Tex. Cr. App. 257, 20 S. W. 585; *Bailey v. State*, 50 Tex. Cr. App. 398, 97 S. W. 694.

Where stolen property belongs to two persons jointly, but was in the possession of neither, an indictment which, before the amendment to the code, alleged the property in one of such owners, is bad. *Hannahan v. State*, 7 Tex. Cr. App. 664.

An indictment for theft need not allege that stolen property was joint property of two alleged owners. *Terry v. State*, 15 Tex. Cr. App. 66.

Where One Joint Owner Is in Possession and Control.—Under Pasch. Dig., art. 2381, allowing the ownership of stolen articles to be alleged in the one having the special or the one having the general property therein, if they belonged to joint owners, but when stolen were in the exclusive pos-

session and control of one of them, the ownership may be alleged to be in him alone. *Samora v. State*, 4 Tex. Cr. App. 508.

(3) Ownership Unknown.

An indictment sufficiently alleges ownership in charging the property stolen to be that of some person to the grand jurors unknown. *Mackey v. State*, 20 Tex. Cr. App. 603; *State v. Haws*, 41 Tex. 161; *Culberson v. State*, 2 Tex. Cr. App. 324; *Taylor v. State*, 5 Tex. Cr. App. 1; *Maddox v. State*, 14 Tex. Cr. App. 447; *McVey v. State*, 23 Tex. Cr. App. 659, 5 S. W. 174; *Wills v. State*, 40 Tex. 69.

An indictment charging that a head of cattle stolen was the property of some person to the grand jury unknown is tantamount to an allegation that the name of the owner was unknown to the grand jury, and is a sufficient allegation as to ownership. *Melton v. State* (Cr. App.), 56 S. W. 67.

A mere partial compliance with the estray laws, such as preliminary advertisement, does not confer right of possession or special property; and an indictment for theft of the animal may simply allege ownership in an unknown person. *Lowe v. State*, 11 Tex. Cr. App. 253.

Diligence Required of Grand Jury in Ascertaining Owners Name.—Where the indictment for larceny alleges ownership in an unknown person, it is proper to instruct the jury to acquit defendant if the grand jury did not exercise sufficient diligence in ascertaining the name of the owner. *Logan v. State*, 36 Tex. Cr. App. 1, 34 S. W. 925; *Atkinson v. State*, 19 Tex. Cr. App. 462; *Fenton v. State*, 33 Tex. Cr. App. 633, 28 S. W. 537; *Brewer v. State*, 18 Tex. Cr. App. 456.

On the trial of an indictment for theft, wherein the surname of the owner was not stated, a witness testified that he knew the owner's full name when he was before the grand

jury, and would have given it if the jury had asked him; that, immediately after testifying, he was discharged, and left for his ranch, twenty-five miles distant. Two grand jurors testified that the witness was not asked the name of the owner, and that, directly after discharging him, they went to his residence to recall him, but he had gone to his ranch. Held not to show reasonable diligence by the grand jury to ascertain the owner's name. *Shockley v. State*, 42 S. W. 972, 38 Tex. Cr. App. 458.

(4) Persons Holding Animals as Estray.

Ownership, in an indictment for theft of cattle, may be properly laid in the person who holds the animals as estrays. *Jinks v. State*, 5 Tex. Cr. App. 68.

An indictment for the theft of an animal which had been taken up as an estray should allege ownership in the taker up, and not that the ownership is unknown. *Swink v. State*, 32 Tex. Cr. App. 530, 24 S. W. 893.

"The court instructed the jury, in effect, that if they believed the animal was an estray, without any known owner in the community, when Lackey took him up, the possession and ownership could be charged in Will Deal, said Lackey holding said property for Deal. Appellant contends that this was error; that the possession in Lackey was complete, he having actual care, control, and management of the animal at the time appellant procured the same by false pretext of ownership; and that the indictment should have alleged the ownership and possession in Lackey. In this appellant is correct. *Tinney v. State*, 24 Tex. Cr. App. 112, 5 S. W. 831; *Alexander v. State*, 24 Tex. Cr. App. 126, 5 S. W. 840; *Williams v. State*, 26 Tex. Cr. App. 131, 9 S. W. 357; *Arcia v. State*, 28 Tex. Cr. App. 198, 12 S. W. 599; *Otero v. State*, 30 Tex. Cr. App. 450, 17 S. W. 1081.

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Tinney's Case, supra, was very much like this case. There the real owner was Doyle, but the animal had strayed away from home some twelve miles, and was taken up by one Hurst, who had not estrayed it at the time. When taken by Tinney it was in Hurst's actual control, care, and management. The court held in that case that the possession was in Hurst and not in the owner, and the indictment should have so alleged. This is not like those cases which hold that the possession of the servant is the possession of the master, and that the possession can be charged in the master. *Graves v. State* (Cr. App.), 42 S. W. 300; *Willis v. State* (Cr. App.), 44 S. W. 826. On the contrary, this is a case where the person in possession did not know who the owner was, and was holding the same as lost property. Of course, the true owner had a right to reclaim it, but until he did so it was in the actual possession of Lackey." *Williams v. State*, 47 Tex. Cr. App. 536, 84 S. W. 829.

(5) Property of Husbands and Wives.

Where a husband telephoned to his wife at their home to bring him some money he had left at the house, and she, when on her way to do this, left the money in her buggy seat, from which it was taken by defendant, the indictment properly alleged the ownership of the money in the wife. *Miles v. State*, 51 Tex. Cr. App. 587, 103 S. W. 854.

Wife's Separate Property.—Where the husband's possession of the wife's separate property is constituted by his actual control, care, and management thereof, an indictment for its theft may allege the ownership to be in him. *Alexander v. State*, 9 Tex. Cr. App. 48.

Rev. St. 1895, arts. 2967, 2968, provide that during marriage the wife's separate property is under the sole management of the husband, and by Code Cr. Proc. 1895, art. 445, where

property is the separate property of a married woman, the ownership may be alleged in her or in her husband. Held, in a prosecution for theft of a ring which was the separate property of a wife, but was at the time of the theft in a box belonging to the husband in a room occupied by both, the ownership thereof was properly alleged in the wife. *Kauffman v. State*, 53 Tex. Cr. App. 209, 109 S. W. 172.

Community Property.—An indictment that alleges the ownership of stolen community property in the wife is bad. The allegation should lay it in the husband. *Merriweather v. State*, 33 Tex. 789.

If a married woman has been abandoned by her husband, the ownership of community property stolen from her possession may be alleged to be in her. *Ware v. State*, 2 Tex. Cr. App. 547.

(6) Property in Possession of Bailee.

The special property in a chattel of one in full possession, and responsible to the true owner for the use of the chattel, is a sufficient ownership to predicate an indictment for larceny upon. *Blackburn v. State*, 44 Tex. 457.

Where prosecutor left his hack temporarily in another's inclosure, from which it was stolen, the possession of the owner of the premises was the possession of prosecutor; and hence the indictment correctly charged that the taking was from the possession of prosecutor. *Garling v. State*, 2 Tex. Cr. App. 44.

In an indictment for stealing from the house of A. an article belonging to B., it is not necessary either to allege or prove that the article stolen was under the control of or belonged to A. *Hill v. State*, 41 Tex. 157.

Where the animal stolen belonged to S. but was taken from the possession of B., an indictment alleging possession and ownership in S. was not sustained. The indictment should

either have alleged both the possession and ownership in B. or that S. was the owner and that the animal was taken from B's possession who was holding it for S. *Williams v. State*, 26 Tex. Cr. App. 131, 9 S. W. 357.

A theft of pledged property may be charged under a general indictment for theft. *Smith v. State* (Cr. App.), 29 S. W. 785.

(7) Property of Corporations.

An indictment charging theft of property of a corporation must both describe the corporation by its corporate name and allege that it is a corporation. An allegation that property belonged to "Mo. P. Rway. Company" is sufficient. *White v. State*, 24 Tex. Cr. App. 231, 234, 5 S. W. 857; *Thurmond v. State*, 30 Tex. Cr. App. 539, 540, 17 S. W. 1098.

(8) Property Belonging to Decedent's Estate.

When property belongs to the estate of a deceased person, ownership may be alleged to be in the executor, administrator or heirs of such deceased person, or in any one of such heirs. *Dreyer v. State*, 11 Tex. Cr. App. 503, 508.

An allegation of ownership is sustained where a party is managing his father's estate. *Pippin v. State*, 9 Tex. Cr. App. 269, 270; *Crockett v. State*, 5 Tex. Cr. App. 526.

(9) Stolen Property.

Where a stolen article has been sold, and afterwards stolen from the purchaser, an indictment for the second theft may allege the ownership either in the true owner or the purchaser. *King v. State*, 43 Tex. 351.

(10) Parents and Child.

An information for the theft of goods belonging to a minor who lives with his parents may properly allege ownership either in the minor or his parent. *Jackson v. State*, 79 S. W. 521, 47 Tex. Cr. App. 85, judgment affirmed on rehearing in 80 S. W. 631.

Where a minor son and his parent live together and have joint possession and control of the son's property, an indictment for the theft of such property is not defective for alleging the parent's ownership thereof. *Bazan v. State* (Cr. App.), 24 S. W. 100.

In an indictment for theft of jewels, given by a parent to a child, which, at the time of the larceny, were in a box under the parent's control, but to which the child had access, it is only necessary to charge ownership in the parent. *Wright v. State*, 35 Tex. Cr. App. 470, 34 S. W. 273. See *Bailey v. State*, 18 Tex. Cr. App. 426; *Frazier v. State*, 18 Tex. Cr. App. 434, 435; *Clark v. State*, 23 Tex. Cr. App. 612, 5 S. W. 178.

Where the property stolen is the property of a widow and her children, who are under her control, the indictment may allege the ownership to be in the widow. *Crockett v. State*, 5 Tex. Cr. App. 526.

Indictment for theft of property alleged to belong to a minor, charged that it was taken from the possession of "Mrs. J. H., the natural guardian" of the minor. Held, a sufficient allegation of the possession. *Trafton v. State*, 5 Tex. Cr. App. 480.

(11) Servant.

In a prosecution for theft, an indictment charging the stolen property to be the property of a servant of the actual owner, such servant being in possession, was sufficient. *Kush v. State*, 77 S. W. 790, 45 Tex. Cr. App. 451.

Property of an employer, stolen from the possession of an employee, is properly alleged to be the property of, and taken from the possession of, the employer. *Thomas v. State*, 1 Tex. Cr. App. 289; *Frazier v. State*, 18 Tex. Cr. App. 434, 443.

(12) Tenant or Ginner in Possession.

In prosecutions for theft, possession must be alleged in the person who has actual control of the property, and

where the owner of a horse placed it in the pasture of her tenant, with instructions to prevent it from being used during her absence, possession should have been alleged in the tenant. *Honea v. State*, 56 Tex. Cr. App. 278, 119 S. W. 851. See *Bryan v. State*, 54 Tex. Cr. App. 59, 111 S. W. 1035.

Cotton raised on the land of M. by his renter was stolen after it had been ginned and while remaining at the gin. M. never saw the cotton, and never had it in his possession, but was to share in the proceeds thereof after it was sold. An indictment for the larceny alleged the ownership in M. Held, that the indictment would not support a conviction under the proofs; for, if the ginner had exclusive control or management of the cotton, the ownership should have been alleged in him, and otherwise it should have been alleged in the renter, but in either event it was not in M. *Peck v. State*, 54 Tex. Cr. App. 81, 111 S. W. 1019.

9. Accusations of Special Statutory Offenses.

a. Larceny by Bailee.

See the title EMBEZZLEMENT, vol. 2, p. 277.

The information in a prosecution for theft of a bailment, under Pen. Code, art. 877, need not allege any consideration therefor. *Caskey v. State* (Cr. App.), 50 S. W. 703.

Pen. Code 1895, art. 877 (formerly article 742a), making one guilty of theft who has possession of personalty under a contract of hiring or borrowing, or through bailment, and, without the owner's consent, fraudulently converts it to his own use, was meant to cover cases where possession was obtained lawfully, and accused could be convicted of theft of a ring which the owner loaned to a girl to wear, and which she loaned to accused to wear; it being sufficient to allege that the ring was the property of the girl, and was obtained by accused under a con-

tract of borrowing. *Piper v. State*, 56 Tex. Cr. App. 121, 119 S. W. 869. See the title EMBEZZLEMENT, vol. 2, p. 277.

Property Procured as Agent of Prosecuting Witness.—The indictment for theft should be under the bailment statute, where, if defendant procured the property, he did so as agent of the prosecuting witness. *Peters v. State*, 91 S. W. 224, 49 Tex. Cr. App. 365; *Williams v. State*, 30 Tex. Cr. App. 153, 16 S. W. 760; *Nichols v. State*, 28 Tex. Cr. App. 105, 12 S. W. 500; *Torres v. State*, 33 Tex. Cr. App. 125, 25 S. W. 128.

Necessity of Alleging Accused a Party to Contract of Hiring.—An indictment alleging that accused advised and encouraged his principal to commit a theft of horses which he had hired is not defective for failure to allege that accused was a party to the contract of hiring. *Harrold v. State*, 81 S. W. 728, 46 Tex. Cr. App. 568.

Alleging Facts Showing Bailment.—An indictment under Pen. Code 1895, art. 877, making conversion by a bailee theft, alleging that defendant having possession of two horses, then and there the property of G. by virtue of his contract of hiring with W., who was acting for G. as agent, did, without the consent of G., convert the same, is defective in not directly and positively alleging that W. was duly authorized by G., and in not alleging absence of consent of the agent. *McCarty v. State*, 78 S. W. 506, 45 Tex. Cr. App. 510; *Smith v. State*, 38 Tex. Cr. App. 232, 42 S. W. 302.

Sufficient Allegations.—An indictment, which alleges that defendant was bailee of a sewing machine belonging to the prosecutor, and in violation of the contract of bailment sold the machine and converted the proceeds to his own use, is sufficient to sustain a conviction of theft as a bailee. *Collins v. State*, 56 Tex. Cr. App. 385, 118 S. W. 1038.

An indictment for theft, charging

that "Y., having possession of two head of cattle, then and there the property of R., by virtue of his contract of hiring and borrowing with the said R., did then and there unlawfully, and without the consent of the said R., the owner thereof, fraudulently convert said two head of cattle to his, the said Y.'s, own use and benefit, and with the intent to deprive the said R., the owner, of the value of the same," was sufficient under White's Ann. Pen. Code, art. 877, § 1501, declaring that any person having possession of the personal property of another by virtue of any contract of hiring, or other bailment, who shall, without the consent of the owner, fraudulently convert the same to his own use, with intent to deprive the owner of the same, shall be guilty of theft. *Young v. State*, 75 S. W. 798, 45 Tex. Cr. App. 247.

In *Butler v. State*, 49 Tex. Cr. App. 159, 93 S. W. 743, a young lady had deposited with Butler, clerk of a hotel, certain jewelry. She testified that she did not know the clerk, and did not deposit said articles with him individually, but did so knowing that he was clerk of the hotel. The indictment was questioned in that case because the character of bailment was not sufficiently described. In discussing the matter Judge Henderson, speaking for the court, says: "Now, in our opinion, it was not necessary that the indictment should have stated how appellant came to be the bailee, further than was done by his direct contract with Blanche Enloe. In *Elton v. State*, 40 Tex. Cr. App. 339, 50 S. W. 379, 51 S. W. 245, the indictment was similar in terms, except that it was further alleged therein that May was the agent of the livery stable owner (Cain), and as such agent hired the horses to Elton, showing fully the contractual relation. But it is not even held in that case that it was necessary to allege how May came to be the agent of Cain." Again, in fur-

ther discussing the matter, Judge Henderson says: "We do not believe the doctrine of mere custody, as of a servant, as insisted by appellant, has anything to do with this case, or militates against the allegations contained in the indictment. The fact that the person is employed by another does not prevent him from being a bailee. He was the contracting party in this case, and was a special owner, and the property was directly under his control and management, and during that time appears to have been under his exclusive control. Even in a case of theft under the general statute, the possession could have been alleged in the appellant, and it would not antagonize this view if possession might also have been alleged in the proprietor and the clerk treated as a mere custodian." *Piper v. State*, 56 Tex. Cr. App. 121, 119 S. W. 669.

b. Larceny from the Person.

Distinction between Theft from the Person and Ordinary Theft.—Since Pen. Code, arts. 744, 745, define theft from the person as a distinct offense, and essentially different from ordinary theft, one can not be convicted thereof, under an indictment for ordinary theft. *Nichols v. State*, 28 Tex. Cr. App. 105, 12 S. W. 500. See, also, *Harris v. State*, 17 Tex. Cr. App. 132; *Graves v. State*, 25 Tex. Cr. App. 333, 8 S. W. 471.

Statutory Elements Necessary.—Under a statute defining "privately stealing from the person" as "theft committed without the knowledge of the person from whom the property is taken, or so suddenly as not to allow them to make resistance before the property is carried away," an indictment simply charging stealing and carrying away privately from the person is bad. *Kerry v. State*, 17 Tex. Cr. App. 178, 50 Am. Rep. 122; *Burke v. State*, 58 Tex. Cr. App. 233, 125 S. W. 8; *Jones v. State*, 39 Tex. Cr. App. 387, 388, 46 S. W. 250.

Language of Statute Not Necessary.

—Pen. Code, art. 879, makes it unlawful to commit theft by "privately" stealing from the person of another. Article 880 provides that, to constitute the offense, the theft must be from the person, that the theft must be committed without the knowledge of the person from whom the property is taken, or so suddenly as not to allow time to resist. An indictment charged that accused unlawfully and fraudulently took from the possession and person of H., and without his consent, and so suddenly as not to allow time for resistance, etc. Held, that the indictment sufficiently described the crime, and it was not necessary to follow the language of art. 879, and allege that the property was "privately" stolen. *Bush v. State*, 53 Tex. Cr. App. 213, 109 S. W. 184. See, also, *Brown v. State* (Cr. App.), 22 S. W. 24; *Woodard v. State*, 9 Tex. Cr. App. 412.

An indictment charging that defendant unlawfully and privately took from the possession of M., without his knowledge and consent, personal property consisting of a leather belt, a pistol, a brass watch, and four silver dollars of United States of America money, with the intent on defendant's part to deprive M. of the value of the same, and to appropriate it to defendant's use and benefit, sufficiently charged theft from the person. *Chitwood v. State*, 71 S. W. 973, 44 Tex. Cr. App. 439.

An indictment under Pen. Code, art. 744, for theft from the person, is sufficient if, in addition to the allegations necessary to charge theft in general, it avers that the theft was committed in presence of the dispossessed party, and without his knowledge, or so suddenly as to preclude resistance before asportation. *Woodard v. State*, 9 Tex. Cr. App. 412.

Description of Property.—In a prosecution for theft from the person,

an indictment which alleged that a money purse was stolen sufficiently described the property, though it did not specify its color, size, weight, or value, in view of the fact that theft of any article from the person is a felony. *Bush v. State*, 53 Tex. Cr. App. 213, 109 S. W. 184.

c. Larceny from Dwelling House or Other Buildings.

An indictment charging theft from a house must set out theft with certainty. *White v. State*, 1 Tex. Cr. App. 211, 213.

In an indictment for theft from a house, the house should be described by naming its owner or occupant, or by some other description by which it could be identified. *Lamkin v. State*, 42 Tex. 415.

An indictment which alleges that the defendant did "feloniously take, steal, and carry away from the smoke house, and from the possession of the owner thereof, four middlings of bacon, of the value of \$25, the property of S. S.," sufficiently charges the taking from a house, and from the possession of the owner. *Irvin v. State*, 37 Tex. 412.

d. Bringing into State or County Property Stolen Elsewhere.

When property is stolen in one county and carried by the thief into another county, the taking may be charged to have occurred in either county. *Cox v. State*, 43 Tex. 101.

Under a statute making theft and robbery perpetrated in other states crimes, where the property is brought into Texas, provided the law of the state from which the property is brought makes the act of taking theft or robbery, the law of the foreign state is an element of the offense, and therefore must be charged in the indictment. *Cummins v. State*, 12 Tex. Cr. App. 121; *Fernandez v. State*, 25 Tex. Cr. App. 538, 540, 8 S. W. 667; *Edwards v. State*, 29 Tex. Cr. App. 452, 454, 16 S. W. 98; *State v. Morales*,

21 Tex. 298; *Carmisales v. State*, 11 Tex. Cr. App. 474.

An indictment under Pen. Code 1895, art. 951, for the theft of a horse, charged that accused, "in the territory of Oklahoma, did unlawfully and fraudulently take," etc., which said acts by the accused "were by the laws of the territory of Oklahoma, then and there in force, the offense of theft, and which said acts, if the same had been committed in the state of Texas, would then and there have been theft," etc. Held, that the indictment was sufficient against an objection that it failed to allege the theft of the horse in Oklahoma Territory. *Beard v. State*, 78 S. W. 348, 45 Tex. Cr. App. 522.

C. ISSUES, PROOF AND VARIANCE.

See, generally, the title INDICTMENT AND INFORMATION, vol. 4, p. 239.

1. Issues and Proof in General.

a. Issues in General.

Pen. Code, art. 741, provides that any person who carries away any filed paper from any clerk's office, with intent to destroy, suppress, alter, or conceal, or in any wise dispose of the same, "so as to prevent the lawful use of such filed paper," shall be deemed guilty of theft. Held, that where, on a trial for taking a deed from a clerk's office, there is evidence that defendant previously forged the deed, an indictment charging simply that he took it with intent to destroy, etc., "so as to prevent the lawful use" thereof, will warrant a conviction only upon the theory that he took it too prevent its use to prove title, and not upon the theory that he took it to prevent its use as an evidence of forgery. *Witte v. State*, 21 Tex. Cr. App. 88, 17 S. W. 723.

On an indictment charging theft from the person, defendant can not be convicted of theft of property under

\$20 in value. *Roberts v. State*, 33 Tex. Cr. App. 83, 24 S. W. 895; *Harris v. State*, 17 Tex. Cr. App. 132; *Gage v. State*, 22 Tex. Cr. App. 123, 2 S. W. 638; *Green v. State*, 28 Tex. Cr. App. 493, 13 S. W. 784.

b. Matters to Be Proved.

(1) In General.

Theft of Several Articles.—To convict upon an indictment for theft of several articles, where the aggregate value only of such articles is alleged, the testimony must show the theft of all of the articles alleged to have been stolen. *Thompson v. State*, 43 Tex. 268.

Taking.—In a prosecution for the fraudulent taking of property, the main fact in issue is the taking. *Crowell v. State*, 24 Tex. Cr. App. 404, 409, 6 S. W. 319; *Hayes v. State*, 30 Tex. Cr. App. 404, 407, 17 S. W. 940; *Curry v. State*, 7 Tex. Cr. App. 267, 268.

Time of Taking.—In a prosecution for theft, the state must prove the time when the alleged offense was committed. *Jackson v. State*, 34 Tex. 136.

Intent.—On a trial for theft it is error to so charge the jury as to permit defendant's conviction without proof of guilty knowledge or intent. *Logan v. State*, 2 Tex. Cr. App. 408, 411; *Dreyer v. State*, 11 Tex. Cr. App. 631, 642; *Herber v. State*, 7 Tex. 69, 71.

(2) Ownership.

In a prosecution for stealing a hog, failure to prove that the hog was the property of the prosecuting witness was ground for reversal on appeal. *McNight v. State* (Cr. App.), 58 S. W. 95. See, also, *Fletcher v. State*, 16 Tex. Cr. App. 635.

Ownership Unknown.—When one is indicted for stealing property from an unknown owner, that the owner was unknown to the grand jury, that they used reasonable diligence to discover the owner and failed, must be sustained by proof. *Lane v. State* (Cr.

App.), 45 S. W. 693; *Dawson v. State* (Cr. App.), 61 S. W. 489.

On a prosecution for the theft of cattle belonging to an unknown owner, it is not necessary to prove that prior to the alleged theft the cattle were known as the property of an unknown owner, and identified as such; *White's Ann. Code Cr. Proc.*, art. 445, providing generally that, where ownership is unknown, it shall be so alleged. *Clements v. State*, 66 S. W. 301, 43 Tex. Cr. App. 400.

(3) Value of Property.

If the evidence fails to establish the value of the property stolen, there can not be a valid conviction of a felonious theft. *Moore v. State*, 17 Tex. Cr. App. 176; *Duren v. State*, 14 Tex. Cr. App. 624; *Sands v. State*, 30 Tex. Cr. App. 578, 18 S. W. 86; *Ware v. State*, 2 Tex. Cr. App. 547; *Radford v. State*, 35 Tex. 15; *Wills v. State*, 40 Tex. 69, 75; *Cady v. State*, 4 Tex. Cr. App. 238; *Meyer v. State*, 4 Tex. Cr. App. 121; *Hall v. State*, 15 Tex. Cr. App. 40; *Doyle v. State*, 4 Tex. Cr. App. 253; *Lunn v. State*, 44 Tex. 85; *Simpson v. State*, 10 Tex. Cr. App. 681, 683; *Johnson v. State*, 57 Tex. Cr. App. 308, 122 S. W. 877; *Thompson v. State*, 43 Tex. 268, 271; *Street v. State*, 7 Tex. Cr. App. 5.

Under Pen. Code 1895, art. 867, which provides that, within the meaning of "personal property which may be the subject of theft" are included all domesticated animals or birds, when they are proved to be of any specific value, on a prosecution for the theft of a chicken, failure to prove its value necessitates a reversal of a judgment of conviction. *Hasley v. State*, 94 S. W. 899, 50 Tex. Cr. App. 45.

Larceny of Cattle.—On the trial of an indictment charging the stealing of "one beef, then and there being cattle," of the value of \$10, the value need not be proved. *Laws 1873*, p. 80, *Davis v. State*, 40 Tex. 134.

Valuation in Gross.—Under an in-

dictment charging the theft of 340 pounds of brass of stated gross value, and charging the receiving of the same with knowledge that it was stolen, it was not essential to a conviction that the state prove that the entire amount of three hundred and forty pounds of brass was stolen; there being nothing to show that the brass was not of uniform value. *Smith v. State*, 53 Tex. Cr. App. 170, 109 S. W. 127, following *Moore v. State* (Cr. App.), 24 S. W. 900, distinguishing *Thompson v. State*, 43 Tex. 268.

(4) Currency of United States.

Where the information charged accused with the theft of \$1, current money of the United States, of the value of \$1, the state must prove that the money taken was current money of the United States; that allegation being descriptive. *Johnson v. State*, 58 Tex. Cr. App. 442, 126 S. W. 597; *Early v. State*, 56 Tex. Cr. App. 61, 118 S. W. 1036; *Snelling v. State*, 57 Tex. Cr. App. 416, 123 S. W. 610.

Where an indictment charges the theft of United States silver certificates of a specified value, proof must be made that the certificates were issued by authority from the United States and of their value as alleged. *Simpson v. State*, 10 Tex. Cr. App. 681.

Where an indictment charged theft of 85 cents, lawful current money of the United States of America, the evidence must show that the money stolen was legal tender coin, or currency of the United States, in order to sustain a conviction. *Black v. State*, 79 S. W. 311, 46 Tex. Cr. App. 107.

Where the indictment alleged the larceny of a \$5 gold piece of United States money, the state must not only prove that a \$5 gold piece was stolen, but must show that it was United States money. *Maxey v. State*, 58 Tex. Cr. App. 118, 124 S. W. 927.

(5) Nonconsent of Owner.

In a prosecution for theft the want of the owner's consent to the taking,

must be proved like any other element of the offense. It can not be presumed or inferred, though it may be proved by circumstantial evidence. *Wilson v. State*, 12 Tex. Cr. App. 481; *Garcia v. State*, 26 Tex. 209; *Wilson v. State*, 45 Tex. 76; *McMahon v. State*, 1 Tex. Cr. App. 102; *Welsh v. State*, 3 Tex. Cr. App. 413, 422; *Foster v. State*, 4 Tex. Cr. App. 246; *Trafton v. State*, 5 Tex. Cr. App. 480.

In a prosecution of a son for theft of cotton from his father, it appeared that the father owed the son several bales of cotton out of the crop for labor; that the entire crop was mortgaged, of which fact the son was ignorant; that the mortgagee had taken all of the crop but a few bales; that the only objection to the son's having taken the cotton came from the mortgagee; and that the son disposed of the cotton openly. Held, that the prosecution must prove beyond a reasonable doubt the want of consent on the part of the father to such taking. *Johnson v. State*, 34 Tex. Cr. App. 254, 30 S. W. 228.

General and Special Owner.—

Where, on a trial for theft, the evidence shows that one person owned the property and another had possession of it, the want of consent to the taking of both must be shown, either by the parties themselves or by circumstantial evidence. *Williamson v. State*, 13 Tex. Cr. App. 514; *Schultz v. State*, 20 Tex. Cr. App. 308, 310; *Dresch v. State*, 14 Tex. Cr. App. 175; *Ersine v. State*, 1 Tex. Cr. App. 405; *Bailey v. State*, 18 Tex. Cr. App. 426, 427; *Frazier v. State*, 18 Tex. Cr. App. 434; *Atterberry v. State*, 19 Tex. Cr. App. 401; *Williams v. State*, 19 Tex. Cr. App. 276, 277.

Joint Owners.—It is not necessary to prove nonconsent of a third joint owner to the taking of stolen property, when ownership was alleged in only two joint owners. *Barrett v. State*, 13 Tex. Cr. App. 64, 69.

Where an indictment for cattle theft charged that Fred and John D. were the owners of the cattle alleged to be stolen and the proof showed that they were in possession and control of the same it was not necessary in order to secure a conviction to prove want of consent to the taking by A. D. father of Fred and John D. who was in fact the real owner. *House v. State*, 19 Tex. Cr. App. 227.

Owner a Nonresident.—On a trial for the theft of cattle, the state need not prove that the owner did not consent to the taking, where it appears that he was a nonresident, and that the cattle were in the exclusive control of the owner's local agent. *Wilson v. State*, 38 S. W. 624, 37 Tex. Cr. App. 373.

Consent of an Underclerk.—In a prosecution for theft, where ownership was alleged in a person having charge of the entire freight department of the depot of a railway company, there was no error in the failure of the state to prove the nonconsent of an underclerk who had charge of the particular department from which the property was stolen. *King v. State* (Cr. App.), 100 S. W. 387.

Consent of one other than the agent was a matter of defense. *Wilson v. State*, 38 S. W. 624, 37 Tex. Cr. App. 373.

Wife of Alleged Owner.—Where, under an indictment for the theft of a cow, the evidence shows that it belonged to the wife of the alleged owner, it is not necessary for the state to prove her want of consent to the taking, as that is matter of defense. *Holmes v. State* (Cr. App.), 42 S. W. 979.

c. Evidence Admissible under Pleadings.

No proof can be received as to the theft of any article not charged in the indictment. *Fisher v. State*, 33 Tex. 792, 793.

The Taking.—Under an indictment

charging theft a taking by means of a false pretense may be shown. *Atterberry v. State*, 19 Tex. Cr. App. 401.

The obtaining of property by false pretext, making it theft, under Pen. Code 1895, art. 861, may be proved under an ordinary indictment for theft. *Lewis v. State*, 87 S. W. 831, 48 Tex. Cr. App. 309.

Place of Taking.—Where the indictment charged theft in the county where the accused was found in possession of the stolen property, it is not error to admit testimony tending to show that the property was stolen in another. *Allen v. State*, 4 Tex. Cr. App. 581, 583.

Under an indictment charging that cattle were stolen in a county named, evidence was admissible that the cattle were stolen in another county, where the evidence showed that the cattle stolen were driven into the county named in the indictment. *Warren v. State* (Cr. App.), 105 S. W. 817.

Value of Watch.—Where, in an indictment of a theft of a watch and chain from the person of the owner alleged the aggregate value of the two articles, it is not error to admit evidence of the value of the watch alone. *Bennett v. State*, 16 Tex. Cr. App. 236.

Character of Property.—Where an information alleged that defendant committed the theft of a hat, personal property of the complaining witness, testimony of witnesses, as to the character of the property claimed to be stolen as being personal property, was not prejudicial. *Stepp v. State*, 53 Tex. Cr. App. 158, 109 S. W. 1093.

Inquiry by Grand Jury to Ascertain Owner.—An indictment for theft of one head of cattle, alleging it to be the property of some person to the grand jury unknown, was sufficient to admit proof that the grand jury had made inquiry to ascertain the owner, without such an allegation. *Melton v. State* (Cr. App.), 56 S. W. 67.

Loss of Cattle.—Though an indictment for theft merely described the

property as "one cow" it was proper to permit evidence as to the color and description of the cow alleged to have been stolen. *Johnson v. State*, 1 Tex. Cr. App. 118.

Where an indictment for cattle theft alleges the animals to have been stolen from an unknown owner, testimony that cattle had been lost by certain parties was inadmissible. *Dawson v. State* (Cr. App.), 61 S. W. 489.

Property Obtained by False Pretext.

—Under an indictment for theft charging a fraudulent taking without the owner's consent, the state may prove that the taking was with the owner's consent, but obtained by false pretenses. *Hawkins v. State*, 58 Tex. Cr. App. 407, 126 S. W. 268; *Dow v. State*, 12 Tex. Cr. App. 343; *Morrison v. State*, 17 Tex. Cr. App. 34; *Atterberry v. State*, 19 Tex. Cr. App. 401; *Frank v. State*, 30 Tex. Cr. App. 381, 17 S. W. 936; *Berg v. State*, 2 Tex. Cr. App. 148.

Receipt.—On a trial for stealing a "receipt for money in figures as follows," not alleging from whom the money was received, held that a receipt stating of whom the money was received was admissible, with evidence that it had been altered after the theft, provided the jury be properly instructed on the issue of fact of alteration. *Huddleston v. State*, 11 Tex. Cr. App. 22.

Bank Notes or Other Currency.

Under an indictment for theft from the person charging that the property taken was United States currency, it was competent to prove that either treasury notes, national bank bills, or United States gold or silver certificates were taken. *Dennis v. State* (Cr. App.), 74 S. W. 559.

Selling or Giving Away Hog Meat.

—Evidence by the owner of hogs, with the theft of which defendant was charged, that he had never sold or given a codefendant any hog meat, or authorized him to take the meat, is

inadmissible; defendant not having alleged such fact in defense. *Grant v. State*, 58 S. W. 1026, 42 Tex. Cr. App. 273.

Inventory and Appraisal of Estate.—On trial of B. for theft of a mare, the indictment having laid the ownership in A. as administrator of C., under the inventory of C.'s estate, held, that B. might properly introduce the inventory and appraisal. *Baker v. State*, 11 Tex. Cr. App. 262.

Docket of Examining Magistrate and Bail Bond.—Code Cr. Proc., arts. 314, 315, require an examining magistrate to certify the proceedings had before him, including defendant's bail bond, to the proper court, and require the clerk of such court to deliver such proceedings to the foreman of the next grand jury. An indictment for theft of money charged that it was the property of one D., whose Christian name was to the grand jury unknown. Held, that the docket of the examining magistrate, which recited that the complaint was made by S. W. D., and the bail bond, which recited that defendant had been committed on a complaint charging him with the theft of money from said S. W. D., were admissible to show that the grand jury, by reasonable diligence, might have known D.'s Christian name. *Kimbrough v. State*, 23 Tex. Cr. App. 367, 13 S. W. 218.

2. Variance between Allegations and Proof.

a. In General.

Theft of Corn.—Pen. Code 1895, art. 874, makes the stealing or felonious taking of any growing, standing, or ungathered Indian corn theft, and makes any person who shall feloniously sever or carry away any such corn guilty of theft. Accused was charged in an information with unlawfully and fraudulently stealing from the possession of A. one bushel of corn, of the value of forty cents, and that the offense was committed

in a county named, upon a date specified. The evidence showed that accused sold two bushels of corn for fifty cents a bushel, that the corn at the time was in the field and ungathered, that later the corn was gathered by the purchaser, that the corn belonged to another person than accused, and that the latter was not present when the corn was gathered. Held, that the evidence did not support the indictment. *Carson v. State*, 57 Tex. Cr. App. 30, 121 S. W. 860.

Theft of an Appearance Bond.—

Where an indictment charged theft of an appearance bond by a surety to escape liability thereon, the surety was not guilty under the indictment, unless he took the bond for the purpose alleged. *Counts v. State*, 89 S. W. 972, 48 Tex. Cr. App. 629.

Theft from a House.—An indictment for theft from a house can not be sustained by proof of defendant's intimacy with another person whose hat was found in the building. *Tollett v. State*, 44 Tex. 95.

b. Quantity or Number.

In a prosecution for theft of railroad tickets the state was not bound to prove the exact number or value of the tickets stolen as alleged in the indictment. *Kush v. State*, 77 S. W. 790, 45 Tex. Cr. App. 451; *Alderson v. State*, 2 Tex. Cr. App. 10.

There is no variance though the evidence does not show that all the money alleged to have been stolen was stolen. *Pones v. State*, 63 S. W. 1021, 43 Tex. Cr. App. 201; *Green v. State*, 48 Tex. Cr. App. 80, 86 S. W. 332; *Jones v. State* (Cr. App.), 44 S. W. 162.

An indictment for theft from the person which charges the taking of several articles supports a conviction based on a taking of any one of the articles. *Grissom v. State*, 49 S. W. 93, 40 Tex. Cr. App. 146.

Though the indictment charges theft of two animals, evidence establishing

theft of but one warrants a verdict of guilty. *Alderson v. State*, 2 Tex. Cr. App. 10.

c. Place and Time of Taking.

Theft from a House.—An indictment which charges theft from a house, under Pasch. Dig., art. 2409, is not sustained by proof of theft from a tent. *Callahan v. State*, 41 Tex. 43.

An indictment for theft from a house can not be sustained by proof that the stolen property was taken while hanging at and outside of the store door, on a piece of wood nailed to the door, facing and projecting towards the street. *Martinez v. State*, 41 Tex. 126.

Where property is stolen in one county and carried into another, an indictment alleging the taking in the latter county is sustained by proof that it was taken in the former county and brought into the county of the prosecution. *Rose v. State* (Cr. App.), 65 S. W. 911.

Where an animal is stolen in one county, and carried into or through another or other counties, either county has jurisdiction, so far as the venue is concerned, and, though the indictment charges the taking in a county other than that in which it occurred, proof is admissible in said county to show the taking in the original county. *Homer v. State* (Cr. App.), 65 S. W. 371.

Time of Taking.—An indictment found in September, 1875, charged the theft of a plow in May, 1875. The statement of facts alleged that the owner testified that he had had such a plow in the fall of 1876, and it was missed in 1877, and that he had seen it within three weeks of such time. Held, that the conviction could not be supported. *McCoy v. State*, 3 Tex. Cr. App. 399.

The fact that a theft was committed after the time charged is no ground

for an acquittal. *Green v. State*, 43 Tex. Cr. App. 80, 86 S. W. 332.

d. Description of Property.

(1) In General.

The descriptive averments of an indictment must be proved as alleged. *Rogers v. State*, 58 Tex. Cr. App. 146, 124 S. W. 921; *Randell v. State*, 62 Tex. Cr. App. 524, 138 S. W. 118.

An indictment for the theft of a sack of walnuts will not be supported by proof that it was a sack of mixed nuts. *Poston v. State*, 58 Tex. Cr. App. 583, 126 S. W. 1148.

A variance between a complaint charging the theft of a "steel trap" and an information stating that the article stolen was a "steel trap" is fatal to a conviction. *Snoga v. State*, 80 S. W. 625, 46 Tex. Cr. App. 419.

An allegation of theft of a pair of "buckskin gloves" is not supported by proof of theft of a pair of sheepskin gloves. *McGee v. State*, 4 Tex. Cr. App. 625.

(2) Horses.

It has frequently been held by our supreme court that an indictment for stealing a "horse," which, under our statute (Pasc. Dig., art. 2409), means an unaltered horse or stallion, will not be sustained by proof of theft of a mare or gelding, and vice versa. *Jordt v. State*, 31 Tex. 571; *Swindel v. State*, 32 Tex. 102; *Pigg v. State*, 43 Tex. 108; *Keesee v. State*, 1 Tex. Cr. App. 298; *Banks v. State*, 28 Tex. 644; *Lunsford v. State*, 1 Tex. Cr. App. 448; *Brisco v. State*, 4 Tex. Cr. App. 219; *Marshall v. State*, 31 Tex. 471; *Gibbs v. State*, 34 Tex. 134; *Person v. State*, 3 Tex. Cr. App. 240; *Johnson v. State*, 16 Tex. Cr. App. 402; *Mathews v. State*, 44 Tex. 376; *Hampton v. State*, 5 Tex. Cr. App. 463; *Warrington v. State*, 1 Tex. Cr. App. 168.

And this rule would apply to a charge of theft of a "horse" at a date prior to this enactment, although the trial was subsequent thereto. *Valesco v. State*, 9 Tex. Cr. App. 76.

The prosecution being for the larceny of a horse, the state was permitted to prove that the animal stolen was a mare. Held no variance. *Davis v. State*, 23 Tex. Cr. App. 210, 4 S. W. 590.

There is a fatal variance between an indictment charging the theft of a gelding branded "P. A. R.," and proof of theft of a gelding branded "P. R. A." *Ranjel v. State*, 1 Tex. Cr. App. 461.

An indictment for larceny of a gelding is not supported by proof of theft of a ridgeling, even though such half-castrated horse be proved to appear and be regarded as wholly castrated. *Brisco v. State*, 4 Tex. Cr. App. 219.

(3) Cattle.

Where the indictment describes the animals alleged to have been stolen as "work steers," to sustain conviction, the evidence should show that they were "work steers." *Gray v. State*, 11 Tex. Cr. App. 411.

There is no variance between an indictment for stealing a "beef" and evidence that it was a "cow." *Smith v. State*, 24 Tex. Cr. App. 290, 6 S. W. 40.

Proof of theft of a "steer" will not sustain an indictment for stealing a "beef steer;" and this, although the word "beef" was superfluous. *Cameron v. State*, 9 Tex. Cr. App. 332.

Indictment described a stolen ox as "one red and white spotted ox, branded on the left hip thus:" "J A G;" whereas in the evidence it was described as a "red and white spotted steer, branded on the left thigh with the letters J A G, connected." Held, not a material variance, and this case distinguished from *Ranjel v. State*, 1 Tex. Cr. App. 461; *Stoneham v. State*, 3 Tex. Cr. App. 594. See, also, *Wolf v. State*, 4 Tex. Cr. App. 332.

An indictment for stealing a "white, black, and speckled-blue yearling" is not sustained by proof of taking a "white and black speckled" heifer, or a "white and red and frosty-colored

heifer." *Courtney v. State*, 3 Tex. Cr. App. 257.

(4) Swine.

An indictment charging the theft of hogs means live hogs and is not sustained by proof that the stolen property was pork. *Ballow v. State*, 42 Tex. Cr. App. 263, 58 S. W. 1023.

Where an indictment charges the stealing of a domestic animal, without alleging whether or not it was alive at the time, the law presumes the intention is to allege the theft of a living animal, and the proof must comply therewith. *Ballow v. State*, 42 Tex. Cr. App. 261, 58 S. W. 1022.

Where an indictment charged a theft of hogs, and the evidence showed that the hogs were dead when brought into the trial county, there was a fatal variance, since the indictment charged the theft of live hogs, and the evidence showed no more than a larceny of pork. *Grant v. State*, 58 S. W. 1026, 42 Tex. Cr. App. 273.

(5) Money.

Where an indictment charged the taking of \$20 in money and \$30 in current money, an instruction that, if proved that the two amounts were not taken, or \$20 in currency and \$30 in silver, respectively, were taken, defendant should be acquitted, was correct. *Braxton v. State*, 50 Tex. Cr. App. 632, 99 S. W. 994.

An indictment charging theft from the person of "two dollars in money, lawful currency of the United States of America and of the value of two dollars," was sustained by proof of the theft of two dollars in silver; the term "currency," or "lawful currency," being sufficiently broad to include gold and silver, as well as paper money. *Britain v. State*, 52 Tex. Cr. App. 169, 105 S. W. 817.

Under an information for theft, describing the property stolen as "lawful money of the United States," proof of a theft of silver certificates or national bank notes was a variance. *Perry v.*

State, 61 S. W. 400, 42 Tex. Cr. App. 540.

An indictment charging the taking of "ten cents in the money of the United States of America, of the value of ten cents," is sustained, both as to description and value, by proof of a taking of "ten cents in silver." *Me-near v. State*, 30 Tex. Cr. App. 475, 17 S. W. 1082.

Under the statutes pertaining to theft, in which "money" is used as meaning legal tender coin or legal tender currency of the United States, an indictment charging the stealing of "\$20 in money" is not sustained by evidence of the stealing of a \$20 bill, or a \$20 bill American money. *Otero v. State*, 30 Tex. Cr. App. 450, 17 S. W. 1081.

An indictment for theft of money is not supported by proof of theft of checks for money. *Lancaster v. State*, 9 Tex. Cr. App. 393.

The descriptive averments of an indictment must be proved as they are alleged; and in a prosecution for theft, where the property taken was described in the indictment as current money of the United States of America, it was necessary to prove that it was such, and the testimony of the loser that it consisted of certain coins was insufficient. *Rogers v. State*, 58 Tex. Cr. App. 146, 124 S. W. 921.

Under Rev. St. U. S. §§ 3587, 3515 [U. S. Comp. St. 1901, pp. 2401, 2349], providing that the minor coins of the United States shall be legal tender at their nominal value for any amount, not exceeding twenty-five cents in any one payment, and that such minor coins shall consist of five-cent pieces, three-cent pieces, and one-cent pieces, five-cent pieces are legal tender, so that proof that defendant stole eighty-five cents in United States five-cent pieces was sufficient to sustain an indictment charging the theft of eighty-five cents lawful current money of the

United States of America. *Black v. State*, 79 S. W. 311, 46 Tex. Cr. App. 107.

The allegation in an indictment for larceny describing the property stolen as "one five-dollar bill, current money of the United States, of the value of five dollars," is not proven by evidence that the prosecutor did not know whether the money stolen was a national bank note, a treasury note, or a silver certificate, but knew that it was a five-dollar bill, and was good American money, as "current money" means that which by act of congress, whether coin or currency, is made legal tender. *Summers v. State*, 76 S. W. 762, 45 Tex. Cr. App. 423. See, also, *Otero v. State*, 30 Tex. Cr. App. 450, 17 S. W. 1081; *Lewis v. State*, 29 Tex. Cr. App. 140, 12 S. W. 736; *Thompson v. State*, 35 Tex. Cr. App. 511, 34 S. W. 629; *Perry v. State*, 42 Tex. Cr. App. 540, 61 S. W. 400; *White v. State* (Cr. App.), 57 S. W. 100.

Under an indictment charging the theft of a number of \$20 bills in United States currency, the admission of evidence that the bills consisted of one \$20 gold certificate, and that the other bills were \$20 bills, but witness could not state whether they were treasury notes, silver certificates, or national bank bills, was not a variance because failing to show that the bills were legal tender. *Nubel v. State* (Cr. App.), 65 S. W. 374.

An indictment charging the theft of seven dollars in silver is sufficient to charge the theft of five silver dollars and two dollars in minor coin. *Edwards v. State* (Cr. App.), 68 S. W. 795.

Where an indictment charges theft of bills "in the currency of the United States of America," or theft of "current money of the United States of America," giving the denomination and value thereof, the allegation may be proved by theft of United States legal treasury notes, or of United States

demand notes, or United States gold or silver certificates, or of national bank bills of the United States. *Berry v. State*, 80 S. W. 630, 46 Tex. Cr. App. 420.

"*Otero v. State*, 30 Tex. Cr. App. 450, 17 S. W. 1081; *Perry v. State*, 42 Tex. Cr. App. 540, 61 S. W. 400. However, the decisions on this subject have not been uniform. In *Kimbrough v. State*, 28 Tex. Cr. App. 367, 13 S. W. 218, it was held that United States paper currency embraces every character of paper currency issued and authorized to be issued as a medium of exchange and circulated as money under the authority of the laws of the United States, and included national bank bills or United States gold or silver certificates. And this view appears to have been followed in *Dennis v. State* (Cr. App.), 74 S. W. 559, and other cases. In *Summers v. State*, 45 Tex. Cr. App. 423, 76 S. W. 762, another view was taken. There it was held that the indictment charged theft of one \$5 bill, current money of the United States of the value of \$5, only included United States treasury notes; that is, legal tender notes and demand notes of the United States. This case followed the line of decisions first above noted, and is not in harmony with *Kimbrough's* and *Dennis' Cases* and others." *Berry v. State*, 46 Tex. Cr. App. 420, 80 S. W. 630.

An averment of the theft of "United States paper currency money of a certain value" is sustained by proof that the stolen property was either United States treasury notes, or national bank notes, or United States gold or silver certificates. *Kimbrough v. State*, 28 Tex. Cr. App. 367, 13 S. W. 218.

It is not a variance that the indictment described the stolen bill as of the "Chatam National Bank," while the bill proved to have been stolen was of the "Chatham National Bank." *Roth v. State*, 10 Tex. Cr. App. 27.

Proof of stealing "a five dollar bill,

of the value of five dollars," held not to sustain a charge of stealing "a certain United States currency note, commonly called a greenback bill, of the value and denomination of five dollars." *Statum v. State*, 9 Tex. Cr. App. 273.

Where an indictment charged the theft of \$80 in money, the same being paper currency, money of the United States, and the money shown to have been stolen was one \$20 gold certificate, one \$20 bill issued by a national bank of Chicago, one \$5 bill, and one \$10 national bank bill, there was no variance. *Anglin v. State*, 52 Tex. Cr. App. 475, 107 S. W. 835.

An indictment charging accused with stealing a pocketbook and \$30 in money, "said money being then and there good and lawful money of the United States," was not sustained by proof of the taking of a \$10 bill and two \$5 bills, without showing that it was paper money of any character issued under authority of the United States. *Snelling v. State*, 57 Tex. Cr. App. 416, 123 S. W. 610. See, also, *Early v. State*, 56 Tex. Cr. App. 61, 118 S. W. 1036.

Where an indictment charges the theft of a bank bill, and the evidence shows the theft of a bank note, there is no variance. *Roth v. State*, 10 Tex. Cr. App. 27.

Note.—A complaint and information for theft of a promissory note of the value of \$31.80, not alleging by whom the note was executed, its amount, or face value, or the date of its execution or maturity, were insufficient. *Calentine v. State*, 94 S. W. 1061, 50 Tex. Cr. App. 154.

Check.—Evidence held to show that a check charged to have been stolen was drawn on the Farmers' & Merchants' National Bank of Farmersville as alleged in the indictment; the words "McKinney, Texas," on a blank check of another bank used in drawing the check, having been intended to be

erased. *Worsham v. State*, 56 Tex. Cr. App. 253, 120 S. W. 439.

e. Ownership and Possession.

(1) In General.

It is a general rule with regard to indictments for theft that the allegation of the ownership of the stolen property, being descriptive of the offense, must be proved as alleged. *Young v. State*, 30 Tex. Cr. App. 308, 17 S. W. 413; *Ritcher v. State*, 38 Tex. 643; *Robinson v. State*, 5 Tex. Cr. App. 519; *Fletcher v. State*, 16 Tex. Cr. App. 635, 641; *Ryan v. State*, 22 Tex. Cr. App. 699, 703, 3 S. W. 547; *Willis v. State*, 24 Tex. Cr. App. 487, 6 S. W. 200; *Taylor v. State*, 27 Tex. Cr. App. 44, 11 S. W. 35; *Stone v. State*, 27 Tex. Cr. App. 576, 11 S. W. 637; *Phillips v. State* (Cr. App.), 42 S. W. 557; *Isaacs v. State*, 30 Tex. 450; *Clark v. State*, 29 Tex. Cr. App. 437, 16 S. W. 171; *Taylor v. State*, 62 Tex. Cr. App. 611, 138 S. W. 615.

In a prosecution for theft, held that there was no variance between the allegation of ownership and the evidence to support it. *McMullen v. State* (Cr. App.), 59 S. W. 891; *Hernandez v. State*, 43 Tex. Cr. App. 80, 63 S. W. 320.

Under an information for stealing growing corn, alleging the ownership of the corn as the property of A. growing and standing in the field of W., it is not a variance that W. was not the owner but was a tenant who sublet to A. *Williams v. State* (Cr. App.), 98 S. W. 246.

Mistake in Surname.—That the evidence showed that the owner's surname was different from that alleged in the information in a prosecution for theft would be a variance. *Johnson v. State*, 58 Tex. Cr. App. 442, 126 S. W. 597.

An indictment charging the theft of a horse belonging to "J. Alderete" was sustained by proof that the property belonged to "Josianca Alderete." Frank-

lin v. State, 39 S. W. 680, 37 Tex. Cr. App. 312.

Where an indictment for theft of wire laid ownership in G., and on the trial it appeared that G.'s father, after dividing his land equally between his two sons and himself, without their knowledge, ordered wire, intending to inclose the whole tract, and have his sons pay their proportionate share, and that a part of the wire was hauled and placed on the boundary line of G.'s land, and stolen before it could be utilized, no possession or ownership was shown in G., and the variance between the ownership alleged and that proved was fatal. *Pitts v. State* (Cr. App.), 22 S. W. 410.

Name by Which Usually Known.—Where an indictment for theft alleges the name of the property owner to be McCasling, and the evidence showed him to be as well known by that name as by his true name, McCasland, there is no fatal variance. *Bird v. State*, 16 Tex. Cr. App. 528.

Mistake in Middle Initial.—An indictment charging an unlawful taking from the possession of "A. T. Gilbert," property of the said "A. P. Gilbert," is not fatally defective, since such error is immaterial. *Olibare v. State* (Cr. App.), 48 S. W. 69. See, also, *State v. Black*, 31 Tex. 560; *Stockton v. State*, 25 Tex. 772; *State v. Manning*, 14 Tex. 402; *Steen v. State*, 27 Tex. 86; *Dodd v. State*, 2 Tex. Cr. App. 58; *Delphino v. State*, 11 Tex. Cr. App. 30; *English v. State*, 30 Tex. Cr. App. 470, 18 S. W. 94; *Beaumont v. Dallas*, 34 Tex. Cr. App. 68, 29 S. W. 157; *Dixon v. State*, 2 Tex. Cr. App. 530, 537; *Brown v. State*, 32 Tex. 124, 125.

Omission of Word "Junior."—An indictment alleged that the horse stolen was the property of S. R. and J. R. The evidence showed that the horse was owned by two brothers with such names, and also that their father's name was S. R. Held, that there was no presumption that the S. R. named

in the indictment meant the father from the fact that the word "junior" was not attached to his name, thereby constituting a variance. *Windom v. State*, 72 S. W. 193, 44 Tex. Cr. App. 514.

An indictment for theft charged that the property belonged to M. and another. The proof showed that there were two M.'s and that the M. intended was M. "Jr." Held no variance. *Wesley v. State*, 73 S. W. 960, 45 Tex. Cr. App. 64.

Alleging Different Owners in Different Counts.—Where an indictment for theft in one count alleges the ownership in O. and in another count in H., an instruction that, if the jury find the ownership in either, they may find it proved as alleged, is proper. *Roberts v. State*, 70 S. W. 423, 44 Tex. Cr. App. 267.

Property Won at Gaming.—Where the winner of money at cards purchases the loser's horse with it, and subsequently rewins in the further progress of the game the money so paid, he has sufficient ownership of the horse to support an allegation of ownership in an indictment against the loser for stealing it. *Mathews v. State*, 9 Tex. Cr. App. 138.

(2) Ownership Unknown.

Though an indictment for theft of a horse alleges it to belong to a person unknown to the grand jury, there is no variance because the evidence at the trial shows the name of such alleged owner. *Jorasco v. State*, 8 Tex. Cr. App. 540.

On the trial of an indictment for theft alleging that the thing stolen was the property of a person to the grand jurors unknown, if the evidence shows that by proper inquiry of the witnesses before them they could have ascertained the name, a conviction can not be sustained. *Jorasco v. State*, 6 Tex. Cr. App. 238.

Where one is indicted for the theft of a horse from an unknown owner, it

is proper to allege in the indictment that the horse was an estray, and had no known owner; and the fact that the accused proved as a defense that he bought the horse from another person does not authorize an acquittal on the ground of variance. *Baxter v. State* (Cr. App.), 43 S. W. 87.

A prosecution can not be maintained on an indictment charging the theft of property of an unknown owner, where the evidence shows that by reasonable diligence the county attorney could have ascertained the owner of the property. *Hellums v. State*, 55 Tex. Cr. App. 356, 116 S. W. 590.

(3) Joint Ownership.

Under Code Cr. Proc. 1895, art. 445, providing that when property stolen is owned in common, etc., ownership may be charged to be in all or either of the persons, there was no fatal variance between an allegation that property stolen belonged to J. and proof that it belonged to J. and E., as partners. *Davis v. State* (Cr. App.), 140 S. W. 349. See *Coates v. State*, 31 Tex. Cr. App. 257, 20 S. W. 585; *Terry v. State*, 15 Tex. Cr. App. 66, and *Atterberry v. State*, 19 Tex. Cr. App. 401; *Pitts v. State* (Cr. App.), 14 S. W. 1014; *Duncan v. State*, 49 Tex. Cr. App. 150, 91 S. W. 572; *Cogshall v. State* (Cr. App.), 58 S. W. 1011; *Tidwell v. State* (Cr. App.), 45 S. W. 1015; *Scoville v. State* (Cr. App.), 81 S. W. 717; *Clark v. State*, 26 Tex. Cr. App. 486, 9 S. W. 767; *Barrett v. State*, 18 Tex. Cr. App. 64.

See *Brown v. State*, 35 Tex. 691, decided before the statute holding that where an indictment for theft of horses laid the ownership in two persons and the evidence showed ownership in one there was a variance.

Code Cr. Proc. 1895, art. 445, authorizes an indictment for theft, where the property is owned in common or jointly by two or more persons, to allege ownership in all or either of

them. Held that, where an indictment alleged the property to have been in possession of one, proof that it was in possession of himself and another jointly was not a variance, even though the latter was a mere servant of the former. *Duncan v. State*, 91 S. W. 572, 49 Tex. Cr. App. 150.

Code Cr. Proc. 1895, art. 445, authorizes an indictment for theft where the property is owned in common or jointly by two or more persons to allege ownership in all or either of them. Held that, where an indictment charged that the animal stolen was taken from the possession of a certain person, and the evidence showed that the animal belonged to him and was kept on a place belonging to him but leased to another, the animal being looked after by both the landlord and tenant, there was no variance. *Bailey v. State*, 50 Tex. Cr. App. 398, 97 S. W. 694.

Evidence, in a prosecution for theft, that prosecutor was engaged in a game of poker, having placed \$45 on the table, when a friend, seeing his hand, told him that he would back his hand for any amount, and thereupon placed \$78 on the table, which was necessary to meet a "raise" made by prosecutor's opponent, does not sustain an indictment which alleges the money as the property of the two, since the money was either loaned to prosecutor or each was the separate owner of his distinctive share. *Hernandez v. State*, 63 S. W. 320, 43 Tex. Cr. App. 80.

(4) Property of Husbands and Wives.

Under Paschal's Dig., art. 4641, giving the husband entire management of the wife's separate property during marriage, if an indictment had alleged that the property stolen belonged to the husband and the proof had shown it to be either the separate property of the wife or the community property of the husband and wife, the variance would not be fatal. *Wilson v. State*,

3 Tex. Cr. App. 206; *Sinclair v. State*, 34 Tex. Cr. App. 453, 30 S. W. 1070.

An indictment charging the property stolen to have been owned by W., and evidence that it was owned by his wife and child, does not constitute a variance, since Code Cr. Proc. 1895, art. 445, allows the ownership of property of a married woman to be alleged in her or in her husband. *McGee v. State* (Cr. App.), 46 S. W. 930.

An indictment charging "stealing from person" is not sustained by proof that it was delivered to wife and wrongfully converted by husband. *De Gaultie v. State*, 31 Tex. 32, 36.

(5) Property in Possession of Bailee or Agent.

An indictment for theft of money of D. and W. is supported by proof that they held the money as partners on deposit for the owners. *Skipworth v. State*, 8 Tex. Cr. App. 135.

Under an indictment for the conversion of a horse alleged to be the property of M. by virtue of a contract of hiring made with M., an instruction that the jury might convict defendant if he converted the horse without M.'s consent, though the horse in fact belonged to another, is not erroneous, if the evidence showed that the horse was in the exclusive care and control of M. as the agent for the owner. *St. Clair v. State* (Cr. App.), 64 S. W. 238.

Where in a prosecution for larceny the indictment alleged that the property was taken from the possession of an agent of a steamship company, but the evidence proved that it was taken from the vessel and had never passed into the possession of the agent, there was a fatal variance between the allegation and the proof. *Radford v. State*, 35 Tex. 15.

Where an indictment for theft alleged ownership of the property in a person having charge of the entire freight department at the depot of a railway company, proof that an un-

derclerk was in charge of a particular department from which the property was stolen does not constitute a variance. *King v. State* (Cr. App.), 100 S. W. 387.

An indictment for theft alleged the possession and ownership of the property in an individual. The evidence showed that the property was a part of the merchandize of a corporation, of which the individual owned a majority of the stock and was the active manager and had practically the exclusive control. He was not at the store at the time of the taking, having been away for about two weeks, but arrived a few minutes afterwards. Held, that there was no variance. *Price v. State*, 55 Tex. Cr. App. 157, 115 S. W. 586.

Proof that H. conducted a store for M. and was in possession and entitled thereto supports an indictment laying the ownership of money stolen from the store in H. *Bagley v. State*, 3 Tex. Cr. App. 163. See, also, *Langford v. State*, 8 Tex. 115; *Moseley v. State*, 42 Tex. 78; *Henry v. State*, 45 Tex. 84; *Thomas v. State*, 1 Tex. Cr. App. 289.

(6) Possession and Custody.

In General.—Where property having a general owner is in the possession of a special owner, and the indictment charges both property and possession in the general owner, it is not sufficient to show a taking from the special owner. *Littleton v. State*, 20 Tex. Cr. App. 168. See, also, *Bailey v. State*, 18 Tex. Cr. App. 426; *Frazier v. State*, 18 Tex. Cr. App. 434; *Bailey v. State*, 20 Tex. Cr. App. 68; *Briggs v. State*, 20 Tex. Cr. App. 106; *Johnson v. State*, 4 Tex. Cr. App. 594; *Hall v. State*, 22 Tex. Cr. App. 632, 3 S. W. 338; *Conner v. State*, 24 Tex. Cr. App. 245, 6 S. W. 138; *Tinney v. State*, 24 Tex. Cr. App. 112, 5 S. W. 831; *Alexander v. State*, 24 Tex. Cr. App. 126, 5 S. W. 840; *Long v. State*, 39 Tex. Cr. App. 461, 46 S. W. 821; *Case v. State*, 12 Tex. Cr. App. 228; *Coleburn v. State*, 61 Tex. Cr.

App. 26, 133 S. W. 882; *Williams v. State*, 26 Tex. Cr. App. 131, 9 S. W. 357; *Ganoway v. State* (Cr. App.), 21 S. W. 46; *Owens v. State*, 28 Tex. Cr. App. 122, 12 S. W. 506; *Bonner v. State*, 57 Tex. Cr. App. 195, 125 S. W. 22; *Honea v. State*, 56 Tex. Cr. App. 278, 119 S. W. 851; *Bryan v. State*, 54 Tex. Cr. App. 59, 111 S. W. 1035.

Where the evidence shows that the stolen property was taken from the possession of P., a conviction under a count which alleges ownership and possession in C. can not stand, though another count alleges possession in P. *Dawson v. State* (Cr. App.), 24 S. W. 414.

Issue of Special Ownership Not Raised.—On a prosecution for stealing a yearling, the evidence showed that the animal came into possession of D. about the time it was missed by B.; it mingled with D.'s cattle, and remained with them until claimed by defendant as his property. Held, that this proof was not at variance with the indictment alleging that B. was the owner, as it did not raise the issue of special ownership. *Denton v. State* (Cr. App.), 69 S. W. 142. See, also, *Frazier v. State*, 18 Tex. Cr. App. 434; *Merrinweather v. State*, 33 Tex. 789; *West v. State*, 6 Tex. Cr. App. 485; *Graves v. State* (Cr. App.), 42 S. W. 300.

The fact that C., the bailee of an animal, placed it in S.'s pasture, from which it was stolen, and asked permission for it to remain there until he could get it, and that S., took no care or control thereof, does not place the custody of the animal in S., so as to make him a special owner, and thereby vitiate an indictment charging the defendant with taking the animal from the possession of C. *Willis v. State* (Cr. App.), 44 S. W. 826.

Person in Possession Holding Same as Lost Property.—In a prosecution for horse theft, proof that defendant obtained the horse by fraud from L., who had taken him up as an estray, without

any known owner in the community, constituted a fatal variance from the indictment charging the ownership and possession of the horse to be in D., the real owner, instead of L. *Williams v. State*, 84 S. W. 829, 47 Tex. Cr. App. 536. See, also, *Alexander v. State*, 24 Tex. Cr. App. 126, 5 S. W. 840; *Williams v. State*, 26 Tex. Cr. App. 131, 9 S. W. 357; *Arcia v. State*, 28 Tex. Cr. App. 198, 12 S. W. 599; *Otero v. State*, 30 Tex. Cr. App. 450, 17 S. W. 1081.

Pen. Code, art. 724, provides that theft is the fraudulent taking of personal property of another from his possession, or the possession of one holding it for him. Article 729 provides that possession is constituted by "exercise of actual control, care, or management of the property." D. lost a horse which was taken up by H., who staked him out in his field and fed him. The horse was stolen the next night. Defendant was indicted for the theft of the horse, which the indictment alleged was taken from the possession of D. Held, that there was a fatal variance between the allegation and the proof as to the person from whose possession the horse was taken. *Tinney v. State*, 24 Tex. Cr. App. 112, 5 S. W. 831.

Under an indictment for the theft of an animal from a certain person, a conviction can not be had on proof that the person named in the indictment was the owner of the animal, and that it had strayed from him, and had been taken possession of by a third person and put in his lot, from whom accused fraudulently procured it. *Williams v. State* (Cr. App.), 51 S. W. 904.

Possession of Servant as Possession of Master.—Possession of the servant is possession of the master, and proof that the property was taken from the possession of the servant will support the allegation that it was taken from the possession of the master. *Clark v. State*, 23 Tex. Cr. App. 612, 5 S. W.

178. See, also, *Willis v. State* (Cr. App.), 44 S. W. 826; *Livingston v. State*, 38 Tex. Cr. App. 535, 43 S. W. 1008; *Roeder v. State*, 39 Tex. Cr. App. 199, 45 S. W. 570; *Graves v. State* (Cr. App.), 42 S. W. 300.

Under an indictment for larceny, laying the ownership and possession of the property in S., there is no variance if S. owned the property, and the person from whom it was taken was his servant. *Phillips v. State* (Cr. App.), 42 S. W. 557.

Copartnership.—An indictment for theft, which alleges a joint ownership and possession of three persons, a copartnership, is not sustained by proof of ownership and possession by two of such persons, and that the third had neither the possession nor a part ownership. *Hardeman v. State*, 58 Tex. Cr. App. 51, 124 S. W. 632.

Where an indictment for theft charged that the property stolen belonged to three named parties, and that it was taken from their possession without their consent, and the proof showed that it belonged solely to a firm composed of two of such persons, the third one being dead when the offense was alleged to have been committed, there was a fatal variance. *Franklin v. State*, 53 Tex. Cr. App. 547, 110 S. W. 909; *Cohen v. State*, 20 Tex. Cr. App. 224; *Aldrich v. State*, 29 Tex. Cr. App. 394, 16 S. W. 251; *Neely v. State*, 32 Tex. Cr. App. 370, 23 S. W. 789; *Hernandez v. State*, 43 Tex. Cr. App. 80, 63 S. W. 320.

Instances Held Not a Variance.—Testimony of a prosecuting witness, in a prosecution for theft of a bicycle, that he loaned his brother the bicycle temporarily, and on the night his brother had possession of it it was stolen, is not a variance from the allegations of the indictment to the effect that the bicycle was in possession of the prosecuting witness. *Russell v. State*, 55 Tex. Cr. App. 330, 116 S. W. 573.

The indictment for the theft of a bale of cotton laid the possession in the owner. The proof showed that the owner took the cotton to a gin to be ginned and bailed, and that after this was done it was put in the gin yard with other cotton; that the owner took it from there, and removed it some 50 yards from the gin house. Held, that there was no variance between the allegation and the proof. *Doss v. State*, 28 Tex. Cr. App. 506, 13 S. W. 788.

An information for theft charged that the property was taken under the possession of a certain person, while the proof showed that the property was owned by a company, but that such person had the control, care, and management of the company's property. Held, that there was no variance. *Kelley v. State*, 56 Tex. Cr. App. 516, 120 S. W. 877.

An indictment for the theft of an animal alleged possession in W. The proof showed that W. had temporarily gone away, leaving the animal on the range, and that he had requested his father to look after it, which he did, but allowing it to remain on the range. Held, that the indictment properly alleged the possession in W.; the father having no special ownership in the animal. *Parks v. State* (Cr. App.), 89 S. W. 1064.

Evidence that a guest at a hotel left his grip in the office, when no one was present, from which defendant stole an article, sustains an allegation of the indictment that the property was in the guest's possession. *Odell v. State*, 70 S. W. 964, 44 Tex. Cr. App. 307.

There is no variance between an allegation that property of a guest of a hotel was left in the possession of the proprietor and evidence that it was left in a grip in the office, in the possession of the proprietor's son, who looked after the baggage of guests.

Odeil v. State, 70 S. W. 964, 44 Tex. Cr. App. 307.

f. Value.

That the alleged value of an animal stolen was fifteen dollars while the proved value was twelve or fifteen dollars is not a material variance. *Hart v. State*, 14 Tex. Cr. App. 657.

In a prosecution for theft the information charged the theft of two hundred pounds of cotton of the aggregate value of six dollars and the proof showed the theft of seventy-five pounds of the aggregate value of three dollars. Held, that inasmuch as the information and conviction were for a misdemeanor an objection that there was a fatal variance between the proof and the allegation was not well taken, though the rule would be otherwise if the value of the property stolen could affect the grade or punishment of the offense. *Duren v. State*, 15 Tex. Cr. App. 624.

In *Duren v. State*, 15 Tex. Cr. App. 624, the indictment charged theft of two hundred pounds of seed cotton, of the aggregate value of \$6, and it was contended that the proof must correspond precisely with this allegation. The evidence showed the theft of only seventy-five pounds of cotton, of the value of only \$3. Judge Willson, delivering the opinion of the court, said: "If this were a case in which the value of the property could affect the grade or punishment of the offense, we would hold this position to be well taken. Thus, if the indictment had charged the theft of several articles of property, of an aggregate value of more than \$20, and the evidence had established the theft of only a portion of the articles, a conviction upon such a state of proof of a felony could not be maintained, because such proof would leave it uncertain as to whether the offense was a misdemeanor or a felony." Citing *Thompson v. State*, 43 Tex. 268; *Ware*

v. State, 2 Tex. Cr. App. 547, and *Doyle v. State*, 4 Tex. Cr. App. 253. It is further stated, however, the value of the property could have nothing to do with either the grade or punishment of the offense; the reason being that it was a misdemeanor, the question of felony not being involved. But in *Moore v. State* (Cr. App.), 24 S. W. 900, the court said: "It is insisted by appellant that as the indictment alleged the theft of eight hundred and fifty pounds of cotton of the aggregate value of \$25, proof of the theft of a less quantity can not sustain a conviction; that the proof must correspond precisely with the allegation. We do not agree to that proposition in this character of case. While it is true that where the indictment charges various articles of obviously different values, and alleges the aggregate value of the whole, and not the separate value of each article, proof that only some of the articles alleged to be taken were so taken will not sustain a conviction; otherwise, you will have a person convicted of theft of an article of which the indictment shows no value. *Thompson v. State*, 43 Tex. 268. But such reasoning has no application where the property alleged to be stolen is of uniform value, or is all of the same kind or character, as cotton in bulk, and where it is a simple calculation to ascertain the value per pound." *Smith v. State*, 53 Tex. Cr. App. 170, 109 S. W. 127.

XIII. Evidence.

A. PRESUMPTIONS AND BURDEN OF PROOF.

1. Presumptions.

To convict a person of theft for converting borrowed property, conversion must be proved, it can not be presumed from mere failure to return the property. *White v. State*, 11 Tex. 769, 773.

Animals Running on Accustomed Range.—On the trial of one indicted,

under Act Nov. 12, 1866, for unlawfully removing cattle, belonging to some person unknown, from their accustomed range, a prima facie case of guilt is established upon proof that the cattle removed were estrays, or belonged to or were controlled by some other person. *Wills v. State*, 40 Tex. 69.

On the trial of one indicted, under Act Nov. 12, 1866, for unlawfully removing cattle from their range, where it appears that the cattle removed were estrays, no presumption can arise that the accused was the owner from the mere fact of his possession. *Wills v. State*, 40 Tex. 69.

A defendant charged with removing cattle from their accustomed range, under Pasch. Dig., art. 6549, may show that he purchased them from one who represented himself as agent of the owner of cattle of the same road brand, which had strayed from the herd while passing through the county, for the purpose of rebutting the presumption of felonious intent arising from defendant's possession; and such evidence is admissible, though the defendant may not be able to show a written bill of sale, acknowledged, certified, and recorded, to the alleged owner of the herd, for the cattle, or cattle of the same brand. *Smith v. State*, 41 Tex. 168.

2. Burden of Proof.

a. In General.

In a prosecution for theft from the person, the indictment alleged that defendant privately took "from the person and possession" of P. the property mentioned "without the consent and without the knowledge" of P. Held, that it was incumbent on the state to prove that the property was taken "without the knowledge" of P. *McLin v. State*, 29 Tex. Cr. App. 171, 15 S. W. 600.

Consent of Third Person.—Defendant in a prosecution for theft who relies upon the consent of a third person to his taking, must prove such fact to re-

but the presumption of a guilty intent. *Burns v. State*, 35 Tex. 724, 726.

Where, in a prosecution for theft as a bailee, it was claimed, as a defense, that the money converted by defendant had been given to him as the agent of a person other than the pretended bailor, it was error to instruct that the defendant should be acquitted if the jury found beyond a reasonable doubt that the money was given to him as the agent of such third person, as the burden of showing that the money was given to him as the agent of the alleged bailor was on the state. *Crain v. State* (Cr. App.), 56 S. W. 912.

b. Explanation of Possession of Stolen Property.

See post, "Explanation of Possession of Stolen Property," XIII, A, 2, b.

B. ADMISSIBILITY.

1. In General.

Colt and Ridgling Running with Mare.—Where defendant is indicted for the theft of a mare, evidence that a colt and ridgling were running with the mare is admissible, because it is directly connected with the main fact. *Satterwhite v. State*, 6 Tex. Cr. App. 309, 613.

Evidence Held Irrelevant.—In a prosecution for horse theft, there was no error in refusing to permit defendant to introduce an indictment filed during the progress of the trial, and charging defendant with receiving the animal in controversy, knowing it to have been stolen. *Burns v. State* (Cr. App.), 66 S. W. 303.

In a prosecution for theft, where the proof disclosed that the stolen property was found in accused's possession very soon after the theft, and with it a watch chain which had at a different time been stolen from a different owner, testimony of the owner of the watch chain, that he believed it was not stolen by accused with his reasons for so believing was properly excluded as ir-

relevant. *Conner v. State*, 6 Tex. Cr. App. 455.

On a trial for the theft of hogs, evidence that defendant's father owned like hogs is immaterial. *Ledbetter v. State* (Cr. App.), 29 S. W. 479.

On a trial for the theft of a steer, evidence that, four years after the theft, an animal having the same brand was claimed from witness as the property of one A., and that defendant paid witness back the purchase money, held irrelevant. *Williamson v. State*, 13 Tex. Cr. App. 514.

On a prosecution for the theft of an appearance bond by a surety to escape liability thereon, evidence that defendant and the principal in the bond had been living together in adultery was not admissible. *Counts v. State*, 48 Tex. Cr. App. 629, 89 S. W. 972.

On a trial for theft, where defendant has testified that the person told her that she had as much right to clothes stolen as the owner and that he would put them at a designated place where she could get them, it is immaterial and inadmissible that he also told her that he had paid for them. *Stayton v. State*, 32 Tex. Cr. App. 33, 35, 22 S. W. 38.

In a prosecution for theft, evidence that prosecutor had money in the house which was not taken at the time of the burglary during which a watch was stolen was irrelevant, in the absence of proof that the money was with the watch or so close to it that one taking the watch was bound to notice the money. *Bernal v. State* (Cr. App.), 95 S. W. 118.

Hearsay.—On trial for horse stealing, evidence that the alleged owner of the horse went to the livery stable where he was, and took him away in defendant's absence, claiming to own him, is inadmissible in the absence of any testimony by the alleged owner himself as to the ownership and identity of the horse. *Cannada v. State*, 29 Tex. Cr. App. 537, 16 S. W. 341.

Money Made by Cutting and Selling Hay.—In a prosecution for stealing cattle, it is not error to exclude defendant's testimony as to how much money he had been making by cutting and selling hay, and as to his reasons for skinning certain cattle which he claimed to have found dead, but which, on the state's theory, he had stolen and killed for the purpose of skinning and selling the hides. *Clay v. State*, 41 Tex. Cr. App. 653, 56 S. W. 629.

Statements Made at Time of Returning Animal.—Where, on a trial for the theft of a horse the state proved by the owner that it was taken from a hitching post without his consent and that a few days afterwards a man brought the horse to him accoutered as when taken, defendant was entitled, as part of the transaction, to prove by the same witness the account which the man, when he returned the horse, gave of his possession of it. *Dunham v. State*, 3 Tex. Cr. App. 465.

Printed Code of Laws.—On a prosecution in Texas for theft of property brought into the state from the Indian Territory, a printed code of laws of the Muscogee Nation, where the property was stolen, purporting to be published by the authority of the nation, and certified to be a true copy of the manuscript laws thereof by the principal chief of such nation, and authenticated by the seal thereof, is admissible. *Cowell v. State*, 16 Tex. Cr. App. 57.

Records of Railway Company.—On a trial for theft of cattle, evidence is inadmissible of what a witness saw in the records of a railroad company relative to cattle shipped by defendant, where the witness does not know the name of the railroad or the person in whose charge the records were. *Wade v. State*, 37 Tex. Cr. App. 401, 402, 35 S. W. 663. See *Howard v. State*, 35 Tex. Cr. App. 136, 32 S. W. 544.

Business Pursued by Defendant Showing Financial Condition.—In a prosecution for theft it was competent to inquire of defendant what business

he was pursuing, to show his financial condition at the time of the alleged theft. *Sims v. State* (Cr. App.), 45 S. W. 705.

Purchase from Defendant.—In a prosecution for cattle theft, evidence that a witness purchased certain cattle from defendant which were taken from his pasture by the offenders and driven to G. where they were penned in the courthouse yard and that F. and J. D. took them away from the courthouse yard claiming to have been in possession of them at the time they were stolen was admissible. *House v. State*, 19 Tex. Cr. App. 227.

Knowledge of Taking by Prosecuting Witness.—In a prosecution for theft, not from the person, testimony of the prosecuting witness that the money was taken from his open hand with his knowledge, and that he could have prevented its taking had he tried, but did not do so because he thought defendant would not keep it, does not show theft from the person, so as to be inadmissible. *Harris v. State* (Cr. App.), 65 S. W. 921.

Smell of Chloroform in Bed Chamber.—On a trial for theft of jewelry in the night from the owner's bedchamber, evidence that a witness smelled chloroform in the chamber immediately after the theft was committed held to be admissible. *Conner v. State*, 6 Tex. Cr. App. 455.

Defendant's Knowledge of Money in Possession of Prosecuting Witness.—Evidence that just prior to the time the witness came into the back room of the saloon the person whose money was alleged to have been stolen came into the saloon with a companion, bought a drink, pulling out a lot of loose silver which he laid upon the counter; and that defendant was standing near by, and saw such person place the money on the counter is admissible. *Newman v. State* (Cr. App.), 64 S. W. 258.

Pasteboard on Which Was Entered Number of Trousers Purchased.—In a

prosecution for theft of a pair of trousers, evidence that prosecutor entered the number of pairs of trousers purchased on a piece of pasteboard, put the numbers down, and when he would sell a pair would mark out one of the numbers so entered, and that he placed the pasteboard under the pile of trousers, was admissible to corroborate his statement that he had lost a part of the trousers. *Licett v. State* (Cr. App.), 79 S. W. 33.

Defendant's Inquiry as to Lost Horses.—The exclusion of testimony that, at the time and place the state showed defendant first came to the herd and put into it the cattle alleged to have been stolen, he stated he was hunting for horses, and inquired for some lost horses, was not prejudicial. *Stevens v. State* (Cr. App.), 49 S. W. 105.

Disposition of Property after Arrest.—In a prosecution for horse theft, evidence as to what became of the horses after defendant's arrest is inadmissible. *Clay v. State*, 51 S. W. 212, 40 Tex. Cr. App. 556.

Witness Acting as Detective.—In a prosecution for horse theft, it was competent for the state to prove that witness was acting as a detective for the purpose of ferreting out the crime with which defendant was charged or assisting in his detection and apprehension. *Lightfoot v. State* (Cr. App.), 78 S. W. 1075.

Property in Possession of Defendant's Father.—Evidence that a stolen mule was seen in the pasture of the defendant's father, without evidence to connect the defendant therewith, is inadmissible. *Moore v. State* (Cr. App.), 25 S. W. 626.

Owner's Testimony as to Accused's Knowledge of Property.—Testimony by the owner of alleged stolen cattle, that defendant knew his cattle, was admissible, on the trial for the theft thereof, where such witness stated facts which indicated unmistakably that he

knew that whereof he testified. *Wright v. State* (Cr. App.), 44 S. W. 151.

Certified Copy of a Chattel Mortgage Showing Permanent Appropriation.—On a prosecution for petty theft, a certified copy of a chattel mortgage executed by the accused on the alleged stolen article was admissible to show permanent appropriation of the article by the accused, and to rebut his claim that he returned the property before any prosecution. *Swanner v. State* (Cr. App.), 65 S. W. 186.

Butcher's Report to County Commissioner.—On a trial for theft of one head of cattle, evidence that defendant had made no butcher's report to the county commissioners' court, is improperly admitted, for if it prove anything, it proved too much, defendant having butchered twenty head within a few days. *Barker v. State* (Cr. App.), 26 S. W. 400.

Conduct of Prosecuting Witness.—On a prosecution for theft, it is not error to exclude evidence that prosecuting witness and others having charge of defendant the night before the trial were drinking and playing cards. *Tabor v. State*, 34 Tex. Cr. App. 631, 31 S. W. 662, 53 Am. St. Rep. 726.

Selling Cattle under Power of Attorney.—It is error to permit a witness, who has stated that he went to a certain city as employee of a live-stock agent, and found there cattle having the brand of those whose cattle are alleged to have been stolen, to state, further, that he sold such cattle under a power of attorney from the alleged owners, and remitted the proceeds to the agent for them. *Byrd v. State*, 26 Tex. Cr. App. 374, 9 S. W. 759.

Reason Why Brands Mentioned Not Placed upon Cattle.—It is not error, in such case, to permit the owners to testify as to the reason why one of the brands mentioned in the record was not placed upon some of their cattle. *Byrd v. State*, 26 Tex. Cr. App. 374, 9 S. W. 759.

Borrowing a Saddle Along with Horse.—In a trial for stealing a horse, it was not error to permit the state to show that, when defendant borrowed it, he also borrowed a saddle. *Richardson v. State* (Cr. App.), 103 S. W. 352.

2. Other Offenses.

It is a well settled rule of practice that, "when necessary to establish identity in developing the *res gestæ*, or in making out the guilt of the accused by circumstances connected with the theft, or to explain the intent with which the accused acted with respect to the property for the theft of which he is on trial, it is competent for the state to prove that other property was stolen at or about the same time and in the same neighborhood from which the property in question was stolen; and that this other property was found in the possession of the defendant when arrested for the theft of the property for which he is on trial. Under such state of case, however, it is the duty of the court to explain, in the charge to the jury, the purpose of such proof." *House v. State*, 16 Tex. Cr. App. 25; *Jones v. State*, 14 Tex. Cr. App. 85; *Gilbraith v. State*, 41 Tex. 567; *Davison v. State*, 12 Tex. Cr. App. 214, 215; *Smith v. State*, 21 Tex. Cr. App. 96, 104, 17 S. W. 560.

Where indictment for theft charges theft of only one animal, there is no error in admitting evidence that at the same time, defendant had stolen two animals, but failure of the court to limit the effect of such testimony is error. *Mask v. State*, 34 Tex. Cr. App. 136, 141, 31 S. W. 408.

On an indictment for theft it appeared that defendant and others had started from S. towards W., driving about twelve cattle, and that they were afterwards seen about noon, about the middle of the month, driving twenty-five or more cattle. Held, that it was competent to show, as against defendant, that on the 16th day of the same

month, about noon, one S., who was shown to have participated in the theft, was seen driving ten or fifteen cattle in the same direction as defendant and his companions, and near the same place that defendant was seen. *Smith v. State*, 21 Tex. Cr. App. 96, 17 S. W. 560.

The admission of evidence showing that a defendant charged with the theft of eight hogs, which were brought into the trial county from another, shortly after the alleged theft brought ten more hogs into the county, one of which was identified by the owner of all the hogs, was error, since it did not tend to prove the ownership of the eight hogs. *Grant v. State*, 58 S. W. 1026, 42 Tex. Cr. App. 273.

In a prosecution for horse theft it was improper for the district attorney to ask witness in regard to a certain mule claimed to have been stolen, the testimony in regard thereto being irrelevant, even if defendant was connected therewith. *Tijerina v. State*, 74 S. W. 913, 45 Tex. Cr. App. 182.

3. Consent of Owner.

Relevancy.—Evidence that the owner of a mule had attempted to find a certain person for the purpose of having him take the mule to a named place is not admissible to show consent, on the prosecution of another for the theft of the mule. *Broomfield v. State* (Cr. App.), 74 S. W. 915.

Evidence, offered on behalf of one on trial for theft, that the owner of the property was dead, and had said that the accused had his consent to take it, held to be properly excluded. *Sneed v. State*, 4 Tex. Cr. App. 514.

Though the owner of cattle alleged to have been stolen is a convict, and can not testify, yet his want of consent to the taking may be shown by circumstances, such as his searching for the cattle after they were missed. *Guin v. State* (Cr. App.), 50 S. W. 350.

Where at the time of trial for cattle

theft the alleged owner was dead, evidence that during his lifetime he attended several terms of court as a witness on behalf of the state was admissible as tending to show his want of consent. *Sapp v. State* (Cr. App.), 77 S. W. 456.

4. Intent.

In a trial for theft of cotton, any testimony tending to show that the taking was not fraudulent, nor with an intention to steal, or to explain the motive of defendant, is admissible. *Williams v. State*, 4 Tex. Cr. App. 5, 9.

One on trial for theft may introduce evidence to show the character and intent of his possession. *Saltillo v. State*, 16 Tex. Cr. App. 249.

Discharge of Debt.—One on trial for theft of his own property should be allowed to prove any fact which may legitimately serve to disprove a fraudulent intent in the taking, as, for instance, the discharge of a debt for which he had pledged the property as security. *Taylor v. State*, 7 Tex. Cr. App. 659.

Declarations of Accused.—Evidence of declarations of defendant as to the ownership of a horse, alleged to have been stolen by him, made after the delivery of it to him by the owner, is competent to show his intent. *Rumbo v. State*, 28 Tex. Cr. App. 30, 11 S. W. 680.

On the trial of an indictment for theft, where the facts show a lawful taking of possession, the statement of the accused as to his intention, made at the time of obtaining the property, is admissible as part of the *res gestæ*. *Maddox v. State*, 41 Tex. 205.

Conduct of Defendant before the Taking.—On the trial of defendant for stealing a bull, testimony that he was seen a day or two before riding through the owner's pasture, looking at his cattle, was competent for the purpose of showing his intent, though the evidence of the taking by him was positive.

Spiars v. State (Cr. App.), 69 S. W. 533.

Habit.—Defendant, while riding on horseback with his employer, B., on the latter's horse, encountered C., to whom he gave up the horse at B.'s request. B. and C. then rode off, stole and butchered a cow, and brought defendant some of the meat. Held, that it was not error to admit testimony that accused knew the principals were in the habit of stealing cattle together. *Tippie v. State* (Cr. App.), 13 S. W. 777.

Defendant's Mistake.—Where, on a prosecution for theft by means of drawing worthless checks in payment of the property alleged to have been stolen, the state showed that defendant represented at the time of the drawing of the checks that he had money and credit at the First National Bank of a certain city, though he might have called the bank the State National Bank, which did not exist, defendant's evidence, showing that he had money and credit at the State Bank of the same city, was admissible as tending to prove good faith, and as showing that the checks evidenced a transfer of the property. *Powell v. State*, 70 S. W. 968, 44 Tex. Cr. App. 273.

Inquiry as to Ownership of Property.—In a trial for theft, evidence that the accused made inquiry as to the ownership of the property taken is admissible as affecting his intent. *Green v. State* (Cr. App.), 30 S. W. 220.

Accomplices Testimony.—In a prosecution for horse stealing, a person who, under assumed name, executed a bill of sale of the horses to defendant after they were stolen, may testify as to the bad faith and fraudulent character of his transactions with defendant. *Brown v. State* (Cr. App.), 20 S. W. 924.

Return of Saddle.—Where a saddle was taken at the same time that a horse was stolen, testimony that accused did not return the saddle, being part of the *res gestæ*, was admissible on the

question of motive or intent. *Clark v. State* (Cr. App.), 59 S. W. 887. See, also, *Brown v. State* (Cr. App.), 59 S. W. 1118.

Conversation with Accused's Father in Reference to Property in Question.

—It being necessary, to constitute a finding a theft, that the finder must, at the time of taking possession, have intended to defraud the owner and appropriate the property to his own use, a subsequent intent not rendering the original taking theft, defendant, on a prosecution for the theft of the watch of H., which he found in the bathroom of an association and kept, and did not report to the association secretary located in the building, and who later, according to the testimony of H., refused to let him see the watch, and told him that his brother had bought it and another like it of a third person, but who, according to testimony for him, showed it to friends when it was found, and stated he had found it, and wore it without concealment, and did not intend to more than keep it till its true owner appeared and identified it, he telling a person that if he heard of any one having lost a watch to send him to him, should be permitted to introduce the testimony of his father, as corroborative of his testimony, and tending to explain and break the force of that of H. that defendant, on telling his father of finding the watch, was told by him to keep it and advertise it, and to require any one claiming it to describe it. *Worthington v. State*, 53 Tex. Cr. App. 178, 109 S. W. 187.

5. Identity of Property.

See post, "Marks and Brands," XIII, B, 6.

Necessity of Identification.—Introduction of a ham in evidence in a trial for theft of hogs, which was not identified as stolen meat, did not tend to show the commission of the offense, and its admission was error. *Ballow v. State*, 58 S. W. 1023, 42 Tex. Cr.

App. 263; *Grant v. State*, 58 S. W. 1026, 42 Tex. Cr. App. 273.

Paper money is generally identified by particular marks but circumstances from which guilt may be inferred dispense with the necessity of identification. *Bagley v. State*, 3 Tex. Cr. App. 163, 166.

Running Alleged Brand in Certain County.—In a prosecution for cattle theft, where the record of the alleged brand of the animal stolen was not admissible because too indefinite evidence by a certain person that he ran the alleged brand in that county was admissible for the purpose of identifying the animal, though not admissible for the purpose of proving ownership. *Steed v. State*, 43 Tex. Cr. App. 567, 67 S. W. 328.

Identification of Part of Stolen Property.—The identification of a part of the money found on defendant as money taken from prosecutor is admissible against defendant. *Pones v. State*, 63 S. W. 1021, 43 Tex. Cr. App. 201.

Identification of Owner at Slaughter House.—Evidence that the owner identified the head and hide of the stolen animal at a slaughter house in the absence of the accused is admissible in a prosecution for cattle theft. *Davis v. State* (Cr. App.), 55 S. W. 340; *House v. State*, 19 Tex. Cr. App. 227.

Likeness of Money Found to Money Lost.—On a prosecution for larceny, it was proper to permit the prosecuting witness to testify that the money found upon accused looked like the money he lost. *Anglin v. State*, 52 Tex. Cr. App. 475, 107 S. W. 835.

Digging of Bones on Defendant's Premises.—Evidence that witnesses dug up bones on defendant's premises appearing to be those of a beef corresponding in size to that alleged to have been stolen by defendant was admissible as circumstantial evidence. *Foster v. State* (Cr. App.), 56 S. W. 58.

Employment to Butcher Cow Other

than One Stolen.—In a prosecution for the theft of cattle, evidence of a witness that he had been employed by defendant to butcher a red cow in 1898, and had put the hide in some high weeds over the butcher-pen fence, at the request of defendant, was inadmissible, where there was no evidence that such cow was the animal alleged to have been stolen. *Wilson v. State*, 51 S. W. 916, 41 Tex. Cr. App. 115.

Weight of Property.—In a prosecution for hog theft, where the evidence showed that the hog stolen was a black sow, and defendant testified to the killing of a red hog by him, and stated that it was of the same litter as a black sow which he acknowledged killing, testimony of the state with reference to the weight of the red hog, which was much greater than that of the black sow killed by defendant, was admissible to show the improbability that the two hogs were of the same litter. *Franks v. State*, 48 Tex. Cr. App. 211, 87 S. W. 148.

Money Found in Possession of Accused Codefendant.—Where, on a trial for the larceny of money, the evidence showed that the amount and the denomination of the money found on accused and in the possession of his confederates a short time after the money was stolen corresponded with the money which the prosecutor claimed was stolen from him, it was not error to permit a witness to state that he found money under the wall paper in the room of one of accused's confederates. *Hooten v. State*, 53 Tex. Cr. App. 6, 108 S. W. 651.

Description of Hides by Owner.—In a trial for stealing hides, it was proper to permit an officer to testify that, before recovering them from a package which accused had shipped, the owner described part of the stolen hides, and on afterwards opening the package found the hides described. *Davis v. State* (Cr. App.), 140 S. W. 349.

Brand on Animal.—Where, in a trial

for stealing a cow alleged to be the property of H., it appeared that he purchased the animal from O. the state was properly permitted to prove by H. that the brand on the animal was O. S. which was the brand of said O. as the evidence tended to identify the animal as one of several which H. had purchased from O. by bill of sale describing the cattle as marked with the O. S. brand. *Timbrook v. State*, 18 Tex. Cr. App. 1.

Exhibits.—The state, on a trial for larceny, may trace by positive or circumstantial evidence the property alleged to have been stolen and exhibit the same to the jury, except where the introduction of the same will serve no useful purpose, and may, because of its character, inflame the minds of the jury. *Hooten v. State*, 53 Tex. Cr. App. 6, 108 S. W. 651.

Where, on a trial for larceny, the prosecutor testified that money shown to him on the trial was the same kind and of the same denomination as that which was stolen from him, and the money exhibited to him was identified by a witness as the money found on accused and his confederates a short time after the larceny, and the amount of the money found and the denominations thereof corresponded with the money which prosecutor claimed was stolen from him, and the pocketbook of the prosecutor, in which his money had been kept, was found in the place where accused said he had thrown it, the court did not err in permitting evidence of the denominations of bills found in possession of accused and his confederates, and in permitting the introduction of such money. *Hooten v. State*, 53 Tex. Cr. App. 6, 108 S. W. 651.

In a prosecution for the theft of a cow, the hide of the cow alleged to have been stolen may be exhibited to the jury. *Ledbetter v. State*, 35 Tex. Cr. App. 195, 32 S. W. 903. See, also, *Hart v. State*, 15 Tex. Cr. App. 202;

Bryant v. State, 18 Tex. Cr. App. 107; *Levy v. State*, 28 Tex. Cr. App. 203, 12 S. W. 596; *Jackson v. State*, 28 Tex. Cr. App. 370, 13 S. W. 451; *Bell v. State*, 32 Tex. Cr. App. 436, 24 S. W. 418.

The value of the stolen property having been proved, there was no error in permitting the state's attorney to exhibit the property to the jury. *Buntain v. State*, 15 Tex. Cr. App. 485.

The introduction of a ham in evidence, brought into court by the prosecuting witness in a trial for theft of hogs, but not identified as stolen property, was error. *Ballow v. State*, 42 Tex. Cr. App. 263, 58 S. W. 1023.

Testimony in a prosecution for theft as to finding certain charred remains and burned clothing, and their introduction in evidence, held improper. *Murrah v. State* (Cr. App.), 63 S. W. 318.

Identity by Owner in Absence of Defendant.—A witness can not, on a trial for larceny, testify that the day after the theft the person from whom the property was stolen, in the absence of defendant, identified and claimed it. *Anderson v. State*, 14 Tex. Cr. App. 49.

6. Marks and Brands.

In a prosecution for theft of cattle it is proper to permit the witness to identify the animals by flesh marks and general appearance. *Wilson v. State*, 37 Tex. Cr. App. 373, 35 S. W. 390, 38 S. W. 624, 39 S. W. 373.

Recorded Brand.—In a prosecution for theft of cattle proof of ownership may be made by a recorded brand. *Reese v. State*, 44 Tex. Cr. App. 34, 68 S. W. 283; *Poag v. State*, 40 Tex. 151; *Nannon v. State*, 17 Tex. Cr. App. 650, 660; *Elsner v. State*, 22 Tex. Cr. App. 687, 689, 3 S. W. 474; *Love v. State*, 15 Tex. Cr. App. 563, 566; *Shackelford v. State* (Cr. App.), 53 S. W. 884, 885; *Hutto v. State*, 7 Tex. Cr. App. 44, 47.

Under Rev. St., art. 4930, providing that no brands shall be recognized as evidence of ownership of the animals

on which they are used, unless such brands are recorded, an instruction, in a prosecution for the theft of an animal, that a certified copy of the brand of the alleged owner, which had been recorded since the theft, might be considered with other evidence, in determining the ownership of the animal, is error. *Chowning v. State*, 51 S. W. 946, 41 Tex. Cr. App. 81.

In connection with other proof of ownership of cattle, a brand recorded after indictment for their theft is admissible. *Spinks v. State*, 8 Tex. Cr. App. 125.

A recorded cattle brand, designating the place where it is to be placed as "on shoulder or side," held in violation of Penal Code, art. 932, 934, and inadmissible in evidence on a prosecution for cattle theft. *Reese v. State*, 43 Tex. Cr. App. 539, 67 S. W. 325.

Unrecorded Brand.—In a prosecution for cattle theft, an unrecorded brand, though inadmissible as evidence of ownership of the cattle, may be admitted for the purpose of proving the identity of the animals stolen, if the jury is properly instructed as to the scope to be given to such evidence. *Chowning v. State*, 41 Tex. Cr. App. 81, 51 S. W. 946; *Lee v. State* (Cr. App.), 65 S. W. 540; *Welch v. State*, 42 Tex. Cr. App. 338, 60 S. W. 46; *Poage v. State*, 43 Tex. 454; *Johnson v. State*, 1 Tex. Cr. App. 333, 345; *Coffelt v. State*, 19 Tex. Cr. App. 436, 442; *Lockwood v. State* (Cr. App.), 26 S. W. 200, 201; *Fisher v. State*, 4 Tex. Cr. App. 181, 183; *Maddox v. State*, 12 Tex. Cr. App. 429, 433; *Title v. State*, 30 Tex. Cr. App. 597, 599, 17 S. W. 1118; *Lockwood v. State*, 32 Tex. Cr. App. 137, 139, 22 S. W. 413.

Brand of Cow Claimed to Be Mother of Stolen Calf.—Evidence of a brand on a cow claimed to be the mother of a stolen calf is not admissible in a prosecution for the theft of the calf. *Wallace v. State* (Cr. App.), 66 S. W. 1102.

The brand of a former owner is not evidence to prove ownership of a stolen horse in the purchaser. *Horn v. State*, 30 Tex. Cr. App. 541, 543, 17 S. W. 1094.

Earmarks.—On a trial for the theft of cattle, testimony is admissible to prove unrecorded earmarks. *Johnson v. State*, 1 Tex. Cr. App. 333, 345.

Alteration of Brand.—The state has the right in a prosecution for cattle theft to prove that the defendant illegally altered the brands on the cattle. *House v. State*, 16 Tex. Cr. App. 25.

In a prosecution for theft of a cow, having adduced proof that the owner's brand was changed into a different brand, the state proposed to prove that the new brand was claimed by the accused, to which the defense objected on the ground that the record of brands was the best, and the primary evidence that accused owned or claimed the new brand. Held, that the objection was properly overruled, and the proof correctly admitted as evidence pertinent to the issue. *Fisher v. State*, 4 Tex. Cr. App. 181.

7. Bills of Sale.

A bill of sale may be read in evidence in a trial for theft without proof of its execution if filed among papers of the cause three days before the commencement of the trial and notice of such filing given to the opposite party or his attorney. *Graves v. State*, 28 Tex. Cr. App. 354, 355, 13 S. W. 149.

Where in a trial for the theft of cattle, the controversy is as to whether or not the alleged stolen animal corresponds with that described in the bill of sale, and there is no dispute as to the description in the bill of sale, the bill of sale is no evidence of the act in dispute, and its execution or nonproduction would not be error. *Hailes v. State*, 10 Tex. Cr. App. 490, 491.

Accused while on the stand as a witness in his own behalf was asked by the district attorney on cross-examination if while in jail he had not

procured a certain person to write a bill of sale of the horse for the theft of which he was being prosecuted and to sign thereto the name of its owner. He answered that he had no recollection of the matter and the person said to have written the bill of sale was introduced and testified that he had written the bill of sale at the request of accused. Held, that an objection by accused that such evidence was inadmissible unless the bill of sale was introduced in evidence was not well taken, since such bill of sale was in the possession of accused, and even if it were not the evidence was admissible without the introduction of the bill of sale. *Bratton v. State*, 34 Tex. Cr. App. 477, 31 S. W. 379.

Admissibility against Defendant of Bill Given by Him.—In a prosecution for cattle stealing, a bill of sale, by which defendant conveyed the stolen animal, whether intended as a mere mortgage or as an absolute conveyance, is admissible as a circumstance to show defendant's control of the animal in question at the time. *Brite v. State* (Cr. App.), 43 S. W. 342.

On a trial for theft of a mule, a bill of sale of such mule, which a witness testifies he saw defendant write, and that defendant then gave it to him, and which is not attested, is admissible in evidence. *Abrigo v. State*, 29 Tex. Cr. App. 143, 15 S. W. 408.

Where, on trial for the theft of a horse, the bill of sale given by defendant to the person to whom he sold the horse is proved by witnesses who saw defendant execute it, it is not necessary to file such bill of sale with the record three days before the trial, as the rule requiring instruments to be so filed only applies to those the execution of which is not proved aliunde. *Williams v. State*, 30 Tex. Cr. App. 153, 16 S. W. 760; *Morrow v. State*, 22 Tex. Cr. App. 239, 2 S. W. 624; *Graves v. State*, 28 Tex. Cr. App. 354, 13 S. W. 149.

Admissibility against Defendant of Bill Found in His Possession and Proved to Be a Forgery.—On a trial for theft of horses, a bill of sale, found in defendant's possession, which described the horses, and purported to convey them to defendant, and which was proved to have been forged by him, was admissible in evidence, against him and the fact that it was taken from him without authority of law does not make it inadmissible. *Williams v. State*, 27 Tex. Cr. App. 466, 11 S. W. 481.

Admissibility of Bill in Defendant's Own Behalf.—Where defendant, who assisted in removing a steer from its pasture, was told that it belonged to a Mexican, and a witness testified that afterwards defendant and a Mexican came to his place of business, and defendant requested him, in the presence of the Mexican, to witness a bill of sale of the animal from the Mexican, which transaction took place several months before the sale of the animal by defendant, it is error to exclude the bill of sale from evidence on a trial for theft of the steer. *Buchanan v. State*, 26 Tex. Cr. App. 52, 9 S. W. 57.

The accused was convicted of stealing a cow on the testimony of a butcher who had sold the hide, and testified that he had bought the cow of the accused, taking a bill of sale, which he had with him in the court room. He was allowed to give a description of the cow as to color, marks and brands; the accused objecting on the ground that the bill of sale was the best evidence. Rev. St. art. 4628, made it the duty of the butcher to take a bill of sale containing the sex, age, color, marks, and brands of the animal. Held, that the failure to require the production of the bill of sale was error. *Edwards v. State*, 29 Tex. Cr. App. 526, 16 S. W. 418.

Conversation between Owner and Accused at Time Bill of Sale Made.—When, on a trial for the theft of cat-

tle, the defendant was allowed to introduce a bill of sale for the cattle made to him by the owner, four days after the alleged theft, conversations between the owner and the accused at the time of making the bill of sale are properly excluded. *Harmon v. State*, 3 Tex. Cr. App. 51, 53.

An unacknowledged, unrecorded bill of sale of property, though insufficient to vest legal title in the vendee, is evidence of ownership in a prosecution for theft. *Morrow v. State*, 22 Tex. Cr. App. 239, 2 S. W. 624.

Necessity of Bill Being Acknowledged or Recorded.—*Lockwood v. State*, 32 Tex. Cr. App. 137, 22 S. W. 413; *Wilson v. State*, 32 Tex. Cr. App. 22, 22 S. W. 39; *Chowning v. State*, 41 Tex. Cr. App. 81, 51 S. W. 946.

When Bill Not Evidence of Ownership.—In a prosecution for theft of cattle a bill of sale executed by the general owners subsequent to the theft from the special owner was improperly admitted because irrelevant, and because, not being of record at the time of the theft, it was not evidence of ownership. *Groom v. State*, 23 Tex. Cr. App. 82, 3 S. W. 668.

On an indictment for larceny, a bill of sale of a given number of cattle, branded "Toad," but which does not include all cattle so branded, is not evidence of ownership of a particular beast so branded, and alleged to have been stolen. *Morrow v. State*, 22 Tex. Cr. App. 239, 2 S. W. 624.

In a trial for theft of cattle, the state proved the ownership as alleged. Defendant adduced testimony tending to prove that he purchased the animals from one A., not the owner; and, in further proof of the purchase, offered an unrecorded bill of sale, entirely in the handwriting of an attesting witness, and not proved to be the act of A. Held, properly excluded, on objection of the state. *Shoefercater v. State*, † Tex. Cr. App. 207.

A bill of sale, which purports to

convey a number of cattle, with certain marks and brands, to a certain company, is not evidence of the ownership of another company in a prosecution by it for larceny, in the absence of proof of the identity of the companies. *Morrow v. State*, 22 Tex. Cr. App. 239, 2 S. W. 624.

8. Value of Property.

In General.—Any evidence from which the jury can infer the value of a stolen chattel is evidence; as, for instance, what the owner testifies of its value to him, the opinions of witnesses acquainted with the value of like property, what such property has brought at actual sales, etc. *Martinez v. State*, 16 Tex. Cr. App. 122; *Saddler v. State*, 20 Tex. Cr. App. 195.

Where accused was prosecuted for a misdemeanor only, whether the watch alleged to have been stolen was of the value of \$7 or \$15 was immaterial. *Bernal v. State* (Cr. App.), 95 S. W. 118.

Market Value.—In determining the value of property stolen, for the purpose of fixing the grade of the crime, the market value is that to be taken. *Martinez v. State*, 16 Tex. Cr. App. 122.

Defendant may show that the market value of the articles which he is indicted for stealing is less than the amount necessary to constitute a felony. *Cannon v. State*, 18 Tex. Cr. App. 172.

Evidence Based on Other Standards Inadmissible When Market Value Proved.

Where goods alleged to have been stolen are shown to have a market value, evidence as to value based on other standards is not admissible. *Baden v. State* (Cr. App.), 74 S. W. 769.

Value in Neighboring County.—On a trial for theft of property worth more than \$50, testimony of the owner that he paid for the stolen field glasses \$58, buying them from the manufacturer, and of a witness that, while he did not know their market value in

the county in which they were stolen, he knew their market value in another county, and that they were worth from \$50 to \$60, and that their market value was the same everywhere; that they were strictly standard glasses, and could not be bought anywhere for less than that price is admissible on the issue of value. *Odell v. State*, 70 S. W. 964, 44 Tex. Cr. App. 307.

Value in United States Currency.—

In a trial under an indictment for theft, the permission to prove the value of the stolen property in United States currency is not error. *Hubotter v. State*, 32 Tex. 479.

Value of Goods Superior to Those Stolen—Purchase Price of Property.—

On a trial for theft of a watch, the prosecuting witness was properly permitted to state what she gave for the watch, it being one of the bases for ascertaining its value. *McCoy v. State*, 56 Tex. Cr. App. 551, 120 S. W. 858.

Evidence of a witness as to the value of goods handled by him, which were of a quality superior to those stolen, is not admissible to show the value of goods stolen. *Close v. State*, 55 Tex. Cr. App. 380, 117 S. W. 137; *Floyd v. State* (Cr. App.), 117 S. W. 138.

Cost of Having Deed Executed, Acknowledged and Prepared.—

In a prosecution for theft of a deed, evidence was properly admitted as to the cost of having such a deed executed and acknowledged, and of the cost of having the deed in question prepared. *Roberts v. State*, 61 Tex. Cr. App. 434, 135 S. W. 144.

9. Ownership of Property.

Testimony in a criminal case, concerning the ownership of a stolen animal, which in itself implies the existence of better evidence not adduced or accounted for, is objectionable, on that ground. *Butler v. State*, 3 Tex. Cr. App. 48.

Declarations of Alleged Owner.—In a prosecution for theft of property

whose owner is alleged to be unknown to the grand jurors, statements made by defendant's father, since deceased, claiming the property as his own, are inadmissible. *Anderson v. State*, 39 Tex. Cr. App. 690, 24 S. W. 517.

In a prosecution for theft of a horse, it was error to admit, as evidence of ownership, testimony of a deputy sheriff that the owner told him he was hunting his horse, and gave him a description of it; that witness had seen a horse of that description in the owner's possession; and that he subsequently found a horse in a livery stable, left there by defendant, of the same description, and which he believed he had formerly seen in the possession of the alleged owner. *Canada v. State* (Cr. App.), 24 S. W. 513.

Conversation between Prosecutor and State Witness.—

In a prosecution for cattle theft, where the issue was whether the animal found in defendant's possession belonged to the prosecutor, it was not error to admit evidence of a conversation between prosecutor and a state's witness, offered to show that the prosecutor described an animal he was searching for after the theft was committed. *Gann v. State* (Cr. App.), 59 S. W. 896.

Bill of Lading Not Shown Authentic.

In a trial for theft it is error to admit, as evidence of ownership, a bill of lading, with which defendant had no connection, and authenticity of which is not shown. *Radford v. State*, 35 Tex. 15, 16.

Owner Answering Name Alleged after Prosecution Instituted.—

On a prosecution for theft, testimony that the owner of the property answered to the name alleged after the prosecution was instituted was competent. *Young v. State* (Cr. App.), 24 S. W. 287.

Employees Possession.—In a trial for theft of property in the posses

sion of the owner's employee, the state could show the ownership, and that the property was in the employee's possession, subject to the owner's orders. *Hill v. State*, 55 Tex. Cr. App. 407, 117 S. W. 823.

Execution of Deed.—In a prosecution for theft of a deed, evidence was admissible that accused executed a deed to the property conveyed by that claimed to have been stolen, in order to show that he was exercising acts of ownership under the stolen deed. *Roberts v. State*, 61 Tex. Cr. App. 434, 135 S. W. 144.

Estray.—In a prosecution for cattle theft, evidence that two witnesses, in the absence of the defendant, had caught the cow alleged to have been stolen and, on examining the brand, recognized her as an estray was admissible. *Renfro v. State*, 9 Tex. Cr. App. 229.

As to a Recorded Brand Being Evidence of Ownership.—See ante, "Marks and Brands," XIII, B, 6.

10. Identity, Acts and Presence of Accused.

On a trial for the theft of a mule, the testimony of a witness that on the night of the theft defendant came to her house; that, on being refused admission, he went towards the road; that later she heard some one in the road say "Whoa!" and heard some one pass the road on horseback—was admissible. *Burch v. State*, 90 S. W. 168, 49 Tex. Cr. App. 13.

On a prosecution of a Mexican for horse theft, testimony of the owner that the second evening before the theft three Mexicans passed through his lot, and that one of them looked like defendant, but that all Mexicans looked very much alike to him, is admissible for what it is worth. *Trevenio v. State*, 87 S. W. 1162, 48 Tex. Cr. App. 207.

Testimony that one night, soon after the cow alleged to have been stolen was recovered by the prosecuting wit-

ness, two men came to his premises, and attempted to drive her out; and that on that day defendant was seen in the town of M. near by, in company with two men, and that he then wore a straw hat; and that on said night three men, one of whom was wearing a straw hat, were seen lying in a fence corner, near the house of the prosecuting witness—was properly admitted. *Owens v. State*, 28 Tex. Cr. App. 122, 12 S. W. 506.

On trial of H. for theft of O.'s horse, O. testified that, on information that P. and C. had taken the horse away, he followed them into another county, arrested P., and recovered the horse. Held, that H. should be allowed to prove by O. that H. lent O. the animal ridden in pursuit. *Hinds v. State*, 11 Tex. Cr. App. 238.

In a trial for theft of cattle, the proof showed that the animals in question, together with several which belonged to the defendant, were "rounded up" by him in their accustomed range, and that he there sold those which belonged to him, and left the purchaser with the entire herd. Held, error to exclude evidence offered by the defendant that when he sold his cattle he told the purchaser to turn the others out of the herd, and, to assist the purchaser in separating the cattle, left with him a hired hand, who, after defendant's departure, hired to the purchaser and assisted in driving off the entire herd. *Turner v. State*, 7 Tex. Cr. App. 596.

Evidence identifying defendant as one of the parties who committed theft, and showing that he knew and concurred in the fraudulent intent of his companions in taking the horses, is admissible in a trial for theft of horses. *Lillard v. State*, 17 Tex. Cr. App. 114, 120.

In a prosecution for theft of an overcoat, evidence by the wife of the prosecuting witness that when defendant disappeared from the residence the

overcoat also disappeared, and that she was in an adjoining room, and did not notice defendant when he left, but the coat was hanging at the head of the bed in the room where defendant was immediately before leaving, and was not there after he left, and that she and defendant were the only persons in the house, was properly admitted, though elicited in answer to a question by defendant's counsel. *Smith v. State* (Cr. App.), 75 S. W. 298.

Statement in Regard to Presence of Partner.—On a prosecution for larceny the evidence for the state showed that F. rented a room over a store, and that the room was occupied by himself and defendant, and that during their occupancy a hole was cut through the floor whereby access was obtained to the store and goods taken therefrom. Held, that testimony of the one who leased the room as to the statements of F., when taking the room, to the effect that he was going to bring a "partner" with him was admissible. *Hernandez v. State*, 60 Tex. Cr. App. 30, 129 S. W. 1109.

Manner When Selling Stolen Horse.—In a trial for horse theft, testimony of a witness as to the manner of defendant and companions when selling the stolen horse is admissible. *Allen v. State*, 8 Tex. Cr. App. 67, 70.

Evidence of theft by another person and at the same time and place as charged against defendant, is admissible for the purpose of identifying defendant. *Holmes v. State*, 20 Tex. Cr. App. 509, 518.

Declarations in Regard to Possession.—Where defendant was charged with the theft of three head of cattle, in his possession, and the first notice he had that the cattle were claimed by another was by the service of a writ of sequestration, a statement by him, made to the officer serving the writ, to the effect that defendant claimed only two of the cattle, and that he had driven the other away several times, but that it

had returned, is admissible. *Hodge v. State*, 53 S. W. 862, 41 Tex. Cr. App. 229.

Evidence that defendant was seen in a certain place several nights after his alleged theft of a horse, and that on said night another horse was there stolen is inadmissible on a prosecution for theft. *Carter v. State*, 23 Tex. Cr. App. 508, 511, 5 S. W. 128.

Defendant Payee of Draft.—Where, on a trial for the theft of a mule, it is shown that after the alleged theft the mule was sold and paid for with a draft, evidence that defendant was identified as the payee of the draft, and cashed it at a bank, is admissible. *Hargrove v. State* (Cr. App.), 65 S. W. 1070.

11. Confessions and Declarations of Accused.

See, generally, the titles CONFESIONS, vol. 1, p. 781; EVIDENCE, vol. 2, p. 324.

Confessions.—Accused's confession denying a participation in a theft, and stating that the property was stolen, and that he helped to conceal it, may be considered by the jury with other testimony, in determining whether he was guilty of the theft. *Richmond v. State* (Cr. App.), 45 S. W. 495.

On a prosecution for the theft of a hog, testimony of an officer, who had testified to a confession, that defendant did not tell him where he would find the meat, but that defendant went into his house ahead of the witness, and, producing a box, said, "Here it is," was entirely germane. *Gibson v. State*, 83 S. W. 1119, 47 Tex. Cr. App. 489.

Must Be Relevant.—On a trial for the theft of a roan steer, evidence that defendant told a witness that certain cattle were "crooked" cattle, and that some one might get into trouble about them, though he was safe, was irrelevant and prejudicial, where it did not appear that any of such cattle were branded like the stolen steer. *Barbee*

v. State, 30 Tex. Cr. App. 669, 18 S. W. 680.

Statement While Not under Arrest.—In a trial for stealing hides, based upon circumstantial evidence, any circumstance connecting accused with hides shipped and identified as including those stolen, or any misstatement by him concerning them while not under arrest, were admissible as bearing on his claim that he bought the hides from an unknown man. *Davis v. State* (Cr. App.), 140 S. W. 349.

Statements by defendant, just before the theft, that he heard that parties with stolen horses, when pursued by officers, would throw them from a bluff into the water, and that the horse in question was a "damned good horse," are admissible. *Stephens v. State* (Cr. App.), 26 S. W. 728.

Interest in Certain Brand.—On the trial for the theft of a mare branded "H O F," the theory of the state being that defendant and M. acted together in the theft, it is proper to permit a witness to testify that defendant and M. told him that they were jointly interested in the "H O F" brand. *Huffman v. State*, 28 Tex. Cr. App. 174, 12 S. W. 588.

Order for Horse.—Where defendant, after arrest, wrote an order for the delivery of the stolen horse, but the horse was not obtained thereunder, the order was inadmissible, as admission of theft. *Allison v. State*, 14 Tex. Cr. App. 122, 128.

Resistance of Arrest.—On a trial for the theft of a horse, evidence that defendant was in possession of twenty stolen horses and resisted the sheriff's approach with firearms, is admissible under a charge limiting its effect. *Willingham v. State* (Cr. App.), 26 S. W. 834.

Statement of Accused in Regard to Care of Horses.—In a prosecution for the theft of horses, testimony of a state witness that he had a conversation with the accused about the Reed horses (the

horses stolen), and that accused said that he would like to get the job to care for them, or to get them on the shares, is admissible, although the witness had not identified the horses by brands, or shown any particular knowledge of them. *Shackelford v. State* (Cr. App.), 53 S. W. 884.

In a prosecution for the theft of horses, testimony of a state witness that, while in company with accused and others, some one said they would like to get the JU brand of horses or Reed horses (the horses stolen) on the shares, or to care for the horses, and that he (witness) knew the remark was made by one of the three men, of which the accused was one, is admissible, regardless of whether or not a conspiracy has been proven between the accused and any one else. *Shackelford v. State* (Cr. App.), 53 S. W. 884.

As to declarations of accused showing intention, see ante, "Intent," XII, B, 4.

12. Incriminating Circumstances.

It is competent for the state, in a trial for theft, to prove the guilt of the accused by circumstances connected with the theft, or to show the intent with which the accused acted with respect to the property alleged to have been stolen by him. *Conley v. State*, 21 Tex. Cr. App. 495, 1 S. W. 454; *Jinks v. State*, 5 Tex. Cr. App. 68, 73.

Presence in Store of Defendant's Partner Evening before Theft.—On a prosecution for larceny, the evidence for the state showed that F. rented a room over a store, and that the room was occupied by himself and defendant, that during their occupancy a hole was cut through the floor whereby access was obtained to the store and goods taken therefrom. While the owner of the store was testifying he was asked if he saw any one else that evening in the store, and stated that the other man was F., who came in and asked to be shown some gloves. The evening referred to was the even-

ing before the theft. Held, that the evidence was admissible. *Hernandez v. State*, 60 Tex. Cr. App. 30, 129 S. W. 1109.

Sale of Cattle Prior to Theft.—In a trial for theft of cattle, testimony that codefendant, two or three weeks previous to the theft, had offered to sell the cattle to the witness and that he had said that he had a friend who owned the cattle and that they would bring them to the witness is admissible. *Hannon v. State*, 5 Tex. Cr. App. 549, 550.

Sale of Salt Pork.—Evidence that a defendant charged with the theft of hogs shortly after the alleged theft sold dry salt pork, which was not identified as stolen property, did not tend to prove the commission of the offense, and hence its admission was error. *Grant v. State*, 58 S. W. 1026, 42 Tex. Cr. App. 273.

Accused and Codefendant Going to Where Property Concealed.—Evidence that an accomplice of accused was seen at night, after a theft, going towards the place where the stolen property was concealed, and was shortly after followed by the accused, was admissible against the accused, as tending to show that they were going for the stolen property. *Nash v. State* (Cr. App.), 47 S. W. 649.

Impecunious of Codefendant before Theft.—As a circumstance against one charged with theft, it may be shown that his codefendant was impecunious prior to the offense and had money thereafter. *Roquemore v. State*, 50 Tex. Cr. App. 542, 99 S. W. 547.

Disposition of Property after Arrest.—On a prosecution for cattle theft, evidence of the disposition of the animal after defendant's arrest and in his absence was inadmissible. *Sapp v. State* (Cr. App.), 77 S. W. 456.

Firing on Sheriff Posse.—On a trial for theft of a saddle, evidence that defendant in possession of the saddle and of a stolen horse began shooting at the sheriff's posse on its approach killing

one man is admissible. *Willingham v. State* (Cr. App.), 26 S. W. 834.

Possession of Hide by Defendant's Son.—On a trial for theft of a heifer, where there was evidence that defendant was seen driving it towards his home with other cattle, and that it was not seen thereafter, and that the next day defendant was seen peddling fresh beef, evidence that defendant's son, in the morning of the same day, was seen in defendant's yard with the animal's hide, is admissible. *Brown v. State*, 34 Tex. Cr. App. 150, 29 S. W. 772.

Disposition of Money.—Where a stolen bill was not found on the person of defendant when arrested, evidence that he had spent the money was admissible. *Fenner v. State* (Cr. App.), 20 S. W. 355.

Bringing Witnesses's Near Pasture by Defendant.—On a trial for the theft of cattle, it was legitimate to show that certain witnesses, who testified that they assisted in carrying off the cattle at defendant's suggestion, were brought to or near a pasture in question by defendant, or by horses furnished by him. *Wright v. State* (Cr. App.), 44 S. W. 151.

Horse Trade.—Where defendant was prosecuted for theft of a horse committed November 30th, evidence that during October he traded for a horse was irrelevant. *Hart v. State* (Cr. App.), 40 S. W. 495.

Handkerchief and Tobacco Sack.—In a prosecution for theft, a certain handkerchief and big bale tobacco sack, to both of which defendant had access at the time of the theft, were admitted in evidence, after being identified as the handkerchief and sack in which the stolen property was found concealed on defendant's property. Held, that they were properly admitted, as being a circumstance to show defendant's guilt. *Flores v. State* (Cr. App.), 63 S. W. 330.

Finding Goods in House Where Accused Spent Part of His Time.—Where,

on the trial of a porter in a store for the theft of a skirt, the state proved that accused had a skirt in his possession in the store, but did not prove that he had been in possession of other goods, evidence of goods found in the house of a third person with whom accused spent a part of his time was inadmissible. *Morgan v. State*, 62 Tex. Cr. App. 120, 136 S. W. 1065.

13. Possession by Accused of Property Stolen.

a. In General.

Possession of stolen property, whether recent or remote, is an admissible circumstance to be considered in connection with other proof in the case, in a prosecution for theft. *Moreno v. State*, 24 Tex. Cr. App. 401, 6 S. W. 299; *Newton v. State*, 62 Tex. Cr. App. 622, 138 S. W. 708.

Where it was shown in evidence, on a trial for the theft of bacon, that the accused was seen with a sack at the smokehouse of the owner of the bacon on the night it was taken, evidence of an officer that on the following morning, under a search warrant, he searched the premises of the accused's father, found the meat freshly covered with fodder, and then arrested the accused, was admissible. *Gilford v. State* (Cr. App.), 78 S. W. 692.

Where, in a prosecution for theft of certain money, which was in a purse when stolen, the accused's confession is excluded, it is not error to permit the prosecutor to testify that accused while under arrest handed him the purse containing the money, though the act of handing such purse to the prosecutor was a part of the confession. *Brown v. State*, 67 S. W. 112, 43 Tex. Cr. App. 524.

Where accused was arrested on the belief that he had stolen certain money, and on being directly charged therewith by the owner, and demand made for the money's return, he returned the same with the request that

he be not prosecuted, the testimony of a party that he saw accused and the owner standing together, and that the owner had some money, in bills of the denomination charged by such owner, in his hands, is admissible. *Brown v. State*, 67 S. W. 112, 43 Tex. Cr. App. 524.

Where, on a prosecution for the larceny of money, the prosecutor testified that the money stolen was in his possession about 12 o'clock on the night it was stolen, evidence that defendant gave money to a third person at 9 or 10 o'clock or after midnight that night was not irrelevant and immaterial. *Summers v. State*, 76 S. W. 762, 45 Tex. Cr. App. 423.

Possession of Other Stolen Animals.—Where, in a prosecution for cattle theft, the court permitted the state to prove defendant's contemporaneous possession of other stolen animals than that described in the indictment, it was fatal error for the court to omit to limit such proof to the particular purposes for which alone it was admissible. *Willis v. State*, 24 Tex. Cr. App. 584, 6 S. W. 856.

Possession of Cart to Which Horse Was Attached When Stolen.—On a trial for theft of a horse, evidence that the horse had been left harnessed to a cart, and that the absence of the horse, cart, and wagon was discovered at the same time, is sufficient to show that they were taken at the same time, so as to permit defendant's possession of the cart to be considered against him. *Passagoli v. State* (Cr. App.), 38 S. W. 200.

Possession of Codefendant.—Where the evidence, circumstantial or otherwise, shows that two persons committed theft, and one is on trial, it can be shown as to him that his codefendant, not on trial, was found in possession of the property taken. *Roquemore v. State*, 50 Tex. Cr. App. 542, 99 S. W. 547.

Where the evidence connects defendant with another in the theft of a calf, it may be shown that the skin of the calf was subsequently found in the possession of the other person; this being admissible against the other person, had he been on trial. *Norsworthy v. State*, 77 S. W. 803, 45 Tex. Cr. App. 339.

Possession of Saddle.—In a prosecution for horse theft, evidence of defendant's contemporaneous possession of a stolen saddle is inadmissible. *Neeley v. State*, 27 Tex. Cr. App. 315, 316, 11 S. W. 376.

b. Explanation of Possession.

General Rule.—Possession of recently stolen property is but presumptive evidence against a party accused of theft, and is stronger or weaker according to the circumstances attending it. Any reasonable explanation made of such possession, by the party accused, when his right to the property is first questioned, is admissible for him; and, if not shown to be false, rebuts the presumption against him arising from the fact of possession, and necessitates further evidence of his guilt before a conviction is warranted by law. *York v. State*, 17 Tex. Cr. App. 441; *Perry v. State*, 41 Tex. 483, 486; *Cameron v. State*, 44 Tex. 652, 655; *Shackleford v. State*, 2 Tex. Cr. App. 385, 388; *Foster v. State*, 4 Tex. Cr. App. 246, 247; *Allen v. State*, 4 Tex. Cr. App. 581, 585; *Hampton v. State*, 5 Tex. Cr. App. 463, 468; *Wright v. State*, 10 Tex. Cr. App. 477, 479; *Anderson v. State*, 11 Tex. Cr. App. 576, 582; *Taylor v. State*, 15 Tex. Cr. App. 356, 359; *Howell v. State*, 16 Tex. Cr. App. 93, 98; *Heskeu v. State*, 17 Tex. Cr. App. 161, 166; *Andrews v. State*, 25 Tex. Cr. App. 339, 344, 8 S. W. 328; *Lopez v. State*, 28 Tex. Cr. App. 343, 346, 13 S. W. 219; *Martin v. State*, 32 Tex. Cr. App. 441, 443, 24 S. W. 512; *Lehman v. State*, 18 Tex. Cr. App. 174; *Ewing v. State*, 29 Tex. Cr. App. 434,

16 S. W. 185; *Castellow v. State*, 15 Tex. Cr. App. 551; *Roberts v. State*, 17 Tex. Cr. App. 82; *Lewis v. State*, 17 Tex. Cr. App. 140; *Phillips v. State*, 19 Tex. Cr. App. 158, 163; *Knox v. State*, 11 Tex. Cr. App. 148; *Perry v. State*, 41 Tex. 483; *Thompson v. State*, 43 Tex. 268; *McCoy v. State*, 44 Tex. 616; *McCall v. State*, 14 Tex. Cr. App. 353; *Faulkner v. State*, 15 Tex. Cr. App. 115; *Goens v. State*, 35 Tex. Cr. App. 73, 31 S. W. 656; *Prator v. State*, 15 Tex. Cr. App. 363; *Harris v. State*, 15 Tex. Cr. App. 411; *Saltillo v. State*, 16 Tex. Cr. App. 249, 251; *Darnell v. State*, 43 Tex. 147, 153.

Illustrations.—In a prosecution for the larceny of a horse, it was error to refuse to permit defendant to prove by the sheriff that, immediately upon being informed of the cause of his arrest, he told the sheriff, in explanation of his possession of the alleged stolen horse, that he traded another horse for it with his companion, and that the latter was present, and assented to the statement. *Lopez v. State*, 28 Tex. Cr. App. 343, 13 S. W. 219.

Defendant, who was on trial for theft of certain cotton, testified that he got it from one S., and proposed to give a conversation with S. at that time to the effect that S. said the cotton was his, but that he owed people in W., and was afraid, if he took the cotton to the cotton yard himself, it would be attached, and that he hired defendant to take it for him. Held, that it should have been admitted as *res gestæ*—a part of the transaction by which he claimed to have obtained innocent possession. *Doss v. State*, 28 Tex. Cr. App. 506, 13 S. W. 788.

Where witnesses differed in their statements of defendant's explanation made when first seen in possession of the alleged stolen property, some of the state's witnesses agreeing with the version of defendant's witnesses, de-

defendant's statement on the following day is admissible to corroborate his first explanation. *Andrews v. State*, 25 Tex. Cr. App. 339, 8 S. W. 328.

In a prosecution for larceny from the person, defendant having previously stated, when his possession of two silver dollars in controversy was first questioned and while under arrest for another offense, that he had taken them and other money in the course of his business, he was entitled to show that on the succeeding morning he had found one of such silver dollars on or near the bed on which prosecutor had lain in defendant's place of business after prosecutor had been ejected, and that he had returned that dollar to him the first time he saw him, and that prosecutor had changed the other silver dollar in defendant's store before he was ejected, to explain his possession of the money. *Brittain v. State*, 52 Tex. Cr. App. 169, 105 S. W. 817.

Nature of Evidence.—On a trial for theft of cattle, a charge that the state was not required to disprove defendant's claims to rightful possession by direct and positive evidence, but could do so by any evidence to satisfy the jury that they were false, is proper. *Blanton v. State* (Cr. App.), 26 S. W. 624.

Intermediate Possession by Another.—To rebut presumption of guilt arising from possession of recently stolen property, defendant charged with theft thereof may show intermediate possession by another. *Faulkner v. State*, 15 Tex. Cr. App. 115, 117.

Admissibility Doubtful Accused Entitled to Benefit.—Where there is doubt as to admissibility of declarations of defendant, regarding his possession of stolen property, doubt should be resolved in favor of accused. *Hampton v. State*, 5 Tex. Cr. App. 463, 468.

Testimony of Defendant Respecting Explanation Uncontradicted.—In a

prosecution for theft, a refusal to admit proof of an explanation of possession given by defendant when he was arrested is not error, where defendant's own testimony respecting the explanation is uncontradicted. *May v. State* (Cr. App.), 51 S. W. 242.

What Might Have Happened under Certain Contingencies.—Where, on a trial for horse theft, accused testified that he procured the horse from a third person, and the third person denied the testimony, accused was entitled to prove the relations existing between him and the third person, but not as to what the third person would do in a certain contingency. *Kegans v. State* (Cr. App.), 95 S. W. 122.

Time of Making Explanation.—When possession of recently stolen property is relied on as inculpatory of the accused, his explanation thereof is admissible in his behalf, provided it was given on the first occasion for any explanation by him. *Allen v. State*, 4 Tex. Cr. App. 581; *Heskeu v. State*, 17 Tex. Cr. App. 161; *Wood v. State*, 41 Tex. 611; *Taylor v. State*, 7 Tex. Cr. App. 659; *Shackelford v. State*, 43 Tex. 138; *Toylor v. State*, 15 Tex. Cr. App. 356; *Darnell v. State*, 43 Tex. 147; *Smotherman v. State*, 47 Tex. Cr. App. 309, 83 S. W. 838; *Castellow v. State*, 15 Tex. Cr. App. 551. But see *Cameron v. State*, 44 Tex. 652, 655.

It is not material even that the first occasion did not present itself until three or four weeks after he had parted with the possession. *Heskeu v. State*, 17 Tex. Cr. App. 161; *Anderson v. State*, 11 Tex. Cr. App. 576; *Lewis v. State*, 17 Tex. Cr. App. 140; *Castellow v. State*, 15 Tex. Cr. App. 551, 556.

While any fact tending to show that stolen property came honestly into defendant's possession is competent evidence for him, he can not show that several days after the theft he

told persons, who proposed to buy the property, that he would not sell it because it was not his, and that he intended to give it to the owner, when called for. *Dixon v. State*, 2 Tex. Cr. App. 530; *Robinson v. State*, 3 Tex. Cr. App. 487, 489; *Williams v. State*, 4 Tex. Cr. App. 5, 10.

To be admissible, the party must be in possession of the property, or the explanation must be made when arrested for the theft, or when charged or informed that he is suspected of the theft. *Heskey v. State*, 17 Tex. Cr. App. 161; *Taylor v. State*, 15 Tex. Cr. App. 356; *Childress v. State*, 10 Tex. Cr. App. 698, 699.

Where accused had disposed of the stolen property before his arrest, the explanation of his possession, given by him when arrested, was not admissible. *Robinson v. State*, 3 Tex. Cr. App. 487.

c. Property Other than That Described in Indictment.

In a prosecution for theft it was not error to admit evidence of the theft of other articles than that alleged in the indictment, where it appeared that such other articles were parts of the fruits of the crime for which accused was on trial. *Terry v. State*, 15 Tex. Cr. App. 66.

On a trial for theft, the defendant's possession of other stolen property besides that described in the indictment is a circumstance provable by the prosecution for the purpose of strengthening the inculpatory inference invoked from his possession of the latter; but proof that he had, at a different time, possession of other stolen property is not competent for this purpose. *Webb v. State*, 8 Tex. Cr. App. 115; *Willis v. State*, 24 Tex. Cr. App. 584, 6 S. W. 856; *Ivey v. State*, 43 Tex. 425, 430.

Evidence of defendant's possession of other cattle than the one alleged to have been stolen held admissible only to establish the identity of the herd

in which the stolen cow was found. *Tyler v. State*, 13 Tex. Cr. App. 205.

After the arrest of accused, for the theft of a horse, he was asked by the officer where the saddle was with which the horse had been ridden, to which he replied that it was in the grass behind the horse, where, upon search, the officer then found it secreted. Held, that this, together with other statements of the accused, made after his arrest, and found to be true, tended to establish his guilt, and was competent evidence for the state, notwithstanding the accused was not on trial for the theft of the saddle. *Speights v. State*, 1 Tex. Cr. App. 551.

The owner testified that he had lost some sixty sheep and could not account for them unless they were stolen; that, in a flock purchased by a neighbor from the defendant, he, the witness, within a month after their loss, found the twelve sheep described in the indictment, and that his marks and brands on them had recently been overlaid with the defendant's marks and brands. Over objection by the defense, the witness was further allowed to testify that in the same flock he also found other and similar sheep which had been similarly remarked and rebranded, but that the original marks and brands had been so effaced that he could not identify those sheep as his. Held, that this testimony was admissible as a link in the chain of circumstances relied on by the state to connect the defendant with the theft of the sheep described in the indictment. *Hester v. State*, 15 Tex. Cr. App. 567.

The indictment charged the theft of "one certain horse, the property of A," giving no further description, and the court permitted the witnesses to describe the horse of A found in defendant's possession. Held, proper as if defendant had more than one of A's horses in his possession, and they were taken at or about the same time,

the state could show it for the purpose of establishing identity in developing the *res gestæ*, or in making its proof by a chain of circumstances connected with the offense on trial, or for the purpose of showing motive or intent in the crime charged. *Wright v. State*, 10 Tex. Cr. App. 476.

On one's trial for theft of a cow, the legal effect of evidence of his possession of other cows, at the time he was found in possession of her, should be explained to the jury. *Long v. State*, 11 Tex. Cr. App. 381.

14. Matters of Defense.

In a prosecution for theft of cattle, defendant may prove that the animals alleged to be the property of the party set out in the indictment were not in fact his property, or that they were the property of some other person, or were taken from the possession of some other person. *Clark v. State*, 29 Tex. Cr. App. 437, 16 S. W. 171; *Long v. State*, 1 Tex. Cr. App. 466, 476.

On a trial for theft in removing cattle from accustomed range, defendant may prove directions given employees regarding gathering and driving cattle for the purpose of rebutting a charge of fraudulent intent. *Bawcom v. State*, 41 Tex. 189, 192.

Agreement to Catch Chickens for Fun.—On trial for theft of a chicken it was error to exclude testimony that on the night of the alleged theft witness and defendant agreed, for sport merely, and without intent to steal, to catch a chicken in prosecutor's hen-roost, make it squall, and then let it go. *Colwell v. State* (Cr. App.), 34 S. W. 615.

Ownership of Other Calves in Defendant's Possession than Those Alleged to Have Been Stolen.—On a prosecution for stealing two calves, defendant having pleaded not guilty, though not claiming to own the two calves, may, as tending to weaken the state's case, show that other calves

also found in defendant's possession, and likewise identified by the prosecuting witness as his, in fact belonged to defendant. *Yates v. State* (Cr. App.), 42 S. W. 296.

Check Given to Employee for Yearling.—In support of the defense, on a trial for theft of a yearling heifer, that defendant bought it of J., there being evidence that J. was at the time working for the defendant and claiming the right to sell it, and there being no evidence of a purchaser by defendant of J. at or about that time of any other yearling, a check for work and one yearling given by defendant to J. at or about the time of the alleged purchase is admissible, though there may have been a witness of the transaction who could have identified the check therewith, and his testimony was not introduced. *Tankersley v. State*, 51 Tex. Cr. App. 224, 101 S. W. 997.

Claim of Ownership by Codefendant.—A, jointly indicted with B for theft of an estray cow, was tried first and acquitted. Held, that B, on B's trial might prove by C that, when A and B were first found in possession of the cow, A claimed it as his property, since A's declaration being *res gestæ* they could be proved by any one who heard them. *Shelton v. State*, 11 Tex. Cr. App. 36.

Drunkenness.—On his trial for theft, the accused offered to prove that, when he took the property, he was so drunk as to be incapable of forming an intent to steal it. Held, that the proof was admissible for the purpose indicated, and it was error to exclude it on the score of irrelevancy. *Loza v. State*, 1 Tex. Cr. App. 488, 28 Am. Rep. 416.

Evidence Sustaining Kleptomania.—In a case of theft, where accused relies upon the defense that he is and was a kleptomaniac, the fact that evidence to sustain such defense would be but cumulative is no sufficient reason for its exclusion. *Harris v. State*, 18 Tex. Cr. App. 287, 295.

Reimbursement of Purchaser.—In a trial for theft of a horse, the proof showed that accused had taken up and sold the animal openly, claiming it as his wife's, and the state showed by the purchaser that the animal was taken from him by the owner, and that accused had never indemnified witness for his loss. Held, that such proof was calculated to show a fraudulent intent on the part of accused; and hence he was entitled to show that he had reimbursed the purchaser. *Sigler v. State*, 7 Tex. Cr. App. 283.

Calf Slaughtered in Secluded Place on Advice of Purchaser.—Defendant solicited M. to take a portion of a beef he was about to slaughter at a place more than two miles distant. M. declined to take it if the calf were driven there, as the animal would become heated. Defendant, following M.'s advice, then took the calf to a near-by pasture, and there slaughtered it. In a prosecution against defendant for stealing a calf alleged to be the one thus slaughtered, the state laid great stress on the fact that the calf was killed in a secluded place. Held, that the testimony of M. as to the facts above stated was admissible. *Landers v. State* (Cr. App.), 63 S. W. 557.

Statement of Accused as to Payment of Money.—In a prosecution for theft of a mower, accused, claiming that he bought it from others, and paid part down, and subsequently paid the remaining twenty-five cents, could show that he paid the money for the mower, and evidence that he stated at the time what he paid the twenty-five cents for, was admissible. *White v. State*, 57 Tex. Cr. App. 196, 122 S. W. 391.

Statement by Accused That He Had Borrowed Money to Pay for Cattle.—Where defendant, on a trial for theft of cattle, claimed that he had bought them, evidence that he had borrowed money, stating at the time that he wanted it to pay for cattle, was immaterial, in the absence of evidence that

he used the proceeds of the loan to buy the cattle which it was claimed he stole. *Bratt v. State* (Cr. App.), 41 S. W. 624.

Reasons Actuating Counsel in Giving Advice Not to Go after Cattle.—On a trial for theft of cattle, which defendant claimed he had bought, it appeared that defendant was advised by his counsel not to go after the cattle after they had been taken from him by prosecutor. Held, that the reasons actuating counsel in giving such advice were immaterial. *Bratt v. State* (Cr. App.), 41 S. W. 624.

15. Corroboration.

Where in a prosecution for cattle theft defendant's wife testified that a short time before a man came to her house looking for stolen cattle S. brought some cattle to her husband's barn, put them in a pen and branded them, the sheriff was properly permitted to testify that he had received official notice that S. had been released from the penitentiary and was a fugitive from justice. *House v. State*, 19 Tex. Cr. App. 227.

One charged with stealing property, which he sold, who claimed that he was authorized to sell it by the person in possession, which is denied by such person, may prove, as corroborating his testimony, that such person offered to sell the property to others, and attempted to secure the services of others to effect a sale. *Kemball v. State*, 39 S. W. 297, 37 Tex. Cr. App. 230, 66 Am. St. Rep. 799.

16. Rebuttal.

Rebuttal by Prosecution of Evidence for Defense.—On trial for horse theft under an indictment containing three counts—one for theft, a second for being an accomplice to one S., and a third for being accessory to one S.—defendant having testified that he had only hired to S. to assist him in trading horses, and that he did not know the horses he had were stolen, it was not error to allow evidence of a prior

conversation between witness and defendant, in which defendant spoke of S. as a notorious thief, and, on being advised to have nothing to do with S., replied that he was able to care for himself. *Chambers v. State* (Cr. App.), 65 S. W. 192.

On a prosecution under Pen. Code 1895, art. 877, making the fraudulent conversion of property under bailment theft, where the defendant was charged with the conversion of a gun left with him to be repaired, and his defense was that prosecutor failed to pay charges and that when defendant removed from the county he took the gun with him to secure his charges, it was error to permit the state to prove to prosecutor that he would have left the money to pay the repairs if defendant had told him to do so. *Simpson v. State* (Cr. App.), 96 S. W. 925.

In a trial for stealing hides, based on circumstantial evidence, the state could show that hides found in a package which accused shipped with those stolen were stolen the night after the particular theft, and on the night before accused delivered the package for shipment, where accused claimed to have bought the hides in good faith from a stranger. *Davis v. State* (Cr. App.), 140 S. W. 349.

Rebuttal by Defendant of Rebutting Evidence of Prosecution.—On a trial for stealing a black yearling colt, defendant testified that one W. had sold and delivered to him a similar colt; that about the time the prosecutor's colt disappeared defendant's colt escaped; and that he took the prosecutor's colt by mistake. Held, where a witness for the defense testified that he was at W.'s house prior to the alleged theft, and saw him feeding a black yearling colt, that it was competent for the witness to testify that W. said he was going to take the colt that morning to defendant. *Herndon v. State* (Cr. App.), 18 S. W. 551.

The brand of the party from whom

the defendant claimed to have obtained the alleged stolen animal was proved to be a horizontal "11." The brand on the animal was proved to be a perpendicular "11." The defense offered evidence to the effect that mistakes in the manner of applying the brand were frequently made by stockmen. Held, that the exclusion of the proof was error. *Boren v. State*, 23 Tex. Cr. App. 28, 4 S. W. 463.

In a prosecution for theft of a cow which disappeared Saturday, where the theory of the prosecution was that the cow was killed by the accused on Monday, and as to which the evidence for the prosecution was only circumstantial, the rejection of evidence offered by the accused to show that, when the cow was found on Tuesday, she had been dead four or five days, is error, as the killing of cattle to secure the hide constitutes a theft of the cattle, but it is not a theft of an animal to remove the hide from a dead animal. *Jackson v. State*, 62 Tex. Cr. App. 106, 136 S. W. 783.

C. WEIGHT AND SUFFICIENCY.

1. Evidence of the Particular Elements of Offense.

a. In General.

A conviction for theft can not be sustained unless founded on evidence sufficient to exclude every other reasonable hypothesis than that of guilt. *Buntain v. State*, 15 Tex. Cr. App. 490.

Circumstantial Evidence.—In a prosecution for theft of a mule, defendant admitted the taking and was found in possession of the animal. Held that, as the only question for the jury was the intent with which the taking was done, the case was not one of circumstantial evidence. *Flagg v. State*, 51 Tex. Cr. App. 602, 103 S. W. 855.

Instances of Circumstantial Evidence Held Sufficient to Sustain Conviction.

—*Thompson v. State*, 30 Tex. 356, 359; *Cox v. State*, 41 Tex. 1, 10; *Chester v. State*, 1 Tex. Cr. App. 702, 707; *Shubert v. State*, 20 Tex. Cr. App. 320,

332; *Simnacher v. State* (Cr. App.), 43 S. W. 354; *Wright v. State* (Cr. App.), 45 S. W. 723.

Instances of Circumstantial Evidence Held Insufficient to Sustain a Conviction.—A yearling calf was killed without the consent of the owner. The hide was found by the owner at the place of killing. Under a search warrant fresh beef was found in defendant's possession, which the officer thought was the beef of a yearling. Defendant told him he could show the hide of the animal from which it was taken, but, on being told to produce it, said he had sold it to a certain person. The person referred to testified that he never, at any time, purchased a hide from defendant. Held, that the evidence, though strongly inculpatory, was not sufficient to support a conviction. *Bennett v. State*, 25 Tex. Cr. App. 695, 8 S. W. 933.

On the trial of a defendant for the theft of a bull, all the evidence for the prosecution was that the bull, with other cattle, passed along a certain road, at a certain time; that the track of a certain horse was made along said road on the night the cattle were driven; and that defendant rode the horse in the direction the cattle were driven. Held insufficient to support a conviction. *Hankins v. State* (Cr. App.), 12 S. W. 490.

Evidence Sustaining a Conviction of Another Crime.—A conviction under an indictment for theft of cattle will not be set aside merely because the evidence would sustain an indictment for illegal marking and branding. *Smith v. State*, 8 Tex. Cr. App. 141.

For instances of evidence held sufficient to sustain a conviction of larceny, see *Brown v. State*, 32 Tex. 606, 608; *Bowman v. State*, 40 Tex. 8, 11; *Haynes v. State*, 40 Tex. 52, 55; *Musquez v. State*, 41 Tex. 226; *Hall v. State*, 41 Tex. 287; *Cameron v. State*, 44 Tex. 652, 657; *Brown v. State*, 2 Tex. Cr. App. 139, 148; *Gonzales v. State*, 3 Tex. Cr. App. 507; *Ruston v.*

State, 4 Tex. Cr. App. 432; *Sweat v. State*, 4 Tex. Cr. App. 617, 624; *West v. State*, 6 Tex. Cr. App. 485; *Hozier v. State*, 6 Tex. Cr. App. 501, 504; *Anderson v. State*, 8 Tex. Cr. App. 542, 545; *Jones v. State*, 8 Tex. Cr. App. 648, 652; *Lowe v. State*, 11 Tex. Cr. App. 253; *Rhodes v. State*, 11 Tex. Cr. App. 563; *Odle v. State*, 13 Tex. Cr. App. 612, 618; *Jones v. State*, 14 Tex. Cr. App. 85; *Luttrell v. State*, 14 Tex. Cr. App. 147; *Magee v. State*, 14 Tex. Cr. App. 366; *Hart v. State*, 14 Tex. Cr. App. 657; *Terry v. State*, 15 Tex. Cr. App. 66; *Schultz v. State*, 15 Tex. Cr. App. 258; *Chandler v. State*, 15 Tex. Cr. App. 587; *Elam v. State*, 16 Tex. Cr. App. 34; *Cowell v. State*, 16 Tex. Cr. App. 57; *Sutton v. State*, 16 Tex. Cr. App. 490; *Roberts v. State*, 17 Tex. Cr. App. 82; *McAfee v. State*, 17 Tex. Cr. App. 135; *Reynolds v. State*, 17 Tex. Cr. App. 413, 425; *Timbrook v. State*, 18 Tex. Cr. App. 1, 7; *White v. State*, 19 Tex. Cr. App. 343; *Atterberry v. State*, 19 Tex. Cr. App. 401; *Block v. State*, 20 Tex. Cr. App. 175; *Schultz v. State*, 20 Tex. Cr. App. 308, 312; *Lawrence v. State*, 20 Tex. Cr. App. 536; *Masterson v. State*, 20 Tex. Cr. App. 574; *Rummel v. State*, 22 Tex. Cr. App. 558, 3 S. W. 763; *Hart v. State*, 22 Tex. Cr. App. 563, 3 S. W. 741; *Blain v. State*, 24 Tex. Cr. App. 626, 637, 7 S. W. 239; *Wolfe v. State*, 25 Tex. Cr. App. 698, 9 S. W. 44; *Thompson v. State*, 25 Tex. Cr. App. 161, 168, 7 S. W. 589; *Spoone-more v. State*, 25 Tex. Cr. App. 358, 359, 8 S. W. 280; *Gentry v. State*, 25 Tex. Cr. App. 614, 616, 8 S. W. 925; *Menges v. State*, 25 Tex. Cr. App. 710, 713, 9 S. W. 49; *Willard v. State*, 27 Tex. Cr. App. 386, 392, 11 S. W. 453; *Williams v. State*, 27 Tex. Cr. App. 466, 11 S. W. 481; *Huffman v. State*, 28 Tex. Cr. App. 174, 12 S. W. 588; *Bayne v. State*, 29 Tex. Cr. App. 132, 15 S. W. 404; *Conners v. State*, 31 Tex. Cr. App. 453, 20 S. W. 981; *Dale v. State*, 32 Tex. Cr. App. 78, 22 S. W. 49; *Martin v. State*, 32 Tex. Cr. App.

441, 24 S. W. 512; *Emmerson v. State*, 33 Tex. Cr. App. 89, 90, 25 S. W. 289; *Trimble v. State*, 33 Tex. Cr. App. 397, 400, 26 S. W. 727; *Chitister v. State*, 33 Tex. Cr. App. 635, 638, 28 S. W. 683; *Carson v. State*, 34 Tex. Cr. App. 342, 30 S. W. 799; *McDonald v. State*, 34 Tex. Cr. App. 556, 560, 35 S. W. 286; *Logan v. State*, 36 Tex. Cr. App. 1, 34 S. W. 925; *Nicks v. State*, 40 Tex. Cr. App. 1, 48 S. W. 186; *Lane v. State*, 41 Tex. Cr. App. 558, 55 S. W. 831; *Garza v. State*, 43 Tex. Cr. App. 499, 66 S. W. 1098; *Thompson v. State*, 45 Tex. Cr. App. 244, 76 S. W. 561; *Berry v. State*, 46 Tex. Cr. App. 420, 80 S. W. 630; *Lopez v. State*, 46 Tex. Cr. App. 473, 80 S. W. 1016; *Smotherman v. State*, 47 Tex. Cr. App. 309, 83 S. W. 838; *Pate v. State*, 47 Tex. Cr. App. 373, 83 S. W. 695; *Gibson v. State*, 47 Tex. Cr. App. 489, 83 S. W. 1119; *Ware v. State*, 47 Tex. Cr. App. 541, 84 S. W. 1065; *Carr v. State*, 57 Tex. Cr. App. 185, 122 S. W. 258; *Crane v. State*, 57 Tex. Cr. App. 476, 123 S. W. 422; *Hunnicut v. State* (Cr. App.), 4 S. W. 882, 883; *Baker v. State*, 28 Tex. Cr. App. 5, 11 S. W. 676; *Freese v. State* (Cr. App.), 20 S. W. 587; *Hudlin v. State* (Cr. App.), 25 S. W. 123; *Evans v. State* (Cr. App.), 38 S. W. 616; *Taylor v. State* (Cr. App.), 42 S. W. 285; *Baxter v. State* (Cr. App.), 43 S. W. 87; *Wright v. State* (Cr. App.), 44 S. W. 151; *Cooper v. State* (Cr. App.), 44 S. W. 1109; *Williams v. State* (Cr. App.), 45 S. W. 494; *Cheatham v. State* (Cr. App.), 45 S. W. 565; *Wright v. State* (Cr. App.), 45 S. W. 723; *Watson v. State* (Cr. App.), 48 S. W. 185; *Randolph v. State* (Cr. App.), 49 S. W. 591; *Johnson v. State* (Cr. App.), 55 S. W. 576; *Finks v. State* (Cr. App.), 57 S. W. 649; *Cosby v. State* (Cr. App.), 63 S. W. 129; *Hickey v. State* (Cr. App.), 63 S. W. 641; *Parsley v. State* (Cr. App.), 64 S. W. 257; *Roberson v. State* (Cr. App.), 65 S. W. 910; *Stewart v. State* (Cr. App.), 67 S. W. 107; *Jones v. State* (Cr. App.), 68 S. W. 267; *Ed-*

wards v. State (Cr. App.), 68 S. W. 795; *Homer v. State* (Cr. App.), 68 S. W. 999; *Jackson v. State* (Cr. App.), 70 S. W. 749; *Ezell v. State* (Cr. App.), 71 S. W. 283; *Rodriquez v. State* (Cr. App.), 71 S. W. 596; *Hartley v. State* (Cr. App.), 71 S. W. 603; *Burns v. State* (Cr. App.), 71 S. W. 965; *Bynum v. State* (Cr. App.), 72 S. W. 844; *Chessley v. State* (Cr. App.), 74 S. W. 548; *Pollard v. State* (Cr. App.), 79 S. W. 26; *Jackson v. State* (Cr. App.), 80 S. W. 83; *Blanco v. State* (Cr. App.), 80 S. W. 370; *Snoga v. State*, 46 Tex. Cr. App. 419, 80 S. W. 625; *Williams v. State* (Cr. App.), 85 S. W. 1142; *Watters v. State* (Cr. App.), 94 S. W. 1038; *Harper v. State* (Cr. App.), 95 S. W. 125; *Johnson v. State* (Cr. App.), 95 S. W. 1062; *Crowder v. State*, 50 Tex. Cr. App. 92, 96 S. W. 934; *Ellison v. State*, 50 Tex. Cr. App. 999, 99 S. W. 999; *King v. State* (Cr. App.), 100 S. W. 387; *Miles v. State*, 51 Tex. Cr. App. 587, 103 S. W. 854; *Pool v. State*, 51 Tex. Cr. App. 596, 103 S. W. 892; *Slaughter v. State* (Cr. App.), 105 S. W. 198; *Penrice v. State* (Cr. App.), 105 S. W. 797; *Thorne v. State*, 52 Tex. Cr. App. 309, 107 S. W. 831; *Crouch v. State*, 52 Tex. Cr. App. 460, 107 S. W. 859; *Hooten v. State*, 53 Tex. Cr. App. 6, 108 S. W. 651; *Lynne v. State*, 53 Tex. Cr. App. 375, 111 S. W. 729; *Rochell v. State*, 55 Tex. Cr. App. 152, 115 S. W. 583; *Daly v. State* (Cr. App.), 117 S. W. 798; *Hernandez v. State*, 57 Tex. Cr. App. 15, 121 S. W. 505; *Fields v. State*, 57 Tex. Cr. App. 613, 124 S. W. 652; *LaFlour v. State*, 59 Tex. Cr. App. 645, 129 S. W. 351; *Franklin v. State* (Cr. App.), 129 S. W. 369; *Ferguson v. State* (Cr. App.), 136 S. W. 465; *Smith v. State*, 62 Tex. Cr. App. 124, 136 S. W. 481; *Johnson v. State*, 62 Tex. Cr. App. 284, 136 S. W. 1058; *Taylor v. State*, 62 Tex. Cr. App. 611, 138 S. W. 615; *Davis v. State* (Cr. App.), 140 S. W. 349.

Driving Animal from Accustomed Range.—Evidence that the animal in

question was found fifty miles from its range, in another county, in defendant's herd; that the herd was gathered by defendant partly in the range in which this animal had been running; that the herd was driven to another county for shipment, etc.—justifies a conviction, under Pen. Code, art. 749, of driving the animal from its accustomed range with intent to defraud its owner thereof. *Shubert v. State*, 20 Tex. Cr. App. 320.

For instance of evidence held insufficient to sustain a conviction for larceny, see *Billard v. State*, 30 Tex. 367; *McHenry v. State*, 40 Tex. 46; *Haynes v. State*, 40 Tex. 52; *Poag v. State*, 40 Tex. 151; *Galloway v. State*, 41 Tex. 289; *Wafford v. State*, 44 Tex. 439; *Blackburn v. State*, 44 Tex. 457; *Cameron v. State*, 44 Tex. 652; *Loza v. State*, 1 Tex. Cr. App. 488; *Kelly v. State*, 1 Tex. Cr. App. 628, 637; *Merritt v. State*, 2 Tex. Cr. App. 177, 184; *Moore v. State*, 2 Tex. Cr. App. 350; *Ward v. State*, 10 Tex. Cr. App. 293; *Brite v. State*, 10 Tex. Cr. App. 368; *Ellis v. State*, 10 Tex. Cr. App. 540; *Spruill v. State*, 10 Tex. Cr. App. 695, 697; *Conn v. State*, 11 Tex. Cr. App. 390; *Hardeman v. State*, 12 Tex. Cr. App. 350; *Johnson v. State*, 12 Tex. Cr. App. 385; *Wilson v. State*, 12 Tex. Cr. App. 481; *Taylor v. State*, 12 Tex. Cr. App. 489; *Shelton v. State*, 12 Tex. Cr. App. 513; *Casinova v. State*, 12 Tex. Cr. App. 554; *Voight v. State*, 13 Tex. Cr. App. 21, 28; *Harris v. State*, 13 Tex. Cr. App. 309; *Johnson v. State*, 13 Tex. Cr. App. 378; *Irvine v. State*, 13 Tex. Cr. App. 499; *Holder v. State*, 13 Tex. Cr. App. 601; *McNair v. State*, 14 Tex. Cr. App. 78; *Cook v. State*, 14 Tex. Cr. App. 96; *Mapes v. State*, 14 Tex. Cr. App. 129; *Dresch v. State*, 14 Tex. Cr. App. 175; *Hammel v. State*, 14 Tex. Cr. App. 326; *Knutson v. State*, 14 Tex. Cr. App. 570; *Deering v. State*, 14 Tex. Cr. App. 599; *Evans v. State*, 15 Tex. Cr. App. 31; *Willis v. State*, 15 Tex. Cr. App. 118; *Taylor v. State*, 15 Tex. Cr. App. 356; *Schind-*

ler v. State, 15 Tex. Cr. App. 394; *Harris v. State*, 15 Tex. Cr. App. 411; *Castellow v. State*, 15 Tex. Cr. App. 551; *Saltillo v. State*, 16 Tex. Cr. App. 249, 252; *Johnson v. State*, 16 Tex. Cr. App. 402; *Tucker v. State*, 16 Tex. Cr. App. 471; *Harris v. State*, 17 Tex. Cr. App. 177; *Coombes v. State*, 17 Tex. Cr. App. 258; *Williams v. State*, 17 Tex. Cr. App. 521; *Miller v. State*, 18 Tex. Cr. App. 34, 38; *Lehman v. State*, 18 Tex. Cr. App. 174; *Heskew v. State*, 18 Tex. Cr. App. 275; *Fairy v. State*, 18 Tex. Cr. App. 314; *McGuire v. State*, 19 Tex. Cr. App. 467; *Lott v. State*, 20 Tex. Cr. App. 230; *Norwood v. State*, 20 Tex. Cr. App. 306; *Thompson v. State*, 21 Tex. Cr. App. 141, 148, 17 S. W. 718; *Page v. State*, 22 Tex. Cr. App. 551, 3 S. W. 745; *Phipps v. State*, 22 Tex. Cr. App. 621, 3 S. W. 761; *Romero v. State*, 24 Tex. Cr. App. 130, 5 S. W. 663; *Myers v. State*, 24 Tex. Cr. App. 334, 6 S. W. 194; *Florez v. State*, 26 Tex. Cr. App. 477, 9 S. W. 772; *Reveal v. State*, 27 Tex. Cr. App. 57, 62, 10 S. W. 759; *Castello v. State*, 27 Tex. Cr. App. 188, 11 S. W. 32; *Hannah v. State*, 27 Tex. Cr. App. 623, 628, 11 S. W. 781; *Jones v. State*, 28 Tex. Cr. App. 42, 11 S. W. 830; *Roguemore v. State*, 28 Tex. Cr. App. 55, 11 S. W. 834; *Reynolds v. State*, 29 Tex. Cr. App. 368, 372, 16 S. W. 192; *Parks v. State*, 29 Tex. Cr. App. 597, 599, 16 S. W. 532; *Lacy v. State*, 31 Tex. Cr. App. 78, 82, 19 S. W. 896; *Johnson v. State*, 36 Tex. Cr. App. 394, 37 S. W. 424; *Snoga v. State*, 46 Tex. Cr. App. 419, 80 S. W. 625; *Edwards v. State*, 47 Tex. Cr. App. 65, 79 S. W. 542; *Womack v. State*, 48 Tex. Cr. App. 148, 86 S. W. 1015; *Whitsel v. State*, 49 Tex. Cr. App. 42, 90 S. W. 505; *Johnson v. State*, 50 Tex. Cr. App. 68, 94 S. W. 900; *Banks v. State*, 56 Tex. Cr. App. 262, 119 S. W. 847; *Hankins v. State* (Cr. App.), 12 S. W. 490; *Cranch v. State* (Cr. App.), 12 S. W. 491; *Schnaubert v. State* (Cr. App.), 12 S. W. 733; *Gilmore v. State* (Cr. App.), 13 S. W.

646; *Johnson v. State* (Cr. App.), 13 S. W. 651; *Adams v. State* (Cr. App.), 13 S. W. 1009; *Pittman v. State* (Cr. App.), 17 S. W. 623; *Green v. State* (Cr. App.), 18 S. W. 651; *Foresythe v. State* (Cr. App.), 20 S. W. 371; *Olivarez v. State* (Cr. App.), 20 S. W. 751; *Coleman v. State* (Cr. App.), 22 S. W. 41; *Ligon v. State* (Cr. App.), 22 S. W. 403; *Shelby v. State* (Cr. App.), 42 S. W. 306; *Hicks v. State* (Cr. App.), 47 S. W. 1016; *Newton v. State* (Cr. App.), 48 S. W. 507; *Môte v. State* (Cr. App.), 55 S. W. 173; *McIver v. State* (Cr. App.), 60 S. W. 50; *Fruger v. State* (Cr. App.), 63 S. W. 130; *Murrah v. State* (Cr. App.), 63 S. W. 318; *Hernandez v. State*, 43 Tex. Cr. App. 80, 63 S. W. 320; *Jackson v. State* (Cr. App.), 65 S. W. 520; *Trevino v. State* (Cr. App.), 69 S. W. 72; *Randle v. State* (Cr. App.), 70 S. W. 958; *Gillam v. State* (Cr. App.), 76 S. W. 923; *Walker v. State* (Cr. App.), 81 S. W. 716; *Watters v. State* (Cr. App.), 82 S. W. 654; *Wesley v. State*, 47 Tex. Cr. App. 624, 85 S. W. 802; *Winchester v. State* (Cr. App.), 85 S. W. 1073; *Bogan v. State* (Cr. App.), 95 S. W. 131; *Lowrie v. State* (Cr. App.), 98 S. W. 838; *Wilson v. State* (Cr. App.), 100 S. W. 153; *Rios v. State* (Cr. App.), 101 S. W. 988; *Landreth v. State*, 53 Tex. Cr. App. 556, 110 S. W. 905; *Fruger v. State*, 54 Tex. Cr. App. 638, 114 S. W. 794; *Placker v. State*, 58 Tex. Cr. App. 126, 125 S. W. 409; *Moseley v. State*, 59 Tex. Cr. App. 90, 127 S. W. 178; *McClure v. State*, 59 Tex. Cr. App. 287, 128 S. W. 386; *Petty v. State*, 59 Tex. Cr. App. 586, 129 S. W. 615; *Daniel v. State*, 60 Tex. Cr. App. 515, 132 S. W. 773; *Spiller v. State*, 61 Tex. Cr. App. 555, 135 S. W. 549; *Dixon v. State*, 62 Tex. Cr. App. 75, 136 S. W. 463.

b. Corpus Delicti.

A conviction for larceny is unsustainable without proof of commission of theft. *Brown v. State*, 1 Tex. Cr. App. 154.

A conviction will be set aside where there was no proof of a fraudulent taking. *Martindale v. State*, 19 Tex. Cr. App. 333.

Evidence that the stolen property was claimed and surrendered does not suffice to prove either the fact of the theft or the ownership represented, even though supplemented by proof that the accused had avoided arrest. *Jorasco v. State*, 8 Tex. Cr. App. 540.

Where, on trial for the theft of a steer, several witnesses for defendant testify that the animal alleged to have been stolen is still on the range, and there is other evidence tending to show that it is a case of mistaken identity, a conviction will be reversed as not supported by the evidence. *Reynolds v. State*, 29 Tex. Cr. App. 368, 16 S. W. 192.

In a prosecution for theft of cattle, when the facts adduced by the state, if admitted to be true, do not show the taking to have been fraudulent, and the idea of a fraudulent taking and conversion is rebutted by all the testimony, the verdict should be for defendant. *Brown v. State* (Cr. App.), 19 S. W. 898.

Uncorroborated Confession Sufficient Proof.—The evidence in a prosecution for theft held to have sufficiently established the corpus delicti, so that defendant was not entitled to an instruction that his uncorroborated confession was not sufficient to support a conviction. *Atkins v. State*, 70 S. W. 744, 44 Tex. Cr. App. 291.

Sufficiency of Evidence.—In a prosecution for the theft of a hog it appeared that the prosecuting witness, hearing a gun fired, and seeing all of his hogs come up but one, went in search of the cause, and found defendant with a gun, and a dead hog, with ears freshly cut off, thrown across his horse, and that defendant, upon being accosted by witness, raised his gun, and witness moved on. Held, that the evidence was sufficient to sustain a conviction.

Garcia v. State (Cr. App.), 26 S. W. 504.

On a prosecution for horse theft, proof that accused was found in possession of the animal, and stated that he took it up on the authority of a third person, and subsequently stated that he had purchased it, and proof that he later sold it in a distant county, constitute sufficient evidence of the corpus delicti. *Landreth v. State*, 70 S. W. 758, 44 Tex. Cr. App. 239.

Defendant was accused of stealing a mule which was missing from a pasture. Defendant was near the pasture shortly after the mule was missed, and three days later he was in a town forty miles away, where the mule was found. Defendant's witness testified that defendant assisted in driving the mule from the pasture to said town as a hired hand. Held, that the corpus delicti was proved. *Tidwell v. State*, 47 S. W. 466, 40 Tex. Cr. App. 38, rehearing denied, 48 S. W. 184. See, also, *Atkins v. State*, 44 Tex. Cr. App. 291, 70 S. W. 744; *Turner v. State* (Cr. App.), 74 S. W. 77.

Evidence Insufficient.—Where, on a trial for stealing a hog from an unknown owner, it is shown that the accused had some fresh pork under suspicious circumstances, but it is not shown that any person in the community had lost a hog, the corpus delicti is not proved. *Lane v. State* (Cr. App.), 45 S. W. 693.

Defendant snatched money from the vest pocket of complaining witness, and offered to bet with it. They stood talking at arm's length for about ten minutes, when, after taking a drink, witness asked for his money. Defendant said he had returned it, and asked to be searched. He afterwards went away a short distance out of sight of witness, then returned, and was searched, but the money was not found. Held, under Pen. Code, art. 727, providing that, if the taking was lawful, to constitute theft the property

must be obtained by some false pretext, or with intent to deprive the owner of it, that the evidence did not warrant a conviction. *Graves v. State*, 25 Tex. Cr. App. 333, 8 S. W. 471.

Evidence that the taker of an estray had ridden it for several days in the neighborhood of its range, without having estrayed it, does not show a felonious taking of the animal. *Blackburn v. State*, 44 Tex. 457.

c. Intent.

(1) In General.

A conviction of theft will be set aside where the evidence fails to show a fraudulent intent. *Winn v. State*, 17 Tex. Cr. App. 284; *Donahoe v. State*, 28 Tex. Cr. App. 12, 11 S. W. 677; *Cox v. State*, 28 Tex. Cr. App. 92, 12 S. W. 493.

In order to a conviction for theft, there should be clear evidence that the taking was with a fraudulent intent. So held as to one's taking, after request refused, an eight-gallon keg of syrup, previously having proposed to pay for it in labor. *Winn v. State*, 11 Tex. Cr. App. 304.

Subsequent Conduct.—Defendant worked on a plantation, whose proprietor authorized the employees to kill trespassing stock. Defendant shot a trespassing hog in the daytime, but he waited until after dark before he took the carcass, which he then appropriated to his own use. Held, on a trial for theft, that the jury were warranted in believing that he shot the hog with intent to appropriate it. *Gear v. State* (Cr. App.), 42 S. W. 285.

Evidence that defendant hired a horse to drive home; that he did not go home, but went in another direction; that on the next day he stated that he had bought the horse, and was "going west;" that he then left the state, and never returned the horse—is sufficient to justify a conviction of theft. *Weeks v. State* (Cr. App.), 24 S. W. 905.

Denying Possession of Property.—Where defendant, who was under age, went with certain persons to kill a beef on the assurance that they had authority so to do, and the only evidence of his felonious intent was that the killing occurred at night and that on the next morning he falsely denied having possession of any of the beef, it was insufficient to support a conviction of theft; the animal being one of a bunch of wild cattle whose owner was unknown. *Smith v. State*, 2 Tex. Cr. App. 477.

Capacity to Entertain Criminal Intent.—On a trial of a boy eleven years of age for horse theft, evidence of the character of accused and the degree of his intelligence, and that he knew that theft was criminal and would subject him to punishment, together with evidence of a fraudulent taking, is sufficient evidence of his capacity to entertain the criminal intent necessary to constitute the offense. *Binkley v. State*, 51 Tex. Cr. App. 54, 100 S. W. 780.

Evidence Sufficient.—Where the defendant in a prosecution for larceny claimed that he took the property as a joke, thinking that it belonged to another person, evidence that such other person did not have property of the character stolen, and that when search was made for it in his immediate presence, he did not correct the mistake and failed to return it, is sufficient to show a fraudulent intent. *Shaw v. State*, 23 Tex. Cr. App. 493, 5 S. W. 317.

In a prosecution for theft of a horse, it appeared that when the horse was taken defendant was living several miles from the place of the theft, that he had borrowed a horse, which he used that night, and returned the next evening, and tied the stolen horse in an inclosure eight or ten miles distant, where he was working. Held, that the court properly refused to give a charge applicable to the theory that defend-

ant took the horse for temporary use only. *Hyatt v. State*, 32 Tex. Cr. App. 580, 25 S. W. 291.

For other instances of evidence held sufficient to prove a felonious intent, see *Quitow v. State*, 1 Tex. Cr. App. 65; *Price v. State*, 41 Tex. 215.

Evidence Insufficient.—Defendant hired a horse at 8:30 a. m. to go to a farm six miles distant. At 2 p. m. he was in a town fourteen miles beyond the farm. In response to an inquiry, he truthfully told where he got the horse, and said he was going back with it that evening. On being asked to trade the horse, he said that a certain horse of one of the parties was the only one he would have, and then rode away. He was intoxicated while in town, and was injured, and the horse was returned to the owner by a third person. Held, that an intent to steal existing at the time of hiring was not shown. *Jones v. State* (Cr. App.), 49 S. W. 387.

Where the evidence was that neighboring cattle followed defendant's herd in spite of his efforts, and he at length drove on, deciding to pay the owner for them or replace them with others, and afterwards, having sent word to the owner, at his request helped to drive them part of the way back, the evidence does not support a conviction. *Guest v. State*, 24 Tex. Cr. App. 530, 7 S. W. 242.

On a prosecution for theft of a dog, evidence that accused passed by prosecutor's premises, and blew his horn, and the prosecutor's dog was afterwards found at accused's residence, five miles away, does not prove beyond a reasonable doubt that the taking was fraudulent, where the dog was returned as soon as accused learned its owner, and he explained his possession by the fact that, when near prosecutor's residence, he blew his horn to call his own dog, and, when she appeared, another dog was with her, and followed her to his home.

Hicks v. State (Cr. App.), 47 S. W. 1016.

For other instances of evidence insufficient to establish criminal intent, see *Landin v. State*, 10 Tex. Cr. App. 63; *Voight v. State*, 13 Tex. Cr. App. 21; *Dow v. State*, 12 Tex. Cr. App. 343; *Ricks v. State*, 19 Tex. Cr. App. 308; *Clark v. State*, 7 Tex. Cr. App. 57; *Wolf v. State*, 14 Tex. Cr. App. 210; *Cox v. State*, 28 Tex. Cr. App. 92, 12 S. W. 493; *Billard v. State*, 30 Tex. 367; *Johnson v. State*, 36 Tex. 375.

Lost Property.—Upon trial for larceny of a hack cushion and a pair of lines, evidence for the accused showed that he had found them on the roadside, and had taken them into his possession, but had never claimed them as his own, and had made inquiry for the true owner. This evidence was supported by the testimony for the state. Upon conviction, held, that accused was entitled to a new trial. *McLaren v. State*, 21 Tex. Cr. App. 513, 2 S. W. 858.

(2) Taking under Claim of Right.

When property alleged to have been stolen is taken under a claim of ownership, it must appear from the evidence, in order to convict (1) that the property taken did not belong to the accused; (2) that he did not believe it to be his own when he took it; (3) that it was fraudulently taken. Each of these facts the jury must be satisfied of beyond a reasonable doubt, and, unless they are so instructed, a judgment of conviction will not be permitted to stand. *Johnson v. State*, 41 Tex. 608.

A conviction for horse theft will be set aside, where the ownership is in doubt, and the evidence tends strongly to prove that defendant claimed the horse in good faith and on reasonable grounds. *Tarin v. State*, 19 Tex. Cr. App. 359.

Reasonable Doubt.—Upon a prosecution for theft, if the jury have a reasonable doubt as to whether defendant

believed he had a right to take the property charged to have been stolen, they should acquit. *Reese v. State*, 67 S. W. 325, 43 Tex. Cr. App. 539; *Camplin v. State*, 1 Tex. Cr. App. 108; *Johnson v. State*, 41 Tex. 608.

Instances of Evidence Held Sufficient to Establish Claim of Right.—

Where it was proved by a witness for the prosecution that, being out with the defendant's son, hunting cattle in the prairie, he first saw the yearling heifer in question; that the son claimed it as the property of his father, and drove it up and penned it in the defendant's cow pen; that it was publicly claimed by the defendant as his property, and publicly branded by him; that when the witness told him he was acting imprudently in branding it, as it had on it the brand of Tom, the prosecutor, he replied that it was his own, and he would do it—it was held that the evidence did not warrant a conviction for larceny. *Herber v. State*, 7 Tex. 69.

Upon trial for theft of a horse, the evidence showed that the accused had made no effort at concealment of the horse in question, but in good faith claimed the same as his property. The evidence also failed to show fraudulent intent. Held insufficient to support a conviction. *Owens v. State*, 21 Tex. Cr. App. 579, 2 S. W. 808.

A judgment of conviction of theft of certain horses can not be sustained where the only evidence to connect defendant with the horses is that he was with a person who had taken the horses off a range, claiming them for his employer, and that after he had sold them to a third person they were left in defendant's pasture. *Lunsford v. State*, 29 Tex. Cr. App. 205, 15 S. W. 204.

On a trial for theft of rails a witness testified that the rails were made by defendant, and were on witness' land, which he sold a short time before the alleged theft, reserving noth-

ing; that he had intended to let defendant have the rails if he had not sold the land, but did not tell defendant that he could take them. The purchaser of the land, who had paid nothing thereon at the time the rails were taken, testified that defendant told him that the vendor had said that he (defendant) might take the rails. Held, that no fraudulent intent was established, and a conviction was unwarranted. *Demint v. State*, 26 Tex. Cr. App. 370, 9 S. W. 738.

Where, on a prosecution for stealing a cow, the evidence shows that defendant took her openly, and sold her in the county seat of the county where she was taken, under circumstances which justified him in believing that the cow was his, for the reason that the brand W B, which was on her, was so blotched as to look like W K, his own brand, a conviction will be set aside. *Brooks v. State* (Cr. App.), 27 S. W. 141.

Defendant sold a horse which, according to the state's evidence, was a bay, and according to defendant's evidence, a gray. Failing to find the horse, the vendee agreed to take in lieu thereof a gray horse, which, according to the state's evidence, defendant afterwards took and sold. Defendant's evidence tended to show that the horse taken by him was the one originally sold, and that defendant believed it to be such. Held, that a conviction for theft could not be sustained; the evidence not establishing a fraudulent intent. *Howard v. State*, 25 Tex. Cr. App. 602, 8 S. W. 806.

On indictment for cattle stealing the evidence showed that defendant, a boy of good character, was hired to assist in driving cattle; that before starting his father told him to look for some cattle of his that had strayed away, and, if found, to put them into the herd, and sell them; that he accordingly took two head of cattle, which he found, unmarked and unbranded,

near the place to which his father's cattle had strayed, and openly sold them as his father's property; and that the owner's wife saw him take them, but said nothing. Held, that the fraudulent intent necessary to conviction was not apparent. *Parks v. State*, 29 Tex. Cr. App. 597, 16 S. W. 532.

Where the evidence shows that defendant sold cattle of the same mark and brand as the cow which he was accused of stealing; that the cattle were gathered from the range by the purchaser, the cow being among those gathered; and that defendant, on hearing that the real owner claimed her, returned her to him—a conviction for larceny should be reversed. *Bennett v. State*, 28 Tex. Cr. App. 342, 13 S. W. 142.

On indictment for larceny of fence rails the evidence showed that defendant took the rails from a cow pen openly, in the day time, in the presence of several witnesses; that defendant had the previous year leased and occupied the place from which he took the rails, and had repaired the pen, using more rails than he was charged with taking. Held, that there was not sufficient evidence that the rails were taken with a fraudulent intent to justify conviction. *Wilson v. State*, 27 Tex. Cr. App. 577, 11 S. W. 638.

An indictment for the theft of an animal alleged that the real owner was H., but that it was taken from the possession of S., a special owner. On the trial, H. testified that he saw defendant brand the animal in a brand of which he was part owner. S. testified that he, and not defendant, branded it; that the brand used was not the partnership one of himself and defendant, but that of H.; that he and defendant were joint special owners in the care, management, and control of the animal, under a contract between them and H. The preponderance of the other testimony supported that of S. Held, that the evidence is

not sufficient to support a verdict of guilty. *Sweeten v. State* (Cr. App.), 20 S. W. 712. See, also, *Camplin v. State*, 1 Tex. Cr. App. 108.

Alleged Claim of Right Disproved by Circumstances.—Where defendant, indicted for theft, claimed to have taken the horse stolen under a claim of ownership, evidence that after he took him, instead of going with it to his home, he carried it into the Indian Territory, by a circuitous route, is sufficient to sustain conviction. *Littlejohn v. State* (Cr. App.), 38 S. W. 789.

(3) Mistake.

Instances of Evidence Held Sufficient to Establish Mistake.—On trial for theft of a horse it appeared that the owner of the horse had lost several at one time, branded with a figure "6," and had found all but the one in the possession of defendant. There was testimony that defendant obtained possession of all of them under directions from his brother, who at the time owned some horses branded "6," to gather up all horses so branded. Held, upon all the evidence, that the conviction was unwarranted, and that the judgment should be reversed. *Phipps v. State*, 23 Tex. Cr. App. 621, 3 S. W. 761.

On the trial of an indictment for the theft of half a cord of wood, the evidence showed conclusively that, where defendant took the fuel from the wood camp, the accused thought it was wood purchased by his employer for which he had been sent. Discovering his mistake, he disclosed its whereabouts to the owner, and had his employer tender the owner the value of the same. Held, in view of Pen. Code, art. 45, providing that if a person, mistaken as to a fact, does an act which would otherwise be criminal, he is guilty of no offense, that the evidence was not sufficient to sustain a conviction. *Donahoe v. State*, 23 Tex. Cr. App. 457, 5 S. W. 245.

Where the defendant took the prop-

erty with the theft of which he is charged, in the belief that it was the property of another, and on learning his mistake at once paid the true owner for the same, there is no larcenous intent to justify a conviction. *White v. State*, 23 Tex. Cr. App. 643, 5 S. W. 164.

On a trial for the theft of a sheep the evidence showed that a sheep marked only with a crop on one ear, belonging to prosecutrix, disappeared, and when it returned six weeks later had a brand which was used by defendant and his three brothers together; that their sheep often became mixed with sheep belonging to prosecutrix, and defendant and his brothers often went to her to regain them; that defendant and one brother went to her, and inquired if she had any of their sheep, and on receiving an affirmative reply, took said sheep and another, in the presence of, and without objection from, prosecutrix, who merely directed her son to inquire if defendant was certain it belonged to him; that defendant was in the habit of speaking of all the sheep which bore said brand as "my" or "our" sheep. None of the witnesses knew when or by whom the brand was attached. The brand was recorded in the name of defendant's brother, who assisted him to take away the sheep, and who had been tried and acquitted of the theft thereof. The tax roll for that year showed that defendant rendered a list of a few sheep, but said brother none. Held insufficient to support a verdict of guilty. *Thompson v. State*, 17 S. W. 718, 21 Tex. Cr. App. 141.

On indictment for theft of a heifer the evidence showed that defendant and one M. owned two heifers, unmarked, unbranded, and closely alike, which ran upon the same range. One W. testified that defendant drove one of them away; that witness told defendant that it belonged to M., and

that defendant asserted it was his; that a few days later it came back, with defendant's mark, but no brand; that afterwards it had the defendant's brand on it. Defendant testified that he got the heifer at the time mentioned by W.; that his brother, who branded it, afterwards told him it was not his; that he then went to M., and proposed to pay, and subsequently did pay, him for it. M. testified that before the indictment defendant came and proposed to pay for the animal; stating that some of his boys had branded it by mistake; that defendant afterwards paid for it; that defendant stated he had a similar heifer in the same range. Held, that the evidence was insufficient to support a judgment of conviction. *Pittman v. State* (Cr. App.), 17 S. W. 623.

Instances of Evidence Showing That Defendant Was Not Acting under Mistake.—On trial for theft of two cows, uncontradicted evidence that defendant knew they belonged to another, that prior to the theft that other had proposed to put his brand upon them, that defendant had urged him to do so, and stated that he knew the animals and would protect the owner in his possession, sufficiently shows defendant did not take the cattle under mistake, or in the belief that he had a right to them. *Lawrence v. State*, 35 Tex. Cr. App. 114, 32 S. W. 530, 531.

In a prosecution for stealing a four year old cow, it appeared that it was killed about sixty yards from defendant's house; that the brand was cut out, the lower part of the hide cut away, the ears cut off, and the head skinned; and that the horns were about a foot long. The defense was that defendant told his servant, who was also convicted, to kill a certain yearling, and did not visit the animal until it was cut up. Held sufficient to sustain a conviction. *Johnson v. State* (Cr. App.), 26 S. W. 504. See, also, *Brill v. State*, 1 Tex. Cr. App. 572.

Taking by Employee of Owner.—

Evidence that one employed to drive a herd of mixed cattle, with many different brands, having no interest in the cattle, in rounding them up, drove away a cow belonging to another, whose brand was unknown to him, is insufficient to support a conviction of theft of the cow. *Mims v. State* (Cr. App.), 32 S. W. 540.

Falsification of Cattle Brand.—Taking in honest mistake is not theft, but falsification of cattle brand negatives such defense. *Heskey v. State*, 14 Tex. Cr. App. 606.

d. Nonconsent of Owner.

Necessity of Positive Evidence to Establish Nonconsent When Owner Is a Witness.—Where in a prosecution for theft the owner of the property is a witness, and there is no positive testimony that he did not consent to the taking, a conviction can not be had, no matter how strong the circumstantial evidence of want of consent may be. *Spiars v. State* (Cr. App.), 69 S. W. 533; *Ridge v. State* (Cr. App.), 66 S. W. 774; *Good v. State*, 30 Tex. Cr. App. 276, 17 S. W. 409; *Wisdom v. State*, 42 Tex. Cr. App. 579, 61 S. W. 926, overruling *Hoskins v. State* (Cr. App.), 43 S. W. 1003.

On a trial for theft it appeared that the animal alleged to have been stolen was not found in the possession of defendant, but that the head was found back of another person's field and the meat in the said person's smokehouse; that it was several days after the animal was killed before defendant was connected with it in any way, and then only when he helped the person mentioned to load it out of the smokehouse into a wagon. Defendant, at the time of rendering the assistance, made no claim to the meat, except that he received pay for it. The alleged owner gave no direct proof at the trial of his want of consent to the taking of the animal, but left it to be inferred from circumstances. Held insufficient

to sustain a conviction. *Good v. State*, 30 Tex. Cr. App. 276, 17 S. W. 409

Circumstances Admissible When Owner's Testimony Unattainable.—

The want of consent of the owner can be shown by circumstantial evidence only, when it appears that the owner's evidence on the point was not obtainable. *Love v. State*, 15 Tex. Cr. App. 563; *Kemp v. State*, 38 Tex. 110; *Wilson v. State*, 45 Tex. 76; *McMahon v. State*, 1 Tex. Cr. App. 102, 105; *Porter v. State*, 1 Tex. Cr. App. 394; *Erskine v. State*, 1 Tex. Cr. App. 405; *Welsh v. State*, 3 Tex. Cr. App. 413; *Foster v. State*, 4 Tex. Cr. App. 246; *Trafton v. State*, 5 Tex. Cr. App. 480, 485; *Jackson v. State*, 7 Tex. Cr. App. 363; *Rains v. State*, 7 Tex. Cr. App. 588, 589; *Stewart v. State*, 9 Tex. Cr. App. 321; *Spruill v. State*, 10 Tex. Cr. App. 695, 698; *Wilson v. State*, 12 Tex. Cr. App. 481, 487; *Bowling v. State*, 13 Tex. Cr. App. 338; *Williamson v. State*, 13 Tex. Cr. App. 514; *Anderson v. State*, 14 Tex. Cr. App. 49; *Clayton v. State*, 15 Tex. Cr. App. 348; *Dixon v. State*, 15 Tex. Cr. App. 480, 485; *Miller v. State*, 18 Tex. Cr. App. 34; *Pratt v. State*, 19 Tex. Cr. App. 276; *Scott v. State*, 19 Tex. Cr. App. 325; *Schultz v. State*, 20 Tex. Cr. App. 308, 311; *Mackey v. State*, 20 Tex. Cr. App. 603; *Wisdom v. State*, 42 Tex. Cr. App. 579, 61 S. W. 926.

Circumstance Must Exclude Every Reasonable Presumption That Owner Gave His Consent.—

The want of the owner's consent to the taking of the property charged to have been stolen may be shown by circumstances absolutely excluding every reasonable presumption that the owner gave his consent. *Schultz v. State*, 20 Tex. Cr. App. 308.

On a prosecution for theft the owner of the property alleged to have been stolen was not introduced to prove his want of consent to the taking. The want of consent was proven by circumstances as to what oc-

curred between the owner and defendant in reference to the recovery and surrender of the money. Defendant testified that the owner had removed from the county, and that his whereabouts was not known. Held, that the court properly refused to instruct the jury to acquit for failure to prove the want of consent. *Atkins v. State*, 70 S. W. 744, 44 Tex. Cr. App. 291.

Possession of stolen property is only presumptive evidence of the possessor's guilt, and it does not establish the caption and asportation thereof without the owner's consent. *Garcia v. State*, 26 Tex. 209.

Consent of Bailees.—An indictment for theft of money alleged the ownership and possession in one D. and one W. The proof showed that they were mercantile partners, and that the bulk of the money was on deposit with them for owners whose want of consent to the taking was not proved. Held, that proof that the money was taken without the consent of the bailees was sufficient on that part of the case. *Skipworth v. State*, 8 Tex. Cr. App. 135.

Instances of Evidence Sufficiently Showing Owner's Consent.—

On a prosecution for larceny, the owner of the property testified that a detective informed him of a contemplated larceny of his property by defendant, a third person, and the detective; that the latter claimed to be working to catch defendant and such third person; and that the owner had stated to the detective that they had better leave his cattle alone, but if they came to get them the detective should go ahead and catch them. The detective testified that he told the owner that defendant and a third person and himself intended to steal his cattle; that he wanted the party from whom they wanted the cattle to be informed, so as not to take any chances. The owner and another were in wait, and watched the taking of the cattle. Held, that

evidence was sufficient to show that the owner consented to the taking. *McGee v. State* (Cr. App.), 66 S. W. 562.

On a trial for the theft of a horse taken from the possession of H., who was holding it for S., defendant claimed that he had purchased the horse from H., but this was denied by H. It appeared that defendant took the horse, and delivered it in part payment of a note due from him; that, while defendant was taking the horse to be so delivered, he was met by H., who knew the horse, but who said nothing to defendant about it. The county commissioner stated that the horse was an estray, and turned it over to S. to take care of until it was sold; that S. left the county, and that a short time before the day of sale the commissioner was told by H. that he did not know what had become of the horse. H. testified that he told the commissioner that it had gone off the range. Held, that the evidence tended to show that the horse was taken with H.'s consent, and did not support the conviction. *Chalk v. State* (Cr. App.), 18 S. W. 864. See, also, *Dixon v. State*, 15 Tex. Cr. App. 480; *Canaday v. State* (Cr. App.), 87 S. W. 346.

Instances of Evidence Deemed Sufficient Proof of Owner's Nonconsent.—That the owner of stolen property caused search to be made therefor is a cogent circumstance to show want of his consent to the taking. *Rains v. State*, 7 Tex. Cr. App. 588.

On trial of a person for theft of a horse, the evidence of several witnesses for the state was that defendant took the horse from the range, from the possession of the owner, without her consent. The evidence of several witnesses for defendant showed that he obtained such possession by borrowing the horse from the owner's son-in-law, who had authority to loan it. Held, that a verdict of guilty was supported by the evidence.

Dowell v. State (Cr. App.), 35 S. W. 651.

Where, in a prosecution for cattle theft, the person in possession, charged to be the owner at the time of the theft, died prior to the trial, evidence that on the night of the alleged theft such person immediately pursued and followed the cattle to a town, and there secured officers and followed on until he found defendant, and thereafter claimed the cattle as his property and took them away, was sufficient to show want of consent to the taking of the cattle. *Taylor v. State* (Cr. App.), 75 S. W. 35. See, also, *Nixon v. State* (Cr. App.), 93 S. W. 555; *Allen v. State*, 8 Tex. Cr. App. 67; *Guin v. State* (Cr. App.), 50 S. W. 350; *Hoskins v. State* (Cr. App.), 43 S. W. 1003; *Brooks v. State* (Cr. App.), 31 S. W. 410; *Brown v. State* (Cr. App.), 28 S. W. 536.

e. Value of Property.

Necessity of Proof of Value.—There can be no conviction for theft where there is no proof of the value of the property stolen. *Radford v. State*, 35 Tex. 15; *Moore v. State*, 17 Tex. Cr. App. 176; *Hall v. State*, 15 Tex. Cr. App. 40.

Evidence of Value—Circumstantial Evidence.—Though no witness testified to the exact value of the property, circumstantial evidence that defendant, as bailee, sold it for \$5 and converted the same to his own use, is sufficient to sustain a conviction of theft by the bailee. *Collins v. State*, 56 Tex. Cr. App. 385, 118 S. W. 1038.

About \$17 in money, alleged to have been stolen from the owner's wagon, in which he was riding in the evening after dark, was found on defendant's person a few hours later, when he was arrested. He made no claim thereto, and no effort to account for its possession. On his companion, who was arrested at the same time, was found property, belonging to the same owner, the value of which, added to defend-

ant's \$17, aggregated more than \$20. Held, that a conviction of theft of property over the value of \$20 would not be disturbed. *Harris v. State* (Cr. App.), 20 S. W. 754.

Bill of Lading Not Proof of Value.—A bill of lading with which the defendant has no connection is not proof of value. *Radford v. State*, 35 Tex. 15.

Proof of Two Separate Acts Amounting Together to Value Alleged Not Sufficient.—Under an indictment for felonious larceny, it devolves on the state to select a particular transaction, and prove value of \$20 or more. The averment of value is not proved by the evidence of two separate acts of theft, each of property less than \$20 in value, but together amounting to more. *Lacey v. State*, 22 Tex. Cr. App. 657, 3 S. W. 343.

Evidence Held Sufficient to Sustain Value.—Where, in a prosecution for theft, a witness swore that the value of the property alleged to have been stolen was \$300 at the time of the trial, and there was no claim that the value of the property had undergone any change from the time of the theft up to such time, the value was sufficiently proven. *Cummings v. State* (Cr. App.), 106 S. W. 363. See, also, *Frazier v. State*, 61 Tex. Cr. App. 640, 138 S. W. 620; *Ramon v. State* (Cr. App.), 98 S. W. 872.

Sufficient Proof of Market Value.—On a trial for stealing a saddle, where it was shown that the actual value of the saddle was \$22, and that defendant had since refused that sum for it, there was sufficient proof of its "market value." *Rollins v. State*, 32 Tex. Cr. App. 566, 25 S. W. 125.

Evidence Held Insufficient to Sustain Value.—In a prosecution for theft, evidence held insufficient to sustain a verdict finding that the value of the property stolen was \$50 or more. *Howell v. State*, 83 S. W. 185, 47 Tex. Cr. App. 262; *Flynn v. State*, 83 S. W.

206, 47 Tex. Cr. App. 26; *Close v. State*, 55 Tex. Cr. App. 380, 117 S. W. 137; *Floyd v. State* (Cr. App.), 117 S. W. 138.

Opinion Evidence Held Insufficient to Show Value.—On a trial for the theft of clothing and cuff buttons, the owner swore that he had been buying ready-made clothing for years, and that the three pair of pantaloons stolen were worth \$27 when new, and that he had worn them but little, and the cuff buttons were worth \$1. A merchant who had been selling ready-made clothing for twelve years swore that the pantaloons when new were not worth over \$16, and their present value is \$12. Held, that the evidence is not sufficient to sustain a finding that the value of the property stolen is at least \$20. *Sampson v. State* (Cr. App.), 20 S. W. 711.

Where several witnesses testified that a pearl alleged to be stolen had a market value in the county, but they were not aware what it was, and the only testimony as to the market value was that of an expert, who stated that it was \$22 to \$24, it was error in the instruction to authorize a conviction on a value outside and above the market value, if the jury believed such value existed, and a conviction for felony, based on a valuation of \$50 or more, was error. *McBroom v. State* (Cr. App.), 61 S. W. 480.

Value of Money.—Where one was convicted of the theft of a \$10 United States currency bill, the fact that it was a \$10 bill and United States currency proves its value. *Sowles v. State*, 52 Tex. Cr. App. 17, 105 S. W. 178.

On a trial for theft, the evidence of the prosecutor that the amount of money stolen was \$72 showed that the value thereof was \$72. *Gibson v. State* (Cr. App.), 100 S. W. 776.

f. Ownership and Possession.

(1) In General.

Necessity of Proof of Ownership.—In prosecutions for theft the owner-

ship of the stolen property must be satisfactorily proven as alleged. *Ritcher v. State*, 38 Tex. 643.

To establish ownership of property charged to have been stolen, the state must show exclusive control, care, and management in the claimed owner. *Spiller v. State*, 61 Tex. Cr. App. 555, 135 S. W. 549.

To support a conviction of theft of cotton, the ownership must be more definitely proved than that the alleged owner, who had never seen or identified the cotton as his, had lost about the same weight, and that his field was the only one in which cotton was piled near the place where the cotton in question was for a time placed. *Kinney v. State* (Cr. App.), 19 S. W. 981.

Where, on an indictment for stealing a cow, the evidence showed that the alleged owner of the cow never had one of the brand with which the animal in question was marked, and that no witness ever saw defendant in possession of the cow in question, having only heard reports about this cow which defendant had sold to a third party, held, that the ownership was not made out, and the conviction could not stand. *Thompson v. State*, 23 Tex. Cr. App. 356, 5 S. W. 114.

Exclusive Possession and Management Sufficient Proof of Ownership.—

Where an indictment for theft describes property as belonging to a certain person, proof that he was in the exclusive possession and management of the property is sufficient. *Ledbetter v. State* (Cr. App.), 29 S. W. 1084; *S. C.*, 35 Tex. Cr. App. 195, 32 S. W. 903; *Littleton v. State*, 20 Tex. Cr. App. 168; *Spiller v. State*, 61 Tex. Cr. App. 555, 135 S. W. 549; *Tyler v. State* (Cr. App.), 70 S. W. 750; *Taylor v. State* (Cr. App.), 75 S. W. 35; *Grant v. State*, 3 Tex. Cr. App. 1; *Dodd v. State*, 10 Tex. Cr. App. 370; *Crockett v. State*, 5 Tex. Cr. App. 526, 527; *Turner v. State*, 7 Tex. Cr. App. 596; *Pip-*

pin v. State, 9 Tex. Cr. App. 269; *Alexander v. State*, 9 Tex. Cr. App. 48.

The fact that cattle had wandered from a pasture into an adjoining pasture was not material on the issue of control or ownership. *Taylor v. State* (Cr. App.), 75 S. W. 35. See, also, *Alford v. State*, 31 Tex. Cr. App. 299, 20 S. W. 553.

Instances of Evidence Held Sufficient to Establish Ownership.—Evidence, in a trial for cattle theft, held to support a finding of special ownership in two persons in charge. *Taylor v. State*, 62 Tex. Cr. App. 611, 138 S. W. 615.

Evidence on a prosecution for larceny of a steer, the defense being purchase from the owner, held sufficient to sustain a conviction. *Johnson v. State*, 61 Tex. Cr. App. 104, 134 S. W. 225.

Defendant killed a hog, and fled when he saw a person approaching. Later in the evening he carried the hog away. The evidence as to whether the hog belonged to defendant's daughter or to prosecutor was conflicting. Held, sufficient to sustain a conviction of theft. *Wright v. State*, 48 S. W. 191, 40 Tex. Cr. App. 45.

Where defendant, accused of stealing a mule alleged to be the property of S., set up that G. was the owner, and had given defendant authority to take and sell the mule, and both G. and S. testified that G. had sold the mule to S., and G. denied giving any such authority, and it appeared that defendant had carried the mule to a distant part of the country and sold it, giving a bill of sale under an assumed name, and making false statements in regard to the property, the evidence sustained a conviction. *Homer v. State* (Cr. App.), 68 S. W. 999.

On the trial for the theft of a yearling it appeared that defendant, for a valuable consideration, executed a writing to one M., reciting that defendant sold to M. ten head of yearling cat-

tle marked with defendant's brand, which he was to keep during the winter, and deliver in the spring. There was no other description. It appeared that defendant had other cattle, and there was no evidence but that some of them were of the same age and brand, nor did it appear that the one named in the indictment was one of the ten mentioned in the writing. Said ten head of cattle were never separated from defendant's other cattle, were never designated and set apart as M.'s cattle, and were never delivered to M. Held, that this evidence did not warrant a conviction for theft of one of said cattle, as the sale was executory, and the title and possession never changed. *Johnson v. State* (Cr. App.), 13 S. W. 651.

Instances of Evidence Held Insufficient to Establish Ownership.—Where on a prosecution for the theft of the property of T. F. T., the record showed that none of the witnesses testified as to the initials of the owner, but merely called him by his last name, there was a failure of proof, entitling defendant to a new trial. *Atkins v. State*, 70 S. W. 744, 44 Tex. Cr. App. 291.

Where an indictment for larceny alleged ownership in a certain person, evidence excluding the idea that the property was ever reduced to possession by such person, but showing merely that he had been requested by the real owner to look after it, and, if he found it, to sell or ship it for the benefit of the owner, was insufficient to show ownership as alleged. *Bryan v. State*, 91 S. W. 580, 49 Tex. Cr. App. 196.

Where, on a trial for larceny of coal, there is no evidence that defendant took the coal from the person alleged to be the owner, but took it from along the right of way of a railroad, which was in the possession of a person other than such alleged owner, a judgment of conviction is not

supported by the evidence. *Overturf v. State*, 31 Tex. Cr. App. 10, 23 S. W. 147.

Upon trial for larceny of cattle, if there is evidence that the cattle stolen had the brand "P O" on the left hip, and a lateral "P" on the left side, and the person whose cattle are alleged to have been stolen testifies that he had the management of the cattle in the "P O" brand, it is not to be inferred that the witness refers to the before-mentioned brand, and a conviction upon such testimony can not be sustained. *Groom v. State*, 23 Tex. Cr. App. 82, 3 S. W. 668.

For other instances of evidence held sufficient to establish ownership, see *Butler v. State*, 3 Tex. Cr. App. 48, 51; *Groom v. State*, 23 Tex. Cr. App. 82, 88, 3 S. W. 668; *Myers v. State*, 24 Tex. Cr. App. 334, 6 S. W. 194; *Coombes v. State*, 17 Tex. Cr. App. 258; *Spiller v. State*, 61 Tex. Cr. App. 555, 135 S. W. 549; *Blackburn v. State*, 44 Tex. 457, 458.

(2) Ownership Unknown.

Necessity to Prove Ownership in Person Other than Accused.—To support a conviction for theft, it should clearly appear that the property in question belonged to another than the accused; and where this not only does not appear, but there is evidence to show property in the accused, a conviction will be set aside. *Benton v. State*, 21 Tex. Cr. App. 554, 2 S. W. 885.

Where, on a prosecution for a theft of cattle of an unknown owner, there is no evidence that any unknown owner possessed any cattle in that part of the country, and no evidence to show that animals found in defendant's possession had belonged to any unknown owner, the conviction can not be sustained. *Dawson v. State* (Cr. App.), 61 S. W. 489.

Where it is alleged that a steer belonged to A., but it appears that another owned cattle branded with the

same brand, and that the steer in question was an estray, the averment of ownership is not supported, though A. had bought cattle of that brand, and had branded them with the figure "5" on the left shoulder, and the animal in question was so branded on the left hip. *Sharp v. State*, 29 Tex. Cr. App. 211, 15 S. W. 176.

Estray.—In a prosecution for horse theft, proof that the animal was an estray, and the owner unknown, is sufficient to show ownership in an unknown person. *Landreth v. State*, 70 S. W. 758, 44 Tex. Cr. App. 239.

An indictment charged theft of one head of cattle, in two counts—the first alleging ownership in a person unknown; the second, in one W. It appeared that the animal was an estray, and defendant had made affidavit that it belonged to his codefendant, and had assisted in taking it away. Held, that the case was properly submitted upon the first count. *Peevehouse v. State* (Cr. App.), 27 S. W. 142.

Where one count in an indictment for theft of cattle alleged that they were the property of a certain person, and in his possession, but was ignored, and there was evidence that he was in constructive possession thereof as an estrayer (*Sayles' Civ. St.*, art. 4570, et seq.), and that they were in his pasture when taken, a conviction under a second count charging that the animals belonged to, and were in possession of, an owner to the grand jury unknown, will be set aside as against the weight of the evidence. *Thomason v. State* (Cr. App.), 34 S. W. 121.

Where the ownership of a stolen horse was charged in an indictment as in one S., and it appeared that the horse came near the range of S., about four years prior to the taking, and was known as an estray, there was no such proof of ownership as would sustain conviction. *Ritcher v. State*, 38 Tex. 643.

(3) Claims of Ownership by Defendant.

When property alleged to have been stolen was taken under a claim of ownership, the evidence must satisfy the jury beyond a reasonable doubt that the property did not belong to the accused, that he did not believe it to be his when he took it, and that it was fraudulently taken in order to justify a conviction. *Alexander v. State*, 9 Tex. Cr. App. 48.

As an Admission of Guilt.—A claim of defendant to one of the horses found in his possession can not be deemed an admission of guilt. *Hardin v. State*, 8 Tex. Cr. App. 653, 659.

Instances of Evidence Sustaining Ownership.—Where the taking of a horse, alleged to have been stolen, was open, under claim of property, and there was a difference of opinion as to whether the brand was that of the alleged owner or of defendant, the witnesses being equal in number, and having the same means of knowledge, a verdict of guilty will be set aside. *Thompson v. State*, 26 Tex. Cr. App. 466, 9 S. W. 760.

On indictment for stealing a calf, which was alleged to belong to one M., there was evidence that the calf was running with a cow belonging to M., and that, on being separated, the cow and calf made efforts to remain together. There was also evidence that the motherless calves would take up with strange cows, and that the cows would act as mothers to them. Defendant took the calf openly, declaring it to be his, and his claim of ownership was not disproved. The brands of the calf and the cow were different. Held, that the evidence did not justify a conviction. *Schnaubert v. State* (Cr. App.), 12 S. W. 733.

On a trial for the theft of three hogs, one F., the alleged owner of the hogs, testified that in the spring of 1884 she bought a sow and five pigs from one W.; that in April, 1885, she had three

of the pigs in her pen, and that defendant took them from the pen; that she did not know the marks on the pigs; that when defendant took the pigs from the pen he said that they were his; and that witness knew the pigs to be hers. Other witnesses corroborated F., and stated that they were "confident" that the pigs taken were F.'s pigs, or that such was their "opinion," or that the pigs taken "strongly resembled" those of F. Defendant's witness testified that the pigs taken were the property of defendant; also that they were marked with defendant's mark. Held, that the evidence was not sufficient to support a conviction. *Misseldine v. State*, 21 Tex. Cr. App. 335, 17 S. W. 768.

On a prosecution for stealing hogs, one witness testified that hogs found in defendant's possession had the earmarks used by the prosecuting witness, and like those of hogs which he had missed. There was no other evidence that he owned the hogs found. Defendant proved that the hogs found had the earmarks used by defendant, and were his hogs; that the mark he used was almost identical with that of the prosecuting witness, and that others used the same mark as the latter. Held, that ownership in the prosecuting witness was not sustained. *Stone v. State*, 27 Tex. Cr. App. 576, 11 S. W. 637.

On prosecution for stealing hogs, defendant proved by several witnesses that he took the hogs openly, claiming them as his property, and that he owned such hogs. One witness, who was present when the hogs were recovered, testified that defendant surrendered them under protest, and when threatened with violence. Prosecutor and one witness testified that the hogs belonged to the prosecutor. Held insufficient evidence to convict. *McGowan v. State*, 27 Tex. Cr. App. 183, 11 S. W. 112.

On prosecution for stealing a hog,

the prosecuting witness testified that he did not know whether the hog had strayed, or been stolen. A witness heard the report of a gun in defendant's field; saw defendant going towards the house; saw a dead hog, similar to the lost one; and on the next day saw a drag leading from the place. Defendant's wife and daughter testified that the hog shot by defendant was one he owned. It was openly killed and cleaned, in daylight. Several witnesses testified that they knew defendant's hogs, and, if he owned such a hog as that described, they did not know it. Held insufficient evidence to convict. *Ellis v. State*, 27 Tex. Cr. App. 190, 11 S. W. 111.

On a trial for the theft of a hog, it was shown by the state that a hog killed and salted down by defendant was in the mark of another person, alleged in the indictment to be the owner. The latter, however, would not testify that the hog was his property, but stated that he had found it unmarked and running with his hogs, and had put his mark on it believing it to be his, or that he had as good a right to it as any one else. A son of defendant testified that the hog belonged to him; that it had gone off unmarked when about five months old, and in about three months afterward it came up along with the sow, its mother; that he could see that it had been marked, though, on account of its having grown wild, he could not tell whose mark had been put on it; and that he knew it positively by the flesh marks. It also appeared that there was no secrecy in the conduct of defendant respecting the animal. Held, that the evidence was insufficient to warrant a conviction. *Thurman v. State*, 33 Tex. 684.

Herber v. State, 7 Tex. 69, reaffirmed as to sufficiency of evidence to make out a case of larceny. *Thurman v. State*, 33 Tex. 684.

Where, on a prosecution for larceny,

defendant's guilt was dependent on the ownership of the property once owned by himself and another, to whom the state alleged he had sold it, held, that the latter should have been called, as the best evidence procurable of the real ownership. *Hunter v. State*, 13 Tex. Cr. App. 16.

(4) Marks and Brands.

Record of Brand Anterior to Alleged Theft Is Only Prima Facie Proof of Ownership.—*Turner v. State*, 39 Tex. Cr. App. 322, 328, 45 S. W. 1020.

Necessity That Brand Correspond to Record.—On a prosecution for horse theft, the main fact relied on was the brand. The certificates of the record of the brand of the real owner and that of accused were almost identical, one being a mashed O, and the other a round O. Their horses ran on the same range, and the branding by the means used was not always exact. Several witnesses testified that accused owned the horse. Held insufficient to sustain a conviction for the theft. *Fruger v. State* (Cr. App.), 63 S. W. 130.

Record of Brand Need Not Be Shown Where Ownership Established Independent of Brand.—In a trial for theft of a steer, it is not necessary for the state to show a recorded brand, where the ownership of the animal was established positively and emphatically, independently of the brand. *Wolf v. State*, 4 Tex. Cr. App. 332, 333; *Jones v. State*, 3 Tex. Cr. App. 498, 499; *Fisher v. State*, 4 Tex. Cr. App. 181, 183; *Hutto v. State*, 7 Tex. Cr. App. 44.

Sufficient Designation of Brand.—In a prosecution for cattle theft, the record of a brand designating the place as on the ribs and hip was sufficient. *McGrew v. State*, 31 Tex. Cr. App. 336, 20 S. W. 740.

Fact Animal Is Branded Does Not Prove Ownership in Owner of Brand.—Where cattle of the "WADE" brand were owned by Oran Wade and J. L.

Wade and H. L. Driver, and some of that brand sold every year since 1886, the mere possession by the accused of a steer with the "WADE" brand thereon is not sufficient to convict him of the crime of stealing such steer. The prosecution must prove it to be the property of the alleged owners. *Clark v. State* (Cr. App.), 20 S. W. 555. See, also, *Horn v. State*, 30 Tex. Cr. App. 541, 17 S. W. 1094.

An Unrecorded Brand Is Not Sufficient Evidence of Ownership.—Where, on the trial of an indictment for larceny, the evidence of the alleged owner of the animal was to the effect that in the summer of 1883 he had lost a colt, eighteen months old, and branded with a certain mark, which was not recorded, and that the animal found in the possession of defendant in September, 1886, he identified by this brand, and that there were no flesh marks that he could swear to, except that it had a small neck, and its form, and that he knew it to be the same colt by the brand, and the small neck and form, held that, under Rev. St., art. 4561, declaring that an unrecorded brand shall not be recognized in law as any evidence of ownership, the proof arising from flesh marks was insufficient proof of ownership to sustain a conviction. *Romero v. State*, 24 Tex. Cr. App. 130, 5 S. W. 663. See, also, *Wyers v. State*, 21 Tex. Cr. App. 448, 454, 2 S. W. 816; *Tittle v. State*, 30 Tex. Cr. App. 597, 599, 17 S. W. 1118; *Burke v. State*, 25 Tex. Cr. App. 172, 7 S. W. 873.

g. Taking and Asportation.

Circumstantial Evidence.—Circumstantial evidence, as well as direct evidence, is competent to prove a fraudulent taking. *Roberts v. State*, 17 Tex. Cr. App. 82.

Though defendant claimed he won prosecutor's money from him while drunk, a conviction of theft is sustained by the evidence, it appearing that he got prosecutor into a wine room of a

saloon, the evidence suggesting that he and his companion must have drugged him, and he and his companion having been seen standing over him in a suspicious manner after he was stupefied, one of them having his pocketbook, and, when detected, having appeared quite angry, and abused the porter for being there, and they having then gone away and divided his money. *Hickey v. State* (Cr. App.), 63 S. W. 641.

Where the evidence showed that accused was seen following an alleged accomplice, who was going towards the place where the stolen property was concealed, an instruction to disregard the evidence unless the accused was near the accomplice at the time was properly refused. *Nash v. State* (Cr. App.), 47 S. W. 649.

Defendant saw money in a trunk, and attempted to borrow it from the owner, stating that defendant must have money even if he had to steal it. Later during the same evening defendant returned to the residence of the owner, and was seen at the trunk, and the loss of the money was discovered immediately after his departure. Held sufficient to sustain a conviction for theft. *Edwards v. State* (Cr. App.), 68 S. W. 795.

Circumstantial Evidence Insufficient to Sustain a Conviction.—On a trial for theft there was testimony that a person left his pocketbook, containing money and a drink check, in his trousers at the place where defendant worked to be repaired, that on receiving his trousers he missed his pocketbook, that defendant denied any knowledge thereof, and the drink check was traced into his possession. Held, that it was not error to deny a motion in arrest, on the ground that at most the drink check alone was traced into defendant's possession and that it was insufficiently described in the indictment. *Rose v. State*, 52 Tex. Cr. App. 154, 106 S. W. 143. See *Patrick v.*

State, 50 Tex. Cr. App. 496, 98 S. W. 840; *Wade v. State*, 35 Tex. Cr. App. 170, 32 S. W. 772.

Instances of Evidence Held Insufficient to Sustain a Conviction.—Where two parties are arrested for horse theft, and one of them is indicted for the theft of the animal found in the possession of the other, evidence that the parties were found in company of each other when arrested, that each was in the possession of a horse stolen from different persons at different times, and that tracks indicated that the accused and his companion had committed a burglary together after the animals were stolen is insufficient to support verdict of conviction. *McIver v. State* (Cr. App.), 60 S. W. 50.

Prosecutor engaged in a game of poker with five strangers, one of whom, the defendant, was dealing the cards. During the course of the play, defendant dealt prosecutor four aces and another four kings. Defendant then went out, and another took his place as dealer. When it came to a "show-down," prosecutor stated what he held, but declined to show his hand. One of the others then grabbed his cards, saying, "You have got a foul; you have six cards," and on placing them on the table there were six cards. Thereupon the players grabbed for their money, prosecutor failing to get any. Prosecutor testified that he had five cards until the player grabbed his hand, and that he thought that defendant was present, and joined in the grabbing. All the other witnesses testified that they did not see defendant present or grab for money. Held, that the evidence was insufficient to sustain a conviction for theft. *Hernandez v. State*, 63 S. W. 320, 43 Tex. Cr. App. 80.

Evidence that L., having money which he desired to send to his wife, gave it to defendant, on his suggesting that it be sent by express and offering to send it, and that together they went to a place appearing to be an express

office, and defendant placed the money on the counter, and, a dispute arising, defendant walked away, and L. never saw the money again, is insufficient to sustain a conviction for theft. *Peters v. State*, 91 S. W. 224, 49 Tex. Cr. App. 365.

In a prosecution for theft, it appeared that the prosecutor, hearing the report of a gun, went out, and found one of his hogs freshly shot, and defendant standing 15 feet away from it, loading his gun; that defendant said, "I did not shoot it;" and that the next day defendant told a third person that he had shot the prosecutor's hog and wanted to pay for it. Held insufficient to sustain a conviction, there being no evidence of actual taking of the property. *Martin v. State*, 44 Tex. 172.

Where, in a prosecution for theft of a mule, it is not shown that accused was ever in possession of the animal, but only that it was seen yoked to an animal belonging to him, and accused's statement after his arrest that he purchased it from a named person is not disproved, though such person was examined by the state, a conviction can not be sustained. *Trevino v. State* (Cr. App.), 69 S. W. 72.

Prosecutor was induced by false representations to accompany E. to a room where gambling was being carried on, and was thereafter induced to play poker with defendant and another. During the game, E. induced prosecutor to put up money on a hand, after which defendant drew out of the game, and before the hand was finished the sheriff raided the place and compelled the surrender of all prosecutor's money. Held, that such evidence was insufficient to convict defendant of theft of the amount put up by prosecutor on the game. *Randle v. State* (Cr. App.), 70 S. W. 958.

For other instances of evidence held insufficient to show necessary appropriation of the property. See *Berg v.*

State, 2 Tex. Cr. App. 148; *Black v. State*, 46 Tex. Cr. App. 107, 79 S. W. 311; *Young v. State*, 47 Tex. Cr. App. 468, 83 S. W. 808.

Instances of Evidence Held Sufficient to Sustain a Conviction.—In a prosecution for theft, part of the stolen property, consisting of barbed wire, was found in a building on defendant's place, over which he exercised a personal supervision, though it was occupied partly by others also. Defendant, when arrested, was building a fence with some of the wire, and told the officer who seized it that he bet he would bring it back. Held, that the evidence showed sufficient possession of the property by defendant to warrant a conviction. *Pitts v. State* (Cr. App.), 30 S. W. 359.

On a prosecution for the theft of a bale of cotton, evidence is sufficient to sustain a conviction where defendant was seen en route from the place where the cotton was stolen to where it was sold, driving a wagon with a bale of cotton in it, whereas he owned no cotton at the time, having previously sold his crop. *Piland v. State* (Cr. App.), 47 S. W. 1007.

Proof that accused was found skinning a hog freshly killed, and that, when discovered, he ran away, leaving the carcass, is sufficient to support a conviction of larceny of the hog. *Walker v. State*, 3 Tex. Cr. App. 70.

For other instances of evidence held sufficient to establish fraudulent taking, see *Roberts v. State*, 17 Tex. Cr. App. 82; *Conner v. State* (Cr. App.), 76 S. W. 924; *Robertson v. State*, 1 Tex. Cr. App. 311, 313; *Wright v. State* (Cr. App.), 44 S. W. 151.

Evidence Establishing Single Offense.—In a prosecution for theft, held, that the evidence was sufficient to sustain a conviction of the felonious taking of two bales of cotton at the same time, which defendants admitted to have stolen, but which they claimed were

taken at different times, so that the offense would be a misdemeanor. *McAllister v. State*, 56 Tex. Cr. App. 188, 120 S. W. 420.

Illegal Marking and Branding as Evidence of Fraudulent Taking.—An illegal marking and branding of an animal for the purpose of appropriating the same, will constitute evidence of a fraudulent taking, in a prosecution for theft, since the marking and branding of an animal can not be accomplished without a manual possession of the same by the person performing such act. *Coward v. State*, 24 Tex. Cr. App. 590, 7 S. W. 332.

Sufficient Evidence Showing Place of Taking.—In a prosecution for the theft of a mare it was proved by the state that the animal was running in her accustomed range in C. county, and had been there for a week prior to the time she was seen in the defendant's possession in D. county. Held, sufficient to prove that, when taken, the animal was in C. county. *Ashlock v. State*, 16 Tex. Cr. App. 13.

h. Conversion, Secreting, Withholding, or Appropriation of Property.

Conversion.—In a trial of a bailee for theft of a horse placed in his charge, evidence that defendant borrowed money on the horse was not of itself proof of a conversion of the horse; defendant retaining possession thereof, and the owner being in a position to at any time reclaim it. *McAlister v. State*, 59 Tex. Cr. App. 237, 128 S. W. 123.

In a prosecution under Pen. Code 1895, art. 877, making the fraudulent conversion of property under bailment theft, evidence considered, and held not to sustain a conviction, but to show that the property was kept openly under a claim of right. *Simpson v. State* (Cr. App.), 96 S. W. 925. See, also, *Barnes v. State*, 46 Tex. Cr. App. 513, 81 S. W. 735.

Withholding Property.—Where de-

fendant knew who owned certain mules in his possession, and that the owner was hunting for them, but defendant failed to notify him, a conviction for theft of the mules will not be set aside as contrary to the evidence. *Martinez v. State* (Cr. App.), 57 S. W. 829.

Appropriation.—In a prosecution for theft of a bay horse, which accused was shown to have exchanged for a sorrel, evidence held to show that accused was in exclusive possession of the bay when he swapped it for the sorrel. *Johnson v. State*, 57 Tex. Cr. App. 603, 124 S. W. 664.

Though the property was voluntarily returned to the owner, but not until four months after finding it, and defendant had several times claimed the property as his own, and on one occasion he was apparently trying to trade it off, the evidence justifies a jury in finding that he intended to appropriate the property. *Stepp v. State*, 31 Tex. Cr. App. 349, 20 S. W. 753.

Defendant hired a horse at 8:30 a. m. to go to a farm six miles distant. At 2 p. m. he was in a town fourteen miles beyond the farm. He truthfully told where he got the horse, and said he was going back with it in the evening. On being asked to trade the horse, he said that a certain horse of one of the parties was the only one he would have, and then rode away. He was intoxicated while in town, and was injured, and the horse was returned to the owner by a third person. Held, that an actual appropriation was not established. *Jones v. State* (Cr. App.), 49 S. W. 387.

2. Evidence of Special Statutory Offenses.

a. Larceny from the Person.

Evidence Sufficient.—Evidence held sufficient to establish larceny from the person. *Clemmons v. State*, 45 S. W. 911, 39 Tex. Cr. App. 279, 73 Am. St. Rep. 923; *Finks v. State* (Cr. App.), 57 S. W. 649; *Ezell v. State* (Cr. App.),

71 S. W. 283; *Nelson v. State*, 88 S. W. 807, 48 Tex. Cr. App. 471; *Washington v. State*, 53 Tex. Cr. App. 300, 109 S. W. 157; *Burns v. State* (Cr. App.), 71 S. W. 965; *Johnson v. State*, 55 Tex. Cr. App. 411, 117 S. W. 964.

Evidence that the owner of stolen money felt some one touch his pocket containing his purse, and that on looking around quickly he saw defendant's hand holding the purse pass from his to defendant's pocket, is sufficient to prove theft from the person, under Penal Code, art. 745, which provides that, "the theft must be committed without the knowledge of the person from whom the property is taken, or so suddenly as not to allow time to make resistance before the property is carried away, and that it is only necessary that the property stolen should have gone into the possession of the thief." *Green v. State*, 28 Tex. Cr. App. 493, 13 S. W. 784.

Evidence Insufficient.—Evidence held insufficient to sustain a conviction of fraudulently and privately taking money from another's person without his knowledge and consent. *Day v. State*, 53 Tex. Cr. App. 648, 111 S. W. 408; *Brooks v. State*, 56 Tex. Cr. App. 513, 120 S. W. 878; *Thomas v. State*, 51 Tex. Cr. App. 329, 101 S. W. 797; *Grant v. State*, 59 Tex. Cr. App. 123, 127 S. W. 173.

Where the indictment charged the defendant with stealing money from the "person" of another, held, that proof that the money was delivered to the defendant's wife in one city, to carry to another, did not sustain the charge of theft from the person in the indictment, under Penal Code, art. 772. *De Gaultie v. State*, 31 Tex. 32.

On an indictment under Pen. Code, art. 745, for theft from the person of the prosecuting witness without his knowledge, the only evidence was that of the prosecuting witness, who testified that he went into the room where the theft was alleged to have been

committed, and went to sleep with his clothes on; that he was awakened by defendant's putting his hand into the pocket containing his (prosecutor's) purse; that he "felt him as he shoved his hand on down" into the pocket; and that he then drew out the purse, whereupon prosecutor took it away from him. Held, that the evidence was insufficient to sustain a conviction. *McLin v. State*, 29 Tex. Cr. App. 171, 15 S. W. 600.

b. Bringing Stolen Property into State.

On a prosecution for bringing stolen property into the state, evidence held sufficient to show with reasonable certainty that defendant brought \$50 of stolen money into the state. *Bink v. State*, 89 S. W. 1075, 48 Tex. Cr. App. 598; S. C., 89 S. W. 1077; *Davenport v. State*, 89 S. W. 1077, 49 Tex. Cr. App. 11; S. C., 89 S. W. 1078.

3. Commission of or Participation in Act by Accused.

a. In General.

Necessity That Evidence Show Accused Connected with Taking.—Where there is no evidence connecting defendant with the larceny, a conviction will be set aside. *Foster v. State*, 19 Tex. Cr. App. 73.

Evidence that defendant's first connection with the stolen property was subsequent to the taking does not show that he stole it. *Vaughn v. State*, 17 Tex. Cr. App. 562.

On indictment for stealing an animal, evidence that the brand on the animal had been changed, so as to make it resemble a brand claimed by defendant, without any evidence to show that defendant was concerned in altering the brand, or that he was connected in any way with the stolen animal, is insufficient to justify a conviction. *Schnaubert v. State*, 28 Tex. Cr. App. 222, 12 S. W. 732.

Charge against Third Person.—It is no evidence that another committed the theft with which defendant is charged, that an affidavit or complaint has been

made against said other person, and an appearance bond taken of him on an accusation for theft of the property. *Bingham v. State*, 37 S. W. 753, 36 Tex. Cr. App. 453.

Evidence Sufficient to Connect Defendant with the Taking.—Accused sold a horse within a week after it was taken, in an adjoining county. He testified that he was employed at a charcoal camp in such county, and while there rode the animal to the town where the sale occurred, and after he had returned to camp reported what he had done and accounted for the proceeds. The persons for whom accused was working were not produced, and, so far as the record disclosed, were not sought as witnesses. Held, that the evidence was sufficient to sustain a conviction for a theft of the horse. *Jackson v. State* (Cr. App.), 70 S. W. 749.

Where on a trial for theft the evidence clearly showed, circumstantially, that both defendants took the property and divided it and subsequently confessed to having it and turned the same over to the officer, a ground of motion for new trial that the undisputed evidence, except the statement of his codefendant, showed that defendant had no part in the taking, is without merit. *Moxie v. State*, 54 Tex. Cr. App. 529, 114 S. W. 375. See, also, *Wright v. State* (Cr. App.), 45 S. W. 723.

Evidence Insufficient to Connect Defendant with Taking.—It was proved that another than defendant took a stolen mare, and that defendant was not present when it was taken. A witness testified that he sold the mare to defendant, and that the person who took it told him that he was getting up stock for defendant, and witness gave him authority to get any of witness' stock he found on the outside. There was no proof that defendant and the taker or any others had conspired to steal the mare, nor that defendant, at the time of the taking, was doing anything to further it, or that he knew

that the mare was to be taken. It was simply proved that defendant had the mare in another county after the taking, and told a witness that he sold her. Held insufficient proof to convict defendant as principal. *Knowles v. State*, 27 Tex. Cr. App. 503, 11 S. W. 522.

Appellant was convicted as a principal in the theft of money. He was not present when the money was stolen, and the only evidence of his complicity was that he persuaded the owner to accompany him to a neighbor's house, and the money was stolen from the owner's house by one M. while the owner and the appellant were at the neighbor's. Some weeks after the theft appellant admitted he had received from M. some of the money, but he made no admission tending to implicate himself in the taking of the money from the house. Held, that this does not sustain the conviction of appellant as a principal in the theft. *Trimble v. State*, 18 Tex. Cr. App. 632.

b. Credibility of Witnesses.

Upon a trial for theft, the only evidence tending to criminate the accused was the testimony of a witness for the state, who, before the trial, had assured accused and his counsel that he knew nothing of the case and nothing against accused. Held, that a new trial should be granted. *Adams v. State*, 10 Tex. Cr. App. 677.

A conviction of two brothers for the theft of a cow will not be disturbed, where the trail of three horses and a colt led from the place where the cow was stolen to a camp where three brothers were cutting up fresh meat, and one of the horses and the colt belonged to the younger brother, though the eldest brother testified that he alone stole the cow. *De Los Santos v. State* (Cr. App.), 22 S. W. 924.

In a prosecution for killing and stealing a cow, the testimony of the prosecuting witness, an admitted accomplice to the theft, corroborated by his daugh-

ter and another witness, went to establish defendant's guilt, while a greater number of witnesses testified that defendant was at his house, some distance away from the spot, at the time the killing must have taken place, and that the prosecuting witness was seen going towards his own house with a part of the beef soon after. Held, there being evidence that defendant did the killing, that the verdict of guilty will not be disturbed as against the weight of evidence. *Thompson v. State*, 25 Tex. Cr. App. 161, 7 S. W. 589.

c. Identity of Property.

Necessity of Establishing Identity.—

A conviction for theft can not be sustained when the identity of the animal stolen is not made apparent. *Crockett v. State*, 14 Tex. Cr. App. 226.

Money.—In a prosecution for theft, evidence held to sustain the charge of the indictment that the property taken was lawful current money of the United States of America. *Bacon v. State*, 61 Tex. Cr. App. 206, 134 S. W. 690.

Property Found in Defendant's Possession Must Be Identified with Property Stolen—Identity Must Be Proven Beyond Reasonable Doubt.—In a prosecution for the theft of seed cotton, it appeared that wagon tracks led from the scene of the theft to defendant's house, and that his wagon showed evidence of recent use, and that seed cotton of a much smaller amount than that stolen was found in defendant's house the next morning, but the owners testified that they were unable to identify it. Held insufficient to warrant an instruction as to the possession of recently stolen property. *Roy v. State*, 34 Tex. Cr. App. 301, 30 S. W. 666.

In a prosecution for theft of money, based on circumstantial evidence, the evidence considered, and held insufficient to show that the money found in possession of defendant was the money stolen from the prosecuting

witness, so as to sustain a verdict of guilty. *Johnson v. State*, 52 Tex. Cr. App. 510, 107 S. W. 845.

Where the prosecution could not identify the bale of cotton which defendant had as prosecutor's property, it was error to refuse to charge that, in order to convict, the jury must believe beyond a reasonable doubt that it was the identical bale taken from prosecutor. *Doss v. State*, 28 Tex. Cr. App. 506, 13 S. W. 788.

On the trial of an indictment for the theft of a bull, the evidence showed that the bull disappeared from its accustomed range without the knowledge of the owner, and that a day or two after the alleged theft defendant was seen in possession of a bull which corresponded with the description of of the alleged stolen animal. Witnesses for the defense testified to facts which established the defendant's presence at a remote place on the night of the theft, and identified the animal in defendant's possession as another than the alleged stolen animal. Held, that the evidence was insufficient to support a conviction. *Cranch v. State* (Cr. App.), 12 S. W. 491.

In a prosecution for theft of a hog, evidence held insufficient to sustain a conviction because not identifying the pork found in defendant's possession as being part of the hog alleged to have been stolen. *Watson v. State* (Cr. App.), 82 S. W. 514.

Identity Proved with Reasonable Certainty.—Under an indictment for stealing a sorrel mare, which was described as being thin, and having no particular marks or brands, testimony showing that defendant had been seen coming from the direction of the alleged owner's stable, riding a sorrel mare, thin in order, having no particular marks or brands; that he was seen afterwards by several persons with such an animal in his possession; and that neither defendant nor any of his family were known to have owned a

sorrel mare—was sufficient to identify the animal in the possession of defendant as the stolen mare. *Pierce v. State* (Cr. App.), 36 S. W. 95.

Evidence Held Insufficient to Establish Identity.—In a prosecution for theft, the evidence held not sufficient to show that the time of the theft was before the indictment was found, or to establish the identity of the animal stolen to a reasonable certainty. *McDaniel v. State*, 90 S. W. 504, 49 Tex. Cr. App. 47. See, also, *Crockett v. State*, 14 Tex. Cr. App. 226; *Roebuck v. State*, 40 Tex. Cr. App. 689, 51 S. W. 914.

The indictment charged defendant with the theft of an animal belonging to one F., who testified that the animal taken "would have been two years old in the summer of 1890," and had only one brand, and that was "A F," of medium size. The evidence showed that the animal sold by defendant was a yearling, and would not be "two years old in the summer of 1890;" that it had an unusually large "A F" brand, and also an "I C" brand. Held, that the evidence failed to support the conviction. *Ligon v. State* (Cr. App.), 18 S. W. 865.

The owner of the alleged stolen mare, although living within three miles of defendant, did not identify his property, though hearing that it had been taken up by defendant. The brand on the animal was different from that on defendant's mare, and defendant rode his mare in open day in the neighborhood of the alleged owner, admitting that it looked like his mare, but stating that he (defendant) had bought it. Held, that the evidence was insufficient to sustain a conviction. *Lacy v. State*, 31 Tex. Cr. App. 78, 19 S. W. 896.

On a trial of defendant for theft of a calf branded "O R A," it appeared that the calf taken from defendant, though corresponding to the description of the calf alleged to have been stolen,

was branded "A R. M.;" that defendant had assumed control of it for and under the authority of one A.; that A. had, in driving his cattle through the county, lost several head, one of which was identical in description, both as to brands and peculiarities, with the one taken from defendant; and defendant further proved his authority from A. to sell any of his lost cattle. Held insufficient to support a conviction. *Ligon v. State* (Cr. App.), 22 S. W. 403.

Evidence that defendant had sold a cow which was shown to have entirely different marks from the one lost by the prosecuting witness is insufficient to sustain a conviction. *Stewart v. State*, 24 Tex. Cr. App. 418, 6 S. W. 317.

Circumstantial Evidence Held Sufficient to Establish Identity.—Where, in the trial for theft of cotton and a wagon, the proof showed that accused had more cotton immediately after the theft than before; that the cotton was taken from the field of a neighbor at night, and a wagon was stolen at the same time from the field, and both were taken from near a pecan tree; that the wagon, by its track, was traced to accused's house; that the shoe tracks along the way were identified with muddy shoes of defendant; that cotton was found in accused's shed room early the morning after the theft, and was damp; that the wagon was traced from accused's house to a creek where it was concealed; that the cotton had pecan leaves among it; that the wagon was filled in the field under the pecan tree; that no pecan trees were shown to exist on accused's lands; and that the cotton lost was nearly the same in amount as the cotton found at accused's—the cotton found at accused's was sufficiently identified as the cotton which had been stolen, to sustain the verdict of guilty. *Simmacher v. State* (Cr. App.), 43 S. W. 354.

Evidence that defendant was the only person who had an opportunity to take certain bank notes, and that a few minutes after the taking the notes described in the indictment were found secreted a short distance from where defendant had been seen just before in an excited condition, authorized the conclusion that the notes so found were those described in the indictment. *Bagley v. State*, 3 Tex. Cr. App. 163.

Instances of Circumstantial Evidence Held Not to Establish Identity.

—On trial for theft of a neat animal, evidence that defendant sold an animal similar to that alleged to have been stolen is not sufficient to sustain a conviction where it is not shown that defendant was ever in possession of the animal sold, which was a different one from that alleged to have been stolen. *Beach v. State* (Cr. App.), 11 S. W. 832.

On a trial for stealing a black hog, the only evidence of identification was the testimony of the prosecutor that he found in defendant's smokehouse meat that had been killed two or three days, with black hair; that "I do swear that this meat came from my hog, because it had black hair on it." Defendant also owned some black hogs. Held, that the evidence did not justify a conviction. *Smith v. State*, 68 S. W. 510, 44 Tex. Cr. App. 81.

A conviction for stealing a "plain gold ring" can not be sustained where the only inculpatory facts are that defendant had an opportunity to commit the theft, and that on the day thereafter he was seen wearing a plain gold ring, not identified, however, as the stolen ring, and when his uncontradicted evidence shows that he borrowed the ring from his sister. *Bishop v. State* (Cr. App.), 25 S. W. 25.

On a prosecution for horse theft, the evidence against defendant was that the stolen horse was "heavy built, dark bay or brown color, branded T P on left thigh, about fifteen hands high,

and about ten or twelve years old;" that the horse was stolen on the first Sunday night in December; and that defendant sold a horse answering that description the next day, in Waco, twenty-five miles distant, at public auction; and that, on returning from Waco on the cars, defendant was advised by his brother to throw off his saddle; and that defendant got up and went out of the car, for what purpose witness did not know. Defendant introduced evidence to show that the owner of the brand T P had sold a number of horses like the stolen horse, and so branded, to various parties. Held, that evidence was insufficient to sustain a conviction for want of proof of identity of the horse sold and that stolen. *Horn v. State*, 30 Tex. Cr. App. 541, 17 S. W. 1094.

On an indictment for the larceny of certain cattle belonging to A., evidence that defendant was seen driving cattle corresponding in number to those belonging to A., but not otherwise identified as his, and that he said he had penned A.'s cattle for a certain cattle dealer, who employed him as driver, held not to justify a conviction. *Harris v. State*, 13 Tex. Cr. App. 309.

A conviction for theft of a hog will be set aside where the proof merely shows that the meat of a hog about the size and shape of the missing one was found at defendant's house, and where defendant and two other witnesses testified that it was the meat of defendant's own hog. *Littlejohn v. State* (Cr. App.), 13 S. W. 889.

That defendant had fresh veal in his possession, that a calf belonging to a neighbor had disappeared, and that the calf's mother was seen near defendant's house lowing over a spot where an animal had been recently butchered, is not sufficient to sustain a conviction of theft where defendant and his wife both testify that a party of hunters who camped near their house killed a calf which they had with them,

and gave defendant part of the meat. *Adams v. State* (Cr. App.), 13 S. W. 1009.

d. Complicity as Accomplice or Accessory.

Evidence Sufficient as a Corroboration of an Accomplice.—On the day of a theft of cattle, accused and an accomplice were seen riding towards where the cattle were stolen; and on the day of their sale by the accomplice they together went to the town where the cattle were sold, and were seen there together immediately before and after the sale. After being indicted, accused approached a witness who had seen him riding towards where the cattle were stolen, and told him, if he would swear for him in this case, accused would do as much for him, if he ever got into trouble. Held to connect accused with the theft, and sufficient as a corroboration of an accomplice. *Hankins v. State* (Cr. App.), 47 S. W. 992.

The testimony showed that defendant had been seen, for some days previous to the theft of certain sheep, conversing with one of the persons who stole them; that he lent his pistol to him; that he interceded with his employer to obtain leave of absence to visit a sick brother; that such visit was never made; that one of the thieves was seen riding one of defendant's horses shortly before the taking; and that defendant had arranged for the shipment of some car loads of sheep. Held, that such testimony was sufficient, taken in connection with the declarations of those engaged in the actual taking, to charge the defendant with conspiring to steal the sheep. *Long v. State*, 23 Tex. Cr. App. 692, 5 S. W. 188.

Though, on a prosecution for theft of hogs, it was shown that the hogs were driven to the place where they were killed by others than defendant, the jury were authorized to infer that he was connected with the theft, where

it was shown that he, with three others, was driven away from the dead hogs, and that he was afterwards overheard to say in his home that one of the state's witnesses had given them away. *Tucker v. State* (Cr. App.), 23 S. W. 682.

Evidence Insufficient to Convict Defendant of Complicity.—The state's witness testified that he got the alleged stolen steer out of its pasture, and put it in another pasture, and was assisted by defendant, and that defendant asked him where the steer came from, and he told him it came from the Big Lake country, and belonged to a Mexican. Held insufficient to convict defendant of complicity in the theft, though he afterwards sold the steer, as it was not shown that he knew of the witness' fraudulent intent, and as no subsequent fraudulent participation in the disposition of the steer would constitute theft on his part. *Buchanan v. State*, 26 Tex. Cr. App. 52, 9 S. W. 57.

Evidence that the steer alleged to have been stolen was found in possession of defendant's brothers, 100 miles from the range where it was stolen, with its brand mutilated and changed, together with a large herd of cattle, most of which were stolen; that defendant's brothers declared that the cattle belonged to them and defendant, who was found about twelve miles distant, with his family and a broken-down wagon filled with household goods, in a rough part of the country—is insufficient for conviction, there being no proof that defendant was ever in the county where the steer was stolen, or that he was ever seen with the herd of cattle, or, if he had an interest in the herd, what that interest was, a portion of the herd not having been stolen. *Menges v. State*, 25 Tex. Cr. App. 710, 9 S. W. 49.

On a trial for the theft of a horse, testimony for the state showed that one C. hired the horse to go to W.;

that, while C. was getting it at the stable, defendant came and called for C., but went away on C.'s motioning for him to do so; that defendant went with C. to W., and that the horse was there sold as C.'s property, defendant vouching for C., and his ownership of the horse. Defendant's brother testified that C. tried to hire him to drive on the trip, but that he could not go, and told C. where he could find defendant. Defendant testified that C. hired him to drive, and when they reached W. told him that the horse belonged to him, and he was going to sell it; that he believed the horse belonged to C., and told the auctioneer who sold it that he knew C., and that C. was all right. Held, that the evidence did not warrant a conviction, as none of the facts were inconsistent with his innocence. *Gilmore v. State* (Cr. App.), 13 S. W. 646.

A conviction of theft of hogs was not sustained by testimony of an accomplice that he and defendant bought the hogs from a person who told them where they could be found; that they skinned the hogs, and delivered part to said person, as his share, and returned with the rest—and other evidence that fresh hog meat was found on the premises occupied by defendant and his father, after defendant denied any was there, it not appearing that defendant asserted any claim to said meat. *Funderburg v. State* (Cr. App.), 34 S. W. 613.

Defendant, while riding on horseback in company with his employer, B., on the latter's horse, encountered C., and, at his employer's request, gave up to him the horse. B. and C. then rode off, stole and butchered a cow, and brought defendant some of the meat. B. testified that defendant was told before he gave up the horse of the intention to steal a beef, that he expressed approval, and knew he and C. were in the habit of stealing cattle together. Held, not sufficient to sustain a conviction as an accomplice.

Tippie v. State (Cr. App.), 13 S. W. 777.

Where the only evidence of defendant's complicity in the theft is that he was seen standing by, while two others killed the animal, but took no part in the matter, nor accompanied his companions in the removal of the carcass, it is insufficient to support a conviction. *Sharp v. State*, 29 Tex. Cr. App. 211, 15 S. W. 176. See, also, *Womack v. State*, 16 Tex. Cr. App. 178; *West v. State*, 28 Tex. Cr. App. 1, 11 S. W. 635.

e. Identity and Presence of Accused and Opportunity to Commit Crime.

In a theft prosecution, the evidence held sufficient to identify accused so as to support a conviction. *Cunningham v. State*, 20 Tex. Cr. App. 162.

Participation in a fraudulent taking warrants a conviction for theft, though defendant was not present at the taking. *McCampbell v. State*, 9 Tex. Cr. App. 124, 127; *Welsh v. State*, 3 Tex. Cr. App. 413; *Scales v. State*, 7 Tex. Cr. App. 361.

Opportunity.—A conviction of theft is not supported by evidence which at most shows that defendant, as well as others, had an opportunity to have done the stealing. *Caldwell v. State* (Cr. App.), 42 S. W. 304.

The owner left his watch in his vest, and hung the vest in his office, before noon, and at 6 o'clock the watch was missing. Many people visited the office besides defendant, who was seen to go into and come out of the office. Defendant was arrested for the theft the next month, and after he had been in jail six weeks the watch was found in the house which defendant occupied when arrested, and which had ever since been occupied by another family. When found the watch was running, and was wrapped in calico similar to a dress worn by defendant's wife. Held a verdict of guilty of stealing

the watch was not justified. *Jackson v. State* (Cr. App.), 65 S. W. 520.

Defendant stole \$12 in silver from a safe, and the evidence showed that a \$10 bill was in the safe a short time before the silver was taken, but, after this, it was gone. No other person was shown to have had an opportunity of taking the bill except a clerk and a boy, who were together, and detected defendant taking the silver. The bill was not then found on defendant, but all his clothes were not searched. Held, that the evidence rendered it reasonably certain that defendant stole the bill. *Battle v. State* (Cr. App.), 24 S. W. 642.

In a prosecution for larceny, a witness testified that he kept a grocery store for prosecutor; that on the night of the theft he had been drinking with defendant and others, that he locked the store, and went with defendant, at his request, to defendant's room; that he then went to sleep. Another witness testified that the lock on the store was an unusual one, and could have only been opened by a person acquainted with it. A window of the store was opened, but no fastenings were broken. Defendant, when informed of the theft, stated that he would kill the man that laid it on him. Held, that the evidence was insufficient to warrant a conviction. *Powers v. State*, 16 Tex. 546.

4. Effect of Possession of Property Stolen.

a. In General.

In Texas the rule of law is now well settled that the possession of property recently stolen is a fact or circumstance to be considered by the jury, in connection with all the other evidence submitted to them, in determining the guilt or innocence of the accused. *Alderson v. State*, 2 Tex. Cr. App. 10, 12; *Yates v. State*, 37 Tex. 202; *Martinez v. State*, 41 Tex. 164; *Perry v. State*, 41 Tex. 483; *Thompson v. State*, 43 Tex. 268, 273; *McCoy v.*

State, 44 Tex. 616; *Massey v. State*, 1 Tex. Cr. App. 563; *Hannah v. State*, 1 Tex. Cr. App. 578; *Watkins v. State*, 2 Tex. Cr. App. 73, 74; *Flores v. State*, 13 Tex. Cr. App. 665; *Montgomery v. State*, 13 Tex. Cr. App. 669; *Faulkner v. State*, 15 Tex. Cr. App. 115; *Bryant v. State*, 16 Tex. Cr. App. 144; *Kennedy v. State*, 16 Tex. Cr. App. 258; *York v. State*, 17 Tex. Cr. App. 441, 442; *Lehman v. State*, 18 Tex. Cr. App. 174; *Schultz v. State*, 20 Tex. Cr. App. 308; *Ayres v. State*, 21 Tex. Cr. App. 399, 406, 17 S. W. 253; *Stockman v. State*, 24 Tex. Cr. App. 387, 393, 6 S. W. 298; *Moreno v. State*, 24 Tex. Cr. App. 401, 6 S. W. 299; *Boyd v. State*, 24 Tex. Cr. App. 570, 6 S. W. 853; *Taylor v. State*, 27 Tex. Cr. App. 463, 11 S. W. 462; *Lee v. State*, 27 Tex. Cr. App. 475, 11 S. W. 483; *Cooper v. State*, 29 Tex. Cr. App. 8, 19, 13 S. W. 1011; *Lockhart v. State*, 29 Tex. Cr. App. 35, 13 S. W. 1012.

The single circumstance that the accused was in possession of stolen property within a few days from the time it was taken is not sufficient to justify a conviction of larceny. *Williams v. State*, 4 Tex. Cr. App. 178; *Truax v. State*, 12 Tex. Cr. App. 230; *Dailey v. State*, 4 Tex. 417; *Perry v. State*, 41 Tex. 483; *Allen v. State*, 42 Tex. 517; *Hannah v. State*, 1 Tex. Cr. App. 578; *Hasselmeyer v. State*, 1 Tex. Cr. App. 690; *Hernandez v. State*, 9 Tex. Cr. App. 288, 291; *Dreyer v. State*, 11 Tex. Cr. App. 503; *Pettigrew v. State*, 12 Tex. Cr. App. 225, 226; *Johnson v. State*, 12 Tex. Cr. App. 385; *McNair v. State*, 14 Tex. Cr. App. 78; *Schindler v. State*, 15 Tex. Cr. App. 394; *Bryant v. State*, 16 Tex. Cr. App. 144; *Small v. State*, 18 Tex. Cr. App. 336; *Latham v. State*, 19 Tex. Cr. App. 305, 308; *Scott v. State*, 19 Tex. Cr. App. 325; *White v. State*, 21 Tex. Cr. App. 339, 17 S. W. 727; *Boyd v. State*, 24 Tex. Cr. App. 570, 6 S. W. 853; *Taylor v. State*, 27 Tex. Cr. App. 44, 11 S. W. 35; *S. C.*, 27 Tex. Cr. App.

463, 11 S. W. 462; *James v. State*, 40 Tex. Cr. App. 190, 49 S. W. 401.

Possession without Bill of Sale.—In a prosecution for theft an instruction to the effect that upon the trial of any person charged with the theft of any cattle, the possession of such stolen cattle by the accused without a written bill of sale or transfer containing a specific description of such animal, shall be prima facie evidence against the accused that such possession was illegal, is erroneous. *Schindler v. State*, 15 Tex. Cr. App. 394; *Garcia v. State*, 12 Tex. Cr. App. 335; *Flores v. State*, 13 Tex. Cr. App. 665.

As to admissibility of evidence of possession by accused of property stolen, see ante, "Possession by Accused of Property Stolen," XII, B, 13.

As to possession of property being a question for the jury, see post, "Possession of Property Stolen," XIV, A, 4.

b. Presumptions Arising from Possession.

(1) In General.

To warrant the inference of guilt from the mere possession of stolen property, the possession must be personal, recent, unexplained, and must involve a conscious assertion of claim. *Lehman v. State*, 18 Tex. Cr. App. 174; *Robinson v. State*, 22 Tex. Cr. App. 129, 3 S. W. 736; *Moreno v. State*, 24 Tex. Cr. App. 401, 6 S. W. 299. See *Bell v. State* (Cr. App.), 24 S. W. 647; *Ray v. State* (Cr. App.), 43 S. W. 77; *May v. State* (Cr. App.), 51 S. W. 242; *Williamson v. State*, 30 Tex. Cr. App. 330, 17 S. W. 722; *Lopez v. State*, 28 Tex. Cr. App. 343, 13 S. W. 219; *Pool v. State*, 51 Tex. Cr. App. 596, 103 S. W. 892; *McNair v. State*, 14 Tex. Cr. App. 78; *Williams v. State*, 11 Tex. Cr. App. 275; *Payne v. State*, 21 Tex. Cr. App. 184, 17 S. W. 463; *Vaughn v. State*, 21 Tex. Cr. App. 573, 579, 2 S. W. 825; *Ivey v. State*, 43 Tex. 425; *Thomas v. State*, 43 Tex. 658; *Schindler v. State*, 15 Tex. Cr. App. 394;

Small v. State, 18 Tex. Cr. App. 336, overruling *McCoy v. State*, 44 Tex. 616, 619; *Hannah v. State*, 1 Tex. Cr. App. 578; *Truax v. State*, 12 Tex. Cr. App. 230.

Defendant killed a cow which he had claimed to own, and preserved the hide. The alleged owner, with others, went to his house and examined the hide, which was of a peculiar color and branded. When told that the cow belonged to witness, defendant said he would pay for it. The evidence as to its ownership, and the intent of the defendant in killing it, were conflicting, defendant's own statements as to his claim of ownership being contradictory. Held, that the evidence warranted a conviction of larceny. *Hunnicut v. State* (Cr. App.), 4 S. W. 882.

Where the evidence shows the contemporaneous disappearance of defendant and certain horses, and that defendant, when arrested, had the horses in his possession, and was trying to sell them, a conviction for theft of the horses will be sustained, though defendant committed the crime in company with another, and there is evidence that defendant was of a very weak mind, and easily influenced. *Gentry v. State*, 25 Tex. Cr. App. 614, 8 S. W. 925.

(2) Conclusiveness of Presumption.

See post, "Explanation of Possession," XIII, C, 4, f.

Where property was stolen, the party who is found in possession of it three hours afterwards is prima facie guilty, and, unless there be proof to rebut this presumption, a conviction will not be disturbed. *Jenkins v. State*, 30 Tex. 444; *Thomas v. State*, 43 Tex. 658.

The possession of recently stolen property, unexplained, affords presumptive, not positive, evidence of guilt. *Faulkner v. State*, 15 Tex. Cr. App. 115.

One can not be convicted of larceny upon a mere suspicion, even though

he does not explain his possession of, or connection with, the property stolen, by a preponderance of evidence. If the fact raise a reasonable doubt of his guilt, he is entitled to an acquittal. *Taylor v. State*, 15 Tex. Cr. App. 356.

c. Remoteness of Possession.

Possession of stolen property, to raise against the accused the presumption of guilt, must be recent, and be unexplained under circumstances calling upon accused for an explanation. Remote possession, however, will not call for an explanation, and will not raise the presumption of guilt. *Matlock v. State*, 25 Tex. Cr. App. 654, 8 S. W. 818. See, also, *Porter v. State*, 45 Tex. Cr. App. 66, 73 S. W. 1053; *Mondragon v. State*, 33 Tex. 480; *Lehman v. State*, 18 Tex. Cr. App. 174; *Curlin v. State*, 23 Tex. Cr. App. 681, 5 S. W. 186; *Boyd v. State*, 24 Tex. Cr. App. 570, 6 S. W. 853; *Willis v. State*, 24 Tex. Cr. App. 586, 6 S. W. 857; *Romero v. State*, 25 Tex. Cr. App. 394, 8 S. W. 641; *Florez v. State*, 26 Tex. Cr. App. 477, 9 S. W. 772; *Buchanan v. State*, 26 Tex. Cr. App. 52, 9 S. W. 57.

Defendant, who was found in possession of stolen cattle in another territory about a month after they were stolen, was tried for the theft under an indictment charging him as principal. The evidence showed that he was absent from the state when the theft was committed, and had been absent for several months prior thereto. Held insufficient to sustain a conviction. *Coltharp v. State* (Cr. App.), 60 S. W. 879.

Five or Six Months after Theft.—The possession of stolen property five or six months after its theft is not sufficiently recent to raise a presumption that its possessor stole it. *Bragg v. State*, 17 Tex. Cr. App. 219; *Yates v. State*, 37 Tex. 202; *Beck v. State*, 44 Tex. 430; *Roberts v. State*, 17 Tex. Cr. App. 82.

One, Two or Three Years after Theft.—Evidence that defendant was found in possession of property two years after it was stolen will not sustain a conviction for theft, especially where he accounted for his possession by stating that he bought it of a negro man, S., and by showing a bill of sale for it, and no contradictory evidence is offered except evidence tending to show flight. *Matlock v. State*, 25 Tex. Cr. App. 654, 8 S. W. 818.

Evidence that certain wagon wheels belonging to prosecutor were missed in November, 1901, and that defendant was found openly using the same in November, 1902, but claimed to have exchanged scrap iron therefor with a peddler, was insufficient to sustain a conviction for the theft of the wheels. *Porter v. State*, 73 S. W. 1053, 45 Tex. Cr. App. 66.

Where a horse, alleged to have been stolen, was found three years afterwards in the possession of defendant, who sold it, without explaining his right of possession, and there was no proof of the taking, except the unexplained possession, the evidence was not sufficient to support a conviction for theft, as the possession of stolen property, to raise a presumption of guilt, must be recent. *Romero v. State*, 25 Tex. Cr. App. 394, 8 S. W. 641. See, also, *Bragg v. State*, 17 Tex. Cr. App. 219; *Lehman v. State*, 18 Tex. Cr. App. 174; *Loving v. State*, 18 Tex. Cr. App. 459; *Beck v. State*, 44 Tex. 430; *Barrett v. State*, 18 Tex. Cr. App. 64; *Curlin v. State*, 23 Tex. Cr. App. 681, 5 S. W. 186; *Boyd v. State*, 24 Tex. Cr. App. 570, 6 S. W. 853.

d. Exclusiveness of Possession.

In a larceny case the evidence showed that the stolen articles were found concealed in a trunk in a house occupied by defendant and his wife, who gave no satisfactory account of them; but it did not show conclusively that both were guilty, or which of the two was the guilty one. Held, that the

evidence was insufficient to support a conviction. *Perkins v. State*, 32 Tex. 109.

The stolen calf was found in a pen near where defendant lived, with the brand, consisting of the first three letters of defendant's given name, placed on it. The marks in the ears had also been changed. There was evidence that defendant had formerly claimed a horse which had the same brand as that placed on the calf, but defendant proved that such altered brand and mark were recorded as that of a brother of his, who lived near by. Held, that the evidence was not sufficient to sustain a conviction. *Lacey v. State*, 25 Tex. Cr. App. 618, 8 S. W. 803.

Open and Obvious Possession.—

Where in a trial for stealing cattle, the state relied upon accused's recent possession of the cattle, testimony that the cattle were butchered by accused, at a public pen and that the hides and other evidence of their identity were left exposed for a week or two, was inconsistent with his guilt. *Wafford v. State*, 44 Tex. 439.

e. Identity of Property.

See ante, "Identity of Property," XIII, C, 3, c.

f. Explanation of Possession.

(1) In General.

Explanations offered by the accused to account for his possession, when charged with having stolen the property, are competent evidence either for or against him. If the jury deem them to be reasonable, and they be not shown to be false, any presumption against him arising from the possession is rebutted, and further evidence is indispensable to a conviction. *Hannah v. State*, 1 Tex. Cr. App. 578; *Garcia v. State*, 26 Tex. 209; *Galloway v. State*, 41 Tex. 289; *Perry v. State*, 41 Tex. 483; *Ward v. State*, 41 Tex. 611, 614; *Thompson v. State*, 43 Tex. 268; *McCoy v. State*, 44 Tex. 616; *Shackleford v. State*, 2 Tex. Cr. App.

385; *Fisher v. State*, 4 Tex. Cr. App. 181; *Hampton v. State*, 5 Tex. Cr. App. 463, 468; *Hernandez v. State*, 9 Tex. Cr. App. 288; *Wright v. State*, 10 Tex. Cr. App. 477; *Anderson v. State*, 11 Tex. Cr. App. 576; *Johnson v. State*, 12 Tex. Cr. App. 385, 391; *Irvine v. State*, 13 Tex. Cr. App. 499, 501; *Sitterlee v. State*, 13 Tex. Cr. App. 587, 593; *Harris v. State*, 15 Tex. Cr. App. 411, 417; *Howell v. State*, 16 Tex. Cr. App. 93; *Tucker v. State*, 16 Tex. Cr. App. 471; *Ross v. State*, 16 Tex. Cr. App. 554, 559; *Roberts v. State*, 17 Tex. Cr. App. 82, 87; *Lewis v. State*, 17 Tex. Cr. App. 140; *York v. State*, 17 Tex. Cr. App. 441, 442; *Miller v. State*, 18 Tex. Cr. App. 34, 38; *Lehman v. State*, 18 Tex. Cr. App. 174; *Loving v. State*, 18 Tex. Cr. App. 459, 462; *Windham v. State*, 19 Tex. Cr. App. 413; *Norwood v. State*, 20 Tex. Cr. App. 306; *Holley v. State*, 21 Tex. Cr. App. 156, 17 S. W. 159; *Vaughn v. State*, 21 Tex. Cr. App. 573, 2 S. W. 825; *Shultz v. State*, 22 Tex. Cr. App. 16, 2 S. W. 599; *Brothers v. State*, 22 Tex. Cr. App. 447, 463, 3 S. W. 737; *Clark v. State*, 22 Tex. Cr. App. 599, 603, 3 S. W. 744; *Bean v. State*, 24 Tex. Cr. App. 11, 12, 5 S. W. 525; *Gilleland v. State*, 24 Tex. Cr. App. 524, 7 S. W. 241; *Cudd v. State*, 25 Tex. Cr. App. 666, 8 S. W. 814; *Lee v. State*, 27 Tex. Cr. App. 475, 11 S. W. 483; *Lacy v. State*, 31 Tex. Cr. App. 78, 19 S. W. 896; *Hyatt v. State*, 32 Tex. Cr. App. 580, 25 S. W. 291; *Porter v. State*, 45 Tex. Cr. App. 66, 73 S. W. 1053; *Selph v. State*, 49 Tex. Cr. App. 18, 90 S. W. 174; *Daniel v. State*, 60 Tex. Cr. App. 515, 132 S. W. 773, 774; *Ray v. State* (Cr. App.), 43 S. W. 77.

Evidence Showing Falsity of Defendant's Explanation Must Be Certain and Definite.—

A reasonable explanation of recent possession of property stolen rebuts the inculpatory circumstances of such possession, and, if the evidence introduced by the state to show the falsity of the explanation is uncertain and indefinite, a conviction

tion based on the fact of possession should be set aside. *Schultz v. State*, 20 Tex. Cr. App. 315.

Explanation May Be Shown False by Circumstantial Evidence.—In a prosecution for larceny, defendant's statements as to when he got the property in question may be disproved by circumstantial evidence. *Barfield v. State*, 51 S. W. 908, 41 Tex. Cr. App. 19; *Franklin v. State*, 37 Tex. Cr. App. 312, 314, 39 S. W. 680.

Where Explanation Both Corroborated and Contradicted.—Where defendant's explanation of his possession of the stolen property is both corroborated and contradicted, a conviction can not be sustained. *Tarin v. State*, 25 Tex. Cr. App. 360, 8 S. W. 473.

Where One of Accused's Contradictory Explanations Corroborated by State's Witness.—Where defendant gave contradictory explanations of his possession of recently stolen property, but one of said explanations was corroborated by a witness of the state, conviction of theft is not supported. *Norwood v. State*, 20 Tex. Cr. App. 306, 308.

Explanation by Third Person at Request of Defendant.—Where one, called on to explain his possession of stolen property, asks a person present to speak for him, the explanation is entitled to the same weight as though made by himself. *Windham v. State*, 19 Tex. Cr. App. 413.

Failure to Make Application for Witness as Being on Bona Fide Possession.—Where defendant claimed he obtained the mules in controversy from D., but testified that he had made no application for a subpoena for D., the jury could consider his failure to do so as bearing on the bona fides of his contention that he was an innocent purchaser of the property. *Cleveland v. State*, 57 Tex. Cr. App. 356, 123 S. W. 142.

Inconsistent Statements by Witness

in Giving Additional Testimony Does Not Disprove Explanation.—Where defendant has given a reasonable explanation of his possession of the property which he is charged with stealing, the state does not disprove his explanation merely by showing that a witness who gave additional testimony in support of it had previously made inconsistent statements. *Loving v. State*, 18 Tex. Cr. App. 459.

Extent of Proof Required of State.—When relying upon the possession of recently stolen property, to convict, the state is required only to prove the falsity of the defendant's explanation made at the time his possession was challenged. The state can not be required to disprove every conflicting explanation the defendant may make. *Ashlock v. State*, 16 Tex. Cr. App. 13.

Proof Made Ten Days after Property Disposed of.—Defendant in a trial for theft can not prove his explanation of possession of stolen property, made ten days after he had disposed of it. *Childress v. State*, 10 Tex. Cr. App. 698.

Theft from the Person.—As to evidence admissible in proof of explanation of possession, see ante, "Explanation of Possession," XIII, B, 13, b.

On a trial for theft from the person, the sufficiency of the defendant's explanation of his possession of the stolen property must be tested by the same rules that apply in other cases of theft. *Roberts v. State*, 33 Tex. Cr. App. 83, 24 S. W. 895.

(2) Facts Showing Falsity of Defendant's Possession.

Where defendant accounted for the possession of stolen property by stating that he had purchased it from strangers for a nominal sum and received a bill of sale therefor, a conviction will be sustained where the parties from whom the property was alleged to have been purchased had not been seen by any other person in that section of the country, and the

alleged bill of sale was not introduced in evidence, nor its absence attempted to be accounted for. *Blankenship v. State*, 5 Tex. Cr. App. 218.

On a trial for the larceny of cotton seed, it appeared that, when found with the seed, defendant stated that he got it from his brother. The brother, when brought, remained silent, and defendant, without repeating his claim, gave up the seed, saying he did not want to get into trouble, and though told that, if the seed was his, his possession would be protected, he insisted on giving it up. This brother was present at the trial, but did not testify. Held, that the facts showed the falsity of defendant's account of his possession. *Allen v. State* (Cr. App.), 24 S. W. 30.

Certain hogs alleged to have been stolen were raised by the alleged owner until they were two years old, and bore his mark. Soon after they disappeared from his range, one of them was found in possession of defendant, in the adjoining county, and the others were running in his range, and their marks had been recently changed. Defendant merely claimed that the hogs in question were in his mark, which was recorded, and failed to place on the stand the witnesses whom he had summoned for the purpose of proving his ownership. Held, sufficient evidence to support a conviction of hog theft. *Areola v. State*, 48 S. W. 195, 40 Tex. Cr. App. 51; *Unsell v. State* (Cr. App.), 45 S. W. 902; *Bryant v. State*, 25 Tex. Cr. App. 751, 8 S. W. 937; *Pollard v. State*, 33 Tex. Cr. App. 197, 26 S. W. 70; *Williamson v. State*, 30 Tex. Cr. App. 330, 17 S. W. 722; *Field v. State*, 24 Tex. Cr. App. 422, 6 S. W. 200; *Perry v. State*, 41 Tex. 483; *Morgan v. State*, 25 Tex. Cr. App. 513, 8 S. W. 487; *Jackson v. State*, 28 Tex. Cr. App. 143, 12 S. W. 701; *Moreno v. State*, 24 Tex. Cr. App. 401, 6 S. W. 299; *Faith v. State*, 32 Tex. 373; *Smith v. State*, 41 Tex. 168; *Truax v. State*,

12 Tex. Cr. App. 230, 231; *Phillips v. State* (Cr. App.), 34 S. W. 119.

Bringing into County Property Stolen Elsewhere.—Proof that the property was stolen in another county, and subsequently found in defendant's possession in the county in which he is tried, warrants a finding that it was brought into the latter county by defendant. *Lyon v. State* (Cr. App.), 34 S. W. 947.

Effect of Unexplained Possession.—

If a party in whose exclusive possession property recently stolen is found fails to account for his possession when called on to explain, or when the facts are such as to require him to explain, the presumption of guilt arising from recent loss and possession will warrant a conviction without the necessity of further proof. *Williamson v. State*, 30 Tex. Cr. App. 330, 17 S. W. 722.

(3) Instances of Explanation of Possession Held Sufficient.

Consent Obtained from Owners

Agent.—Proof that the accused, when found in possession of the stolen goods, claimed by virtue of consent of the owner's agent, who was accessible at the time of the trial, but was not produced by the state to negative the statement, held to be ground for setting aside the conviction. *Powell v. State*, 11 Tex. Cr. App. 401.

Custodian.—Defendant was found with others in possession of the stolen horse the morning after the theft. He immediately explained his possession by a statement that one of the other accused persons loaned him the horse, saying that it was his own. This statement was not disproved, but was corroborated by proof of admissions of the persons stated to have loaned the horse, made while defendant had the horse, and before the arrest. Held, that the evidence did not support the conviction. *Arispe v. State*, 26 Tex. Cr. App. 581, 10 S. W. 111.

Finding Horse in Different County with Wife's Stock.—More than a year after the theft of a horse it was again seen in the same open range from which it was taken, with defendant's recent brand on it. Defendant claimed that he found this horse in a range in another county, with his wife's stock, and that he drove it to his home in a third county, and branded it; and this statement was corroborated. There was no evidence that defendant ever had the horse in his possession in the county charged. Held, that the evidence would not sustain a conviction for the theft of the animal. *Harsdorf v. State* (Cr. App.), 18 S. W. 415.

Gift.—On indictment for theft of blankets it was shown that defendant explained his possession of them by proof that one who had such blankets at the place from which defendant took them authorized him to get them, and told him he could have them, that such person had blankets similar in all respects to those taken, and that defendant took them openly, with no attempt at concealment. Held, that a conviction would be set aside. *Green v. State*, 27 Tex. Cr. App. 570, 11 S. W. 636. See, also, *Perry v. State*, 41 Tex. 483.

Hired Hand.—On a trial for the theft the testimony showed that the owner lived in C. county, where the theft occurred; that a few days after the theft one D. drove the mare and other horses to defendant's house, which was 90 miles from where the mare was stolen, and hired defendant to assist in driving them to another town to be sold; that when arrested defendant stated that the animals belonged to D., and that defendant was a hired hand. It did not appear that defendant was ever in C. county. Held, that the evidence did not sustain a conviction. *Green v. State* (Cr. App.), 18 S. W. 651.

Purchase.—Defendant proved that he had obtained possession by purchase,

and exhibited a duly authenticated and recorded bill of sale, and also established a good character for honesty in the community where he lived. The state failed to show bad faith in the purchase, or disprove his explanation. Held insufficient to support a conviction. *Cudd v. State*, 25 Tex. Cr. App. 666, 8 S. W. 814.

Defendant, under indictment for theft of a horse, explained his possession by saying that he had bought it. This explanation was corroborated by positive testimony, which was not rebutted. Held, that a conviction was against the evidence. *Gilleland v. State*, 24 Tex. Cr. App. 524, 7 S. W. 241.

A mare was stolen in Bell county, Tex., on September 10, 1885. Eleven months thereafter she was in the possession of defendant in McLennan county, Tex., who there, under an assumed name, traded her off. One of the state's witnesses proved that defendant bought her in August, 1886. Held, that a conviction of larceny on the above testimony could not be sustained. *Bean v. State*, 24 Tex. Cr. App. 11, 5 S. W. 525.

On the trial for the theft of a hog which belonged to A., and had been running on his range, it appeared that defendant had stated that he purchased it of F., but F.'s testimony was not offered at the trial. A witness testified that the hog was one which F. claimed; that he was present when defendant purchased it, and, at F.'s request, witness pointed it out to defendant. Held not to justify a conviction. *Woods v. State* (Cr. App.), 24 S. W. 99.

In a trial for theft of a horse, the evidence for the state showed that defendant was seen looking at the horse a few days before it was stolen; that when he ascertained that he was charged with the offense he kept out of the way of the officers for several days; that he claimed to have a bill of sale of the horse, but refused to

show it to the owner. Defendant testified that he was at his usual work, thirty miles away, when the horse was stolen, and was corroborated by three persons, who boarded with him; that he bought the horse of a stranger, and was corroborated by three witnesses and the bill of sale. He denied that he refused to show the bill of sale to the owner of the horse, and in this statement was corroborated. He testified that he kept out of the way to procure bonds, but not to escape. Held, that a verdict of guilty was unwarranted. *Foresythe v. State* (Cr. App.), 20 S. W. 371.

On an indictment for theft, the owner of the stolen cattle testified that he missed the cattle from his range, and, hearing that defendant had them, went to defendant, who admitted the fact, but claimed to have purchased them. Defendant showed a bill of sale, stating that he had met a stranger, who inquired about cattle of the brand with which the cattle in question were marked, and he told the stranger that he knew where the cattle ranged, and bought the "chance" from the stranger. The cattle were delivered up to the owner when he claimed them. Defendant afterwards left the neighborhood. A witness testified that he had known defendant for twenty years, and that his reputation for honesty was good. Held, that the evidence was insufficient to support a conviction. *Holley v. State*, 21 Tex. Cr. App. 156, 17 S. W. 159.

On a trial for theft the evidence showed that defendant, about 7 o'clock on the morning after the theft, took the property out of his wagon at his home, six miles away, and continued to use it until recovered by the owner, but that it was not in defendant's wagon the evening before the theft. Defendant testified that one D. sold him the property; that, about 3 o'clock in the evening preceding the theft, he agreed with D. to buy it, and loaned him his wagon to deliver it;

and that D. brought the property to his place about 10 o'clock that night. He also testified that another person was present during his conversation with D., but neither this person nor D. were called by the state, though they were present in court. Held, that a conviction was not warranted. *Coleman v. State* (Cr. App.), 22 S. W. 41.

Trading.—A horse was shown to have been stolen, and to have been in possession of defendant, who proved by one witness, partly corroborated by another, that he obtained the horse from one M. by trading a brown horse. Several witnesses testified in rebuttal that defendant did not have a brown horse, and others testified that he had casually stated that he had obtained the horse alleged to have been stolen "from a man over the river," and "from his uncle." The latter statement was proved untrue. Held, that a conviction should be set aside. *Reveal v. State*, 27 Tex. Cr. App. 57, 10 S. W. 759.

For other instances held sufficient, see *Clark v. State*, 22 Tex. Cr. App. 599, 3 S. W. 744; *Harris v. State*, 15 Tex. Cr. App. 411.

(4) Reasonableness Question for Jury.

See post, "Questions for Jury," XIV, A.

g. Possession of Part of Stolen Property.

The jury may infer the stealing by defendant of the whole property from proof of his recent unexplained possession of a part thereof. *Hill v. State*, 41 Tex. 253.

A charge which in effect authorizes an inference of guilt from defendant's unexplained possession of one of many articles stolen at the same time and place is erroneous. *Gonzales v. State*, 18 Tex. Cr. App. 449.

h. Possession Accompanied by Other Incriminating Circumstances.

Stolen cattle, which defendant denied he had, were found by the sheriff in his possession. After promising to

keep them in his pen until identified, he turned them loose in his pasture, did not help to hunt for them, and subsequently two were found shot, with their ears cut off. His explanation of his possession was shown to be untrue. Held, that the evidence supported the conviction. *Blain v. State*, 24 Tex. Cr. App. 626, 7 S. W. 239.

Contradictory Statements.—On a trial for theft, there was evidence that the property was taken at night, and a few days later was seen at another place in the possession of defendant, who gave contradictory accounts of himself and his ownership thereof, which were submitted under proper instructions. Held, that a verdict against defendant was not erroneous. *Von Emons v. State* (Cr. App.), 20 S. W. 1106.

Evidence that, near the time of the theft, defendant was in the vicinity; that he had no business there; that he slept in the woods; that on the morning of the third day he tried to sell the horse; and that he gave contradictory statements as to the place where he got him—warrants a conviction. *Emmerson v. State*, 33 Tex. Cr. App. 89, 25 S. W. 289.

Inquiry as to Ownership.—The fact that two assumed cattle buyers were found in possession of four cattle, as to the ownership whereof they had a day or two before made inquiry, and been informed that the cattle were estrays, held to raise a strong presumption of theft. *Lowe v. State*, 11 Tex. Cr. App. 253.

Trading Gun to Person upon Whom Accused Attempted to Lay Theft.—Evidence that a gun was found in defendant's possession shortly after it was stolen, and that he traded it to the person on whom he attempted to lay the theft, justified a conviction. *Lyon v. State* (Cr. App.), 34 S. W. 947.

Killing and Cutting of Ears Similar to Those Stolen.—Where there was

testimony that, about the time of the theft of some hogs, defendant killed similar hogs and cut off the ears, mutilating them, a verdict of guilty is not without evidence to support it. *Wolfe v. State*, 25 Tex. Cr. App. 698, 9 S. W. 44.

Accused Giving Fictitious Name When Selling Horses.—In a trial for theft it appeared that certain horses of a number stolen from M. were sold by defendant to C. shortly after the stealing, and that defendant, whose name was Freese, gave his name as Willington, when selling. Held, evidence sufficient to support a conviction. *Freese v. State* (Cr. App.), 21 S. W. 189.

i. Sufficiency of Proof of Defendant's Possession.

On a prosecution for horse theft, a witness testified that he had seen defendant with the stolen mare in another county a day or so after the theft, and that defendant said he had stolen her from a certain place in a certain town, which was in fact the place from which the mare was taken; and the same witness saw the mare at another place in such town, where she was hitched, at the time of the trial, and identified her as the same he had seen in defendant's possession. Defendant denied having had the mare as testified to by the witness, and also the confession. Held, that the evidence was sufficient to sustain a conviction. *Jones v. State* (Cr. App.), 68 S. W. 267.

The fact that other horses were found with a horse alleged to have been stolen, and lately branded, is no evidence that defendant stole such horse. *Kelley v. State*, 18 Tex. Cr. App. 262.

Accused Walking Behind Wagon in Which Stolen Property Conveyed.—On trial of an indictment for theft, the evidence showed that the accused was seen walking along a road in the direction of his house within twenty steps

of a wagon in which the stolen property was being conveyed. Held, not sufficient, in the absence of other evidence connecting him with the theft, to show that the property was in his possession or under his control, or that he aided in stealing it. *Cruit v. State*, 41 Tex. 476.

Finding Hide of Stolen Animal on Defendant's Fence or Near House.—

Where it appears that the hide of the stolen animal was found on defendant's fence, about one hundred yards from his house, and in a thickly settled neighborhood, but defendant at the time repudiated all knowledge of or claim to the hide, there is nothing from which defendant's possession of the hide can be inferred, and consequently there can be no inference of guilt, though upon the owner of the steer identifying the hide defendant remarked that he did not see how the owner could be so positive, as defendant had a red-speckled heifer just like the owner's. *Bryant v. State*, 25 Tex. Cr. App. 751, 8 S. W. 937.

On trial of P. and N. for larceny, the facts proven were that the hide of one of the stolen cattle was found in P.'s house, and the hide of another in a water hole about sixty yards from the house; but P. was not called upon to explain this. There was no evidence against N., except that he lived about forty yards from P.'s house. Held not sufficient to warrant a conviction. *Moreno v. State*, 24 Tex. Cr. App. 401, 6 S. W. 299.

Making No Claim of Ownership and Keeping Property Publicly.—Defendant was convicted of theft of a mare found in his possession. He had taken possession for and at the instance of another person, whose brand the mare bore, and kept her publicly, making no claim to her as his own property. Held not sufficient evidence to convict. *Anderson v. State*, 25 Tex. Cr. App. 593, 9 S. W. 43.

Portion of Stolen Property in Room

Occupied by Accused but Not under His Control.—Upon a trial for larceny, the only fact tending to implicate defendant was that some of the stolen property was found in a box under his bed. It was not shown that defendant had any connection with the box, nor that he had control of the room. Held, that a verdict of conviction should be set aside. *Casas v. State*, 12 Tex. Cr. App. 59.

XIV. Trial and Review.

A. QUESTIONS FOR JURY.

1. In General.

In a theft prosecution the verity and weight of the evidence was for the jury. *Herron v. State*, 20 Tex. Cr. App. 296.

Ownership.—Defendant has a right to have the question of the ownership of stolen property submitted to a jury. *Isaacs v. State*, 30 Tex. 450, 451.

Return of Stolen Property Within Reasonable Time.—Whether the return of stolen property four months after it had been stolen was within reasonable time is a question for the jury. *Stepp v. State*, 31 Tex. Cr. App. 349, 20 S. W. 753.

Servant.—It is error to refuse to submit to the jury whether a person employed for one day to do ironing is a domestic servant or an inhabitant in the house, within the meaning of the statute relating to the mitigation of punishment for theft from a house when committed by such persons. *Coleman v. State*, 44 Tex. 109.

Whether the person from whom the property was taken was the servant of the person in whom the property and possession were laid is a question for the jury, under proper instructions as to what constitutes the relation of master and servant. *Phillips v. State* (Cr. App.), 42 S. W. 557.

Whether Defendant Drove Cattle He Stole in Another County into County Named in Indictment.—Under an indictment charging that cattle were

stolen in a county named, it was proper to submit to the jury the issue whether defendant drove the cattle which he had stolen in another county into the county named in the indictment; such issue not being subject to the objection that it was not raised by the indictment. *Warren v. State* (Cr. App.), 105 S. W. 817.

Defense of Purchase.—Where defendant sets up the defense of purchase, it is the province of the jury to pass on its truth, and the court should submit it to them with appropriate instructions. *Smith v. State*, 24 Tex. Cr. App. 290, 6 S. W. 40; *Roy v. State*, 24 Tex. Cr. App. 369, 6 S. W. 186. See, also, *White v. State*, 18 Tex. Cr. App. 57; *Irvine v. State*, 20 Tex. Cr. App. 12; *Wimberly v. State*, 22 Tex. Cr. App. 506, 3 S. W. 717; *Bond v. State*, 23 Tex. Cr. App. 180, 4 S. W. 580; *Shuler v. State*, 23 Tex. Cr. App. 182, 4 S. W. 581; *Shoefercater v. State*, 5 Tex. Cr. App. 207; *Tankersley v. State*, 51 Tex. Cr. App. 224, 101 S. W. 997.

Value of Property—Fraudulent Conversion by Bailee.—On a trial for theft by a bailee whether the facts are sufficient to show a fraudulent conversion must be found as a matter of fact by the jury and not as a matter of law by the court. *Jaimes v. State*, 32 Tex. Cr. App. 473, 24 S. W. 297.

2. Identity of Property.

On a trial for theft, the state may trace by positive or circumstantial evidence the property alleged to have been stolen; and, where it consists of money, whether the money received in evidence or shown to have been in accused's possession is the identical money stolen, is in most cases a question for the jury. *Lynne v. State*, 53 Tex. Cr. App. 375, 111 S. W. 729. See, also, *Hooten v. State*, 53 Tex. Cr. App. 6, 108 S. W. 651.

3. Intent.

Whether a taking of property was fraudulent or not, depends in all cases

upon the intent or purpose with which the property was taken, and that intent must be determined by the jury from all facts and circumstances of the case. *Wilson v. State*, 18 Tex. Cr. App. 270, 274; *Darnell v. State*, 43 Tex. Cr. App. 86, 63 S. W. 631.

In a trial for theft, where there is evidence tending to show that the taking, though tortious, was not with fraudulent intent, the question is for the jury. *Banks v. State*, 7 Tex. Cr. App. 591. See, also, *Boze v. State*, 31 Tex. Cr. App. 347, 348, 20 S. W. 752.

It is not error for the court to submit to the jury the question of the good faith of accused in taking a horse by bill of sale, from another not in possession, where the accused is charged with theft of the horse as an estray. *Baxter v. State* (Cr. App.), 43 S. W. 87.

On a prosecution for larceny, evidence considered, and held, that the question whether defendant took the property for temporary use, and not to permanently appropriate the same, was for the jury. *Cain v. State*, 92 S. W. 808, 49 Tex. Cr. App. 360.

Driving Cattle from Accustomed Range.—On trial for driving cattle from their accustomed range, the question of fraudulent intent is for the jury. *Bawcom v. State*, 41 Tex. 189.

4. Possession of Property Stolen.

Recent Unexplained Possession.—

Possession of stolen property, if unexplained, warrants the presumption of the guilt of the party in whose possession it is found, but such presumption is one of fact to be found by the jury. *Barnes v. State*, 43 Tex. 98; *Thomas v. State*, 43 Tex. 658; *Thompson v. State*, 43 Tex. 268; *Watkins v. State*, 2 Tex. Cr. App. 73; *Lehman v. State*, 18 Tex. Cr. App. 174, 178; *Tomerlin v. State* (Cr. App.), 26 S. W. 214; *Allen v. State*, 4 Tex. Cr. App. 581; *Jernigan v. State*, 10 Tex. Cr. App. 546; *Massey v. State*, 1 Tex. Cr. App. 563, 569; *Knox v. State*, 11 Tex. Cr. App. 148, 151; *Goens v.*

State, 35 Tex. Cr. App. 73, 74, 31 S. W. 656.

There was no evidence of actual taking by defendants of the cow alleged to have been stolen. The prosecuting witness had left his cow on a ranch in another county in the fall of 1886, and the next time she was seen was in August, 1887, in possession of defendants. Held, that the question of recent possession should have been left to the jury, under proper instructions. *Willis v. State*, 24 Tex. Cr. App. 586, 6 S. W. 857.

Where there is no evidence of possession of the stolen property by defendant until eleven months after the theft, the question of recent possession should be submitted to the jury under proper instructions. *Florez v. State*, 26 Tex. Cr. App. 477, 9 S. W. 772.

Explanation of Possession.—It is for the jury to determine the truth or falsity of defendant's explanation of his possession of recently stolen property. *Eads v. State*, 26 Tex. Cr. App. 69, 71, 9 S. W. 68; *Taylor v. State*, 27 Tex. Cr. App. 463, 465, 11 S. W. 462; *Smith v. State* (Cr. App.), 56 S. W. 54; *Irvine v. State*, 13 Tex. Cr. App. 499, 501; *Wright v. State*, 35 Tex. Cr. App. 470, 471, 34 S. W. 273; *Williamson v. State*, 30 Tex. Cr. App. 330, 332, 17 S. W. 722; *Boyd v. State*, 24 Tex. Cr. App. 570, 6 S. W. 853; *Robinson v. State*, 22 Tex. Cr. App. 690, 2 S. W. 539.

On a trial for theft, where the defendant pleaded purchase of the property from a third person, the court instructed the jury that there was no presumption in favor of the purchase, and that the defendant should prove that affirmative fact satisfactorily to the minds of the jury before they could acquit. Held, that the instruction was erroneous, as the jury should have been left free to determine the innocence or guilt of defendant from other facts proved on the trial, as well as from the fact of purchase. *Williams v. State*, 37 Tex. 474.

B. INSTRUCTIONS.

See, generally, the title INSTRUCTIONS, vol. 4, p. 385.

As to charge in prosecution of theft from the person, see ante, "Charge," V, B, 6.

1. Applicability to Issue and Evidence.

In a prosecution for theft from the person, an instruction that "if the defendant did not take the property alleged in the indictment from the person and possession of" the prosecuting witness, "and without his consent and to make change," etc., and omitting, "so suddenly as not to permit time to make resistance," as charged in the indictment, was not objectionable as failing to comply with the statutory requirement that instructions must distinctly set forth the law applicable to the case. *Williams v. State* (Cr. App.), 114 S. W. 823. See, also, *Homer v. State* (Cr. App.), 65 S. W. 371.

Where the indictment for theft charged the possession in an individual who was holding the property for a corporation, an instruction authorizing a conviction if accused fraudulently took from the possession of the corporation, the property described was erroneous, because the indictment contained no such allegation. *Taylor v. State*, 53 Tex. Cr. App. 615, 54 Tex. Cr. App. 232, 111 S. W. 151.

A state ranger testified that, while scouting, he came to a place where defendant and his two brothers had just camped. Near by was the carcass of a beef. Defendant's brother said he had killed it, and that defendant had nothing to do with it. At the place where the beef was killed were the tracks of three men. Held, that a charge that, to warrant a conviction of theft on circumstantial evidence, each fact necessary to the conviction must be established beyond a reasonable doubt; that if the animal was taken by defendant's brother, and its flesh recently afterwards found in possession of him and defendant, then, to author-

ize a conviction, it must be further shown that defendant was present at the killing, and, knowing the fraudulent intent of his brother, assisted him—was applicable to the facts, and proper. *De Los Santos v. State* (Cr. App.), 26 S. W. 831.

Where, in a prosecution for theft from the person, the indictment charged theft of \$10, but did not specify a \$10 bill, and it was shown at the time prosecutor was drugged and robbed that he had a \$10 bill and some silver on his person, but it did not appear that defendant or his accomplices secured the bill, the court did not err in refusing to confine the jury to the \$10 bill and in permitting them to consider the other money alleged to have been stolen from prosecutor's person. *McCue v. State* (Cr. App.), 103 S. W. 883.

Taking Property for Sport.—On trial for theft of a chicken, where testimony that on the night of the alleged theft witness and defendant agreed, for sport merely, and without intent to steal, to catch a chicken in prosecutor's henroost, make it squall, and then let it go, was offered, it was error to refuse to charge for acquittal if the chicken was taken temporarily and in sport. *Colwell v. State* (Cr. App.), 34 S. W. 615.

Removing Live Stock from Accustomed Range.—Where, on trial for the larceny of a horse, the testimony of the state showed that accused stole the horse, and accused claimed that he borrowed it from a third person for temporary use, the refusal to charge with reference to the statutes making it a penal offense for one to remove live stock from its accustomed range was not erroneous. *Kegans v. State* (Cr. App.), 95 S. W. 122.

Where a horse is taken from the actual possession of the owner, and not from its accustomed range, an instruction as to willfully using, driving, or removing an animal from its accustomed range is inappropriate. *Banks v. State*, 7 Tex. Cr. App. 591.

Character of Liability.—Where, on a trial for cattle theft, there was no direct testimony of accused's presence at the time of taking and killing of the animal, but his connection with the original taking was sought to be established by acts and conduct soon after, as well as by possession of a part of the stolen property, and he relied on an alibi, and denied any connection with any theft, the court was required to submit to the jury whether he was a principal, accessory, accomplice, or receiver of stolen property. *Davis v. State*, 55 Tex. Cr. App. 495, 117 S. W. 159.

Purchase.—Where defendant offered evidence that he had purchased the property, the question of a purchase should have been submitted to the jury. *McDaniel v. State*, 24 Tex. Cr. App. 552, 7 S. W. 249; *Wyers v. State*, 13 Tex. Cr. App. 57; *Murphy v. State*, 17 Tex. Cr. App. 645; *Ryan v. State*, 22 Tex. Cr. App. 699, 3 S. W. 547.

Where defendant contends that he bought the cattle he is accused of stealing, a charge that if the jury believes that he bought said cattle, or has a reasonable doubt that he stole them, the jury will acquit him, sufficiently states the issue. *Mathews v. State*, 32 Tex. Cr. App. 355, 23 S. W. 690.

Bona Fides of a Bill of Sale.—Where in a prosecution for theft the evidence tended to show an acting together, conspiracy or complicity in the taking between a vendor in a bill of sale of the property alleged to have been stolen and the purchaser on trial for the theft, it would become the duty of the court to submit the bona fides of the bill of sale that the jury might ascertain whether or not it was a sham or device to cover up and avoid the crime of theft. *Prator v. State*, 15 Tex. Cr. App. 363.

Animal Won at Game of Cards.—On a prosecution for theft of cattle, an instruction that, if the jury believed accused won the animal at a game of

cards, they must acquit, is proper where the evidence raised such an issue, and the court, in a subsequent portion of the charge, instructed on reasonable doubt. *Pace v. State*, 51 S. W. 953, 41 Tex. Cr. App. 203, reversed on rehearing 53 S. W. 689.

Taking under Claim of Right.—On a trial for theft, where the defense was that the property was defendant's or his mother's, which he had a right to take, it was error to refuse the charge on this defensive matter. *Vance v. State*, 34 Tex. Cr. App. 395, 30 S. W. 792.

On a prosecution for theft of live stock, the court charged that if defendant bought the hogs he was not guilty, and further charged that he was not guilty if he came into possession of the stock in good faith, with the consent of one who had the right to give such consent. Held, that the latter part of the charge was erroneous, there being no evidence that he obtained possession with the consent of one who had the right to give it. *Prewitt v. State* (Cr. App.), 29 S. W. 792.

On trial for theft of a pledged horse, a charge that if, at the time defendant took the horse, he believed he had a right to do so, or if he took it with no intent to appropriate it to his own use, but to use temporarily, or if the jury had a reasonable doubt of either of these propositions, defendant should be acquitted, sufficiently presents the defense that it was a trespass only. *Smith v. State* (Cr. App.), 29 S. W. 785.

Where, in a prosecution for the theft of a cow, defendant claims that the cow which he killed was one he purchased from one K., an instruction that if defendant took the cow under a real claim of title, or if it was not the property of the prosecutor, defendant is not guilty, sufficiently presents defendant's defense. *Ledbetter v. State*, 35 Tex. Cr. App. 195, 32 S. W. 903.

Taking up an Estray.—A requested instruction, on a trial for theft of a horse, regarding the taking up and using of an estray without complying with the law regulating estrays, is properly refused, where the facts show a taking, branding, and sale of the horse by accused. *McVey v. State*, 23 Tex. Cr. App. 659, 5 S. W. 174.

Conspiracy.—On a trial for theft of a cow, there was evidence that defendant and others conspired to prove a purchase of the cow after defendant took possession of it, and the court charged that, "when two or more persons conspire together to commit an offense, and each carries out the part agreed to be done by him, and such offense is actually committed, then all parties to such an agreement are equally guilty of such offense; and if * * * defendant fraudulently took the property, * * * and others agreed or conspired, before or after such taking, to prove a purchase or pretended purchase, * * * either before or after such taking, this would be no such defense to such fraudulent taking." Held, that such instruction was authorized by the evidence, and was correct. *Kegans v. State*, 27 Tex. Cr. App. 703, 11 S. W. 644.

Possession by Defendant's Son of Hide.—On a trial for theft of a heifer, where there was evidence that defendant was seen driving it towards his home with other cattle; that it was not seen thereafter; that defendant next day was peddling fresh beef; and that defendant's son, in the morning of the same day, was in defendant's yard with the animal's hide—it was proper to charge that possession of the hide by defendant's son was not evidence against defendant, unless he obtained possession thereof from defendant, or by his direction or authority. *Brown v. State*, 34 Tex. Cr. App. 150, 29 S. W. 772.

Contemporaneous Theft.—In a prosecution for the theft of a hog, the

state showed that the prosecutor and his employee, after hearing shots in the direction of where they had missed two hogs, found the defendant and others in the act of killing one hog, and that the other was subsequently found wounded, about one hundred and fifty yards from there. Held, that there was sufficient evidence of the theft of two hogs for the court to charge the jury on the subject of contemporaneous theft. *Poteet v. State* (Cr. App.), 43 S. W. 339.

2. General and Specific Instructions.

Defendant Not Entitled to Specific Instructions Where All Elements Contained in General Instructions.—Specific instruction as to what it takes to constitute the identification of money is not necessary. *Pones v. State*, 63 S. W. 1021, 43 Tex. Cr. App. 201.

In a prosecution for theft, a requested instruction that, to convict, defendant must be shown to have taken the property intending to deprive the owner thereof and to appropriate it to his own use, and that no other connection with the transaction will supply the proof of actual taking, is sufficiently covered by an instruction that if accused fraudulently took the property from the owner without his consent, with intent to deprive the owner thereof and appropriate it to his own use, he is guilty. *Ellison v. State* (Cr. App.), 72 S. W. 188.

Specific Charge Unnecessary When Defense Is Adequately Presented.—In a prosecution for stealing, where the court charged on fraudulent intent, and instructed the jury that they must believe beyond a reasonable doubt that defendant took the property, or else acquit him, there was no error in refusing a charge that, if defendant's wife took the property, as was claimed by defendant, the jury should acquit. *Brigham v. State* (Cr. App.), 49 S. W. 381.

Charges, on a prosecution for theft, that, if the jury found that defendant

fraudulently took the horse from the owner's possession, they might convict, and that if they had a reasonable doubt as to defendant's presence at the place where the horse was stolen, they should acquit, makes unnecessary a charge that, before the jury could convict, the evidence must show that defendant was a party to the original taking, and that the fact that he may have been an accomplice, accessory, or receiver of the stolen property would not justify his conviction for the theft. *Trevenio v. State*, 87 S. W. 1162, 48 Tex. Cr. App. 207.

Where, on a trial for horse theft, accused testified that he procured the horse from a third person, and there was nothing to show a temporary appropriation of the horse by accused outside of the alleged borrowing from the third person, and the court charged that before accused could be found guilty he must have taken the horse to appropriate it to his own use, and if he acquired the horse from the third person he should be acquitted, it was not error to refuse to charge that if accused took the horse for a temporary use, and not for permanent appropriation, it would not be theft. *Kegans v. State* (Cr. App.), 95 S. W. 122.

On a prosecution for theft, where defendant claimed that he traded for the property, and the court properly submitted that issue to the jury, it was not error to refuse to charge that if defendant "purchased" the property he was not guilty. *Glass v. State*, 34 Tex. Cr. App. 299, 30 S. W. 556.

In a prosecution for theft from the person, it was not error for the court to fail to define the offense of theft in general. *Chitwood v. State*, 71 S. W. 973, 44 Tex. Cr. App. 439.

Where the indictment charged theft from the person without the owner's consent and so suddenly that he did not have time to make resistance, it was error not to specifically charge

that, even if accused stole the property from the owner's person, he could not be convicted if knowledge of the theft first came to the owner after the theft; a general charge, merely defining the two kinds of theft from the person as provided by statute, with a general application of the law of sudden taking, being insufficient. *Burke v. State*, 58 Tex. Cr. App. 233, 125 S. W. 8.

3. Misleading Instructions.

Where, on a prosecution for cattle theft, defendant claimed that he purchased the cattle, an instruction that, if the proof merely connected the defendant with the property subsequent to the taking, and the jury so believed beyond a reasonable doubt, they should find him not guilty, is misleading and confusing. *Sapp v. State* (Cr. App.), 77 S. W. 456.

Where, on trial for the theft of hogs, the evidence showed that defendant knowingly assisted in butchering the stolen hogs, a special charge that an unlawful taking would be fraudulent if defendant intended to convert the hogs to his own use, "or if he, knowing the unlawful intent, aided others to convert the property to their own use," was confused, indefinite, and may have misled the jury. *Pierce v. State* (Cr. App.), 24 S. W. 899.

On a trial for burglary, and theft of property belonging to F., a charge that if defendant did break and enter a house occupied by F., and did then and there, without the consent of F., steal and carry away from the possession of F., property of the description set out in the indictment, and said property was taken with fraudulent intent to deprive F. of the value of the property so taken, defendant is guilty, is not subject to the objection that under it defendant might be convicted of the theft of property other than that of F. *Connors v. State*, 31 Tex. Cr. App. 453, 20 S. W. 981.

On the trial for the theft of a horse, there being evidence that defendant

had purchased the animal, the jury was instructed that, in order to constitute theft, the property must be taken fraudulently. Therefore, if defendant bought the animal from B., "you will acquit defendant; and this, although you may believe that B. acquired the animal unlawfully." Held, that the instruction is not subject to objection that it authorized a conviction if defendant had knowledge that B. acquired the animal unlawfully, as Penal Code, art. 10 require, that words are to be taken in the sense in which they are understood in common language and the word "bought" does not exclude knowledge of B's fraud. *Lynch v. State*, 32 Tex. Cr. App. 45, 22 S. W. 47, 26 S. W. 409.

The court charged: "If any person other than the defendant took the cotton originally without the aid or encouragement of the defendant, and if afterwards the cotton came into the possession of the defendant, even with the knowledge then that it had been stolen, this would not constitute theft on the part of defendant; and in such case the jury must acquit"—and refused to charge: "In order to convict the defendant in this case, you must believe from the evidence, beyond a reasonable doubt, that the defendant took the bale of cotton in question from the possession of K. [prosecutor]. If any person other than the defendant took the cotton and the said bale of cotton came into the possession of the defendant after the original taking, then you should acquit defendant, regardless of whether defendant acted in good faith or not, and regardless of whether he knew or not as to whether said bale of cotton had been stolen by another; and, if you have a reasonable doubt upon this point, you will acquit." Held, that the charge given was in some essentials inaccurate, and calculated to mislead, and that the charge refused should have been given. *Doss v. State*, 28 Tex. Cr. App. 506, 13 S. W. 788.

Confusing Instructions.—In a prosecution for larceny in the original taking of certain cattle, it appeared that C. was authorized to take up certain stray cattle and put them in his mother's pasture, and that accused assisted C. in driving them to a different pasture; but accused testified that he did not know they were being stolen, that C. told him he thought they were cattle he was looking for, and that he was authorized to handle them. The court instructed that, while a necessary element of theft is a want of the consent of the owner of the property to its taking, yet the fact that the owner may have requested one to take the property for a certain purpose, if at the very time it is taken the person does so with the fraudulent intent at the very time of taking to deprive the owner of the value of the same and to appropriate it to the use or benefit of the person taking the same, then such taking would be without the consent of the owner; but, whatever may have been the intent of C. in taking the cattle, if he did take them, still the jury must acquit defendant unless they were taken under such facts as constitute theft and defendant knew these facts when they were taken. Held, that the instruction was confusing and contradictory in terms. *Warren v. State* (Cr. App.), 106 S. W. 382.

Failure to Charge Whole Law.—The instruction was erroneous, as failing to charge the whole law, in that it failed to charge that, if the original taking was innocent, no subsequent appropriation could convert the innocent taking into theft. *Warren v. State* (Cr. App.), 106 S. W. 382.

4. Instructions as to Particular Elements or Offenses.

a. Instructions Defining Offense or Elements.

A correct definition of the offense charged in the indictment must be given to the jury; and when the evidence of a necessary element of the

offense is purely circumstantial, the jury should be instructed on the requisites of that species of proof. *Lindley v. State*, 8 Tex. Cr. App. 445.

While not essential that the judge should give the statutory definition of theft in the instructions, he should inform the jury of its substantial elements and ingredients. *Johnson v. State*, 1 Tex. Cr. App. 118, 119.

In a prosecution for theft by a bailee, it was not error for the court to define general theft, though the charge may not have been called for by the evidence. *Harding v. State*, 95 S. W. 528, 49 Tex. Cr. App. 601.

"Fraudulent Taking."—On a trial for theft, an instruction that by "fraudulent taking" is meant that the person taking knew at the time of taking that the property was not his own, that the property was taken without the consent of the owner, and with intent to deprive the owner of the value thereof and to appropriate it to the use or benefit of the person taking, was correct. *McCoy v. State*, 56 Tex. Cr. App. 551, 120 S. W. 858.

On a prosecution for the theft of cattle, alleged to have been fraudulently taken by defendant, an instruction defining a fraudulent taking as a taking without the owner's consent, with the intent to deprive him of the value of the property, and to appropriate it to the use and benefit of the person taking, is sufficient, in the absence of requested instructions and exceptions. *Johnson v. State* (Cr. App.), 24 S. W. 285.

An instruction defining theft in the language of Pen. Code 1895, art. 858, was not insufficient for failing to more specifically define "fraudulent taking," in the absence of a request. *Ellington v. State* (Cr. App.), 140 S. W. 1100.

Language of Statute.—In a prosecution for theft from the person, a charge containing all the elements of theft as defined by the statute is sufficient. *Chitwood v. State*, 71 S. W. 973, 44

Tex. Cr. App. 439. See, also, *O'Brien v. State*, 27 Tex. Cr. App. 448, 449, 11 S. W. 459; *Mitchell v. State*, 2 Tex. Cr. App. 404, 406.

In a prosecution for theft of property to the value of over \$50, a charge which failed to give satisfactory definition of such theft, as prescribed by Pen. Code 1895, art. 858, was not erroneous, where the charge required all the elements of the statutory offense to be found against accused before conviction. *Franklin v. State* (Cr. App.), 140 S. W. 1091.

Authorizing Conviction of Offense Other than Alleged.—On a trial for larceny of a horse, instructions that if the jury believed, from the evidence, "that defendant himself did take the horse in question, in such a manner as to constitute theft, or, knowing the same to be stolen, received the same, then he is guilty of the theft thereof," held erroneous, as permitting the jury to convict of receiving stolen property. *Gonzales v. State*, 13 Tex. Cr. App. 48.

b. Consent of Owner.

In a prosecution for theft, a charge of the court which failed to instruct that the taking by defendant must have been without the consent of the prosecuting witness, whom the indictment alleged was the owner, and where the evidence failed to show that the taking was without his consent, is objectionable. *McConico v. State*, 61 Tex. Cr. App. 48, 133 S. W. 1047.

Upon trial of an indictment charging defendant with taking money from the owner's possession without his consent, it appeared that it was taken from one who had it to give to the owner. Held, that a charge that, to convict, the jury must find that defendant obtained the money from the holder, with intent to deprive the owner of its value, and to appropriate it to his own use, and that he did so, was improper, in not requiring that jury to find that the money was taken without the own-

er's consent. *Otero v. State*, 30 Tex. Cr. App. 450, 17 S. W. 1081.

In a prosecution for theft of an overcoat, in which defendant claimed that prosecuting witness had loaned him the overcoat, a charge that if the jury believed the prosecuting witness loaned defendant the overcoat, and that defendant wore it off with the belief that it was a loan, they should find defendant not guilty, was a sufficient charge on this phase of the case. *Smith v. State* (Cr. App.), 75 S. W. 298.

In a prosecution for theft, an instruction that the state must prove the taking of the property without the consent of the owner, without any reference to a statement made to a policeman in the nature of a confession, was properly refused, where the owner testified positively that he did not give his consent to the taking of the property. *King v. State* (Cr. App.), 100 S. W. 387.

An indictment charged theft of certain property, and alleged ownership in a certain person. On the trial it was proved that such person had been in the actual possession and control of the property for some time prior to the theft, but was not the real owner. Held, that the court did not err in failing to instruct the jury to acquit unless want of consent of the real owner was shown. *Von Emons v. State* (Cr. App.), 20 S. W. 1106.

Where, in a prosecution for larceny from the person, the evidence on the issue of prosecutor's want of consent to the taking was weak, it was error to charge that, though the money was taken from prosecutor's person and possession without his knowledge, and prior to the taking it was understood between defendant and prosecutor that, if the latter should become so drunk that he could not take care of himself, defendant should take care of prosecutor's money, and in compliance with such understanding defendant took the money without any intent to steal it,

defendant should be acquitted, unless defendant took the money without prosecutor's consent and with intent at the time of the taking to steal it, was erroneous as too restrictive. *McMahan v. State*, 96 S. W. 17, 50 Tex. Cr. App. 244.

The court should have charged that if, prior to the taking of the money, prosecutor told defendant to take care of him in the case he got too drunk to take care of himself, and defendant believed prosecutor intended him to take his money from him, or in case they had a reasonable doubt as to whether that was true, in either case they should acquit. *McMahan v. State*, 96 S. W. 17, 50 Tex. Cr. App. 244.

Property in One and Possession in Another.—In a prosecution for larceny, on an information charging the property in one and the possession in another holding for him, a charge not requiring the jury to find that the property was taken without the consent of the party in possession is fatally defective. *Henley v. State*, 61 Tex. Cr. App. 428, 135 S. W. 133.

Where Property Laid in General and Special Owner.—Where one count of an indictment for theft charged the property and possession in the general owner, and the other in the special owner, a charge which authorized a conviction if defendant took without consent of either was not reversible error, when neither consented. *Key v. State*, 40 S. W. 296, 37 Tex. Cr. App. 511.

Implied Consent.—On a prosecution for larceny, where defendant relied on the owner's consent, express or implied, to the taking, an instruction that defendant was not guilty if induced to take the property by one who had the owner's consent, or if such a one led the defendant to believe that the owner had consented to the taking, whether or not the owner had actually consented, is erroneous for failing to instruct in reference to an implied con-

sent of the owner and the nature thereof. *McGee v. State* (Cr. App.), 66 S. W. 562.

In a prosecution for theft from the person, an instruction to acquit if defendant took the property with prosecutor's consent, and afterwards formed the intent to appropriate it, is sufficient, as bearing on defendant's claim that he had prosecutor's consent to take the property. *O'Toole v. State*, 51 S. W. 244, 40 Tex. Cr. App. 578.

Owner Unknown.—Accused was tried for the theft of a heifer from an unknown owner. The evidence showed the animal to have been an estray in the possession of one over whose land it ranged. Held, that the court should have instructed the jury that the want of consent on the part of that person must be proven. *Spruill v. State*, 10 Tex. Cr. App. 695.

Joint Ownership.—On trial for theft of a cow alleged to have been owned by P. and M. jointly, it is reversible error to direct a conviction if the cow was taken "without the consent of said P. and said M., or of either of them." The words "or of either of them" should be omitted, and the charge should be "without the consent of P. and without the consent of M." *Jones v. State*, 28 Tex. Cr. App. 42, 11 S. W. 830.

In a trial for theft of property alleged to belong to "W. and J.," the charge to the jury in effect warranted a conviction if the defendant took the property without the consent of either of the alleged owners. Held, error. *McIntosh v. State*, 18 Tex. Cr. App. 284.

c. Intent.

(1) In General.

Instruction Must Contain Element of Intent.—Pen. Code, art. 724, defines theft to be "the fraudulent taking of corporeal personal property belonging to another from his possession, or from the possession of some person holding the same for him, without his consent,

with intent to deprive the owner of the value of the same, and to appropriate it to the use or benefit of the person taking." On a trial for theft, an instruction which ignores any of these essential elements, and their co-existence—as, for instance, that of guilty knowledge and intent—is fatally defective. *Riojas v. State*, 8 Tex. Cr. App. 49; *Willis v. State*, 24 Tex. Cr. App. 584, 6 S. W. 856; *Holsey v. State*, 24 Tex. Cr. App. 35, 5 S. W. 523; *Bearu v. State*, 45 Tex. Cr. App. 522, 78 S. W. 348; *Alford v. State*, 52 Tex. Cr. App. 621, 108 S. W. 364; *Wilson v. State*, 59 Tex. Cr. App. 623, 129 S. W. 836.

A charge that, in order that there be a fraudulent intent, the party taking "must know at the time he took the property that it did not belong to him, and that he took it intending to deprive the owner of its value, and to appropriate it to his own use and benefit," sufficiently guards the defendant's rights. *Brite v. State* (Cr. App.), 43 S. W. 342.

In a prosecution of a bailee of a horse for theft thereof, it was error to fail to charge that proof of a 'fraudulent intent in converting the horse was necessary to sustain a conviction. *Smith v. State*, 76 S. W. 434, 45 Tex. Cr. App. 251.

Taking Oats with Intent of Paying for Them.—Where, in a prosecution for stealing oats, accused and his wife testified that, when he took the oats from a field by which he was driving, he stated his intention to give his father-in-law, who accompanied him in another buggy, money to pay the owner for the oats, accused driving a scary team which he could not leave, it was error to refuse a requested charge that, if accused took the oats without fraudulent intent, with a view to paying for them, the jury should acquit. *Pyles v. State*, 62 Tex. Cr. App. 49, 136 S. W. 464.

Where Evidence Establishes Intent.—Where, on a trial for the theft of a

horse, the evidence showed that accused assisted a third person in the taking of it, that they carried the horse several hundred miles, and that, when they offered to sell it, accused joined in the conversation as to the ownership of it, making false statements, it was not error to refuse to charge that if accused did not intend to appropriate the horse to his use he should be acquitted. *Selph v. State*, 90 S. W. 174, 49 Tex. Cr. App. 18.

Obtaining Money on Worthless Check.—Where, on a prosecution for theft by means of drawing worthless checks in payment of the property alleged to have been stolen, the evidence showed that defendant, when arrested, was about to start to go to the city where he represented at the time of the drawing of the checks that he had money at a bank, the refusal to instruct that, if the defendant acted in good faith, they should acquit him, was erroneous. *Powell v. State*, 70 S. W. 968, 44 Tex. Cr. App. 273.

Necessity of Using Word "Fraudulent."—A charge to the jury, in describing the offense, need not use the word "fraudulent," although the word is indispensable in the indictment, if the charge clearly characterizes the offense. *Ashlock v. State*, 16 Tex. Cr. App. 13.

Where Evidence Tends to Exonerate Accused.—Where there was evidence tending to exonerate accused from a guilty intent in taking property, he was entitled to an instruction directing the attention of the jury to the question of intent. *Hamilton v. State*, 2 Tex. Cr. App. 494.

Distinction between Theft and Trespass.—Where the jury may infer from the evidence that the taking was not fraudulent, accused is entitled to an instruction as to the distinction between trespass and theft. *Ainsworth v. State*, 11 Tex. Cr. App. 339; *Harris v. State*, 2 Tex. Cr. App. 102; *Guest v. State*, 24 Tex. Cr. App. 235, 5 S. W.

840; *Bray v. State*, 41 Tex. 203; *Isaacs v. State*, 30 Tex. 450; *Loza v. State*, 1 Tex. Cr. App. 488.

Where, on trial for theft of a heifer, there was no clear proof that the taking was with fraudulent intent, an instruction that the public manner of the taking would not lessen or excuse the offense, if the heifer was taken with guilty knowledge and fraudulent intent, held abstractly true, but misleading, as not sufficiently distinguishing between theft and mere trespass. *Ainsworth v. State*, 11 Tex. Cr. App. 339.

(9) Existence at Time of Taking.

Necessity for.—Pen. Code, art. 727, provides that if the property came into the possession of a person accused of theft, by lawful means, the subsequent appropriation of it is not theft; but if the taking, though lawful, was obtained by any false pretext, or with any intent to deprive the owner of the value, and appropriate the property, and the same is so appropriated, the theft is complete. Defendant was indicted for general theft, and the evidence showed that the stolen property was handed to him by the owner, and that the theft might have been committed by his retaining it. Held, that the court should have instructed that, in order to convict, the jury must find that the intent to deprive the owner of the value of the property existed at the very time of acquisition. *Nichols v. State*, 28 Tex. Cr. App. 105, 12 S. W. 500; *Burdett v. State*, 51 Tex. Cr. App. 345, 101 S. W. 988; *Crouch v. State*, 52 Tex. Cr. App. 460, 107 S. W. 859; *Green v. State* (Cr. App.), 33 S. W. 120; *Dunham v. State*, 3 Tex. Cr. App. 465, 468; *Veasley v. State* (Cr. App.), 85 S. W. 274; *Phillips v. State* (Cr. App.), 42 S. W. 557; *Tanner v. State* (Cr. App.), 44 S. W. 489.

Where, in a prosecution for the theft of a hog, defendant claimed he first killed the hog because it got into his field, without the intent of stealing

the same, and thereafter appropriated the meat, an instruction that if the jury had a reasonable doubt that at the very time of the killing defendant had a fraudulent intent to steal the hog they should acquit him, no matter if he afterwards conceived the idea of appropriating the meat, was an adequate presentation of defendant's theory. *Jemeson v. State* (Cr. App.), 68 S. W. 275.

Upon a trial for larceny of cattle there was evidence tending to show that the cattle followed defendant's herd, and joined it, in spite of defendant's efforts to keep them out. Defendant asked for the special instruction that, in order to convict, the jury must be satisfied, beyond a reasonable doubt, "that he not only did appropriate the cattle to his own use, but that the intention of the defendant to defraud the owner of the value thereof existed at or before the taking;" and that if the jury found that the cattle followed defendant, and got into his herd, and that afterwards he formed the idea of fraudulently appropriating them to his own use, he could not be convicted of theft. Held, that the court erred in refusing to give the instruction. *Guest v. State*, 24 Tex. Cr. App. 235, 5 S. W. 840.

Where defendant took a calf of a third person, believing, as he testified, that it belonged to his employer, of whose cattle he had charge, and drove it to the employer's farm, and there branded it with the employer's brand, and thereafter sold it as his own, it is not enough to instruct that if he took the animal under an honest mistake of fact, or if he believed it was the property of another, and had authority to take it as the property of such other person, he would not be guilty of theft; but the jury should have been told specifically that if defendant took the animal, believing, at the time of the taking, it to be his employer's, he would not be guilty, and that no

subsequent appropriation by defendant would justify his conviction. *Leak v. State* (Cr. App.), 97 S. W. 476.

On a trial for the theft of a \$20 gold piece, handed defendant by mistake, instead of a silver dollar, the refusal to instruct to acquit if the taking of the gold piece was with an intent formed in the mind of defendant subsequent to the time of receiving it, is not reversible error, where the jury has been instructed that, in order to convict, defendant must have formed the intent to appropriate the money at the time of receiving it, and did so appropriate it. *Thompson v. State* (3d App.), 55 S. W. 330.

An instruction on a trial for theft that, if when defendants took the money they knew whose it was, or could have so known by reasonable inquiry, etc., they would be guilty, was not open to the objection that it did not confine the fraudulent intent to the very time of taking, but extended it to the time immediately after the taking by imposing the burden of making diligent search and reasonable inquiry for the owner after the property was found. *Moxie v. State*, 54 Tex. Cr. App. 529, 114 S. W. 375. See, also, *Reed v. State*, 8 Tex. Cr. App. 40, 43.

A conviction for theft of oxen was had upon evidence from which the jury might have inferred that, though the defendant killed the oxen without their owner's consent, and afterwards skinned them and appropriated the hides, yet that he killed them because they were depredating on his crop, and with no intent to appropriate them. Held, that the trial court should have instructed that in case the jury so found the facts, defendant was not guilty of theft of the oxen and it was not sufficient to instruct that such a state of facts would warrant a conviction for the misdemeanor of killing live stock without the owner's consent, etc. *McPhail v. State*, 10 Tex. Cr. App. 128.

Where All Evidence Indicates a Present Intent.—It was not error to fail to instruct that if defendant did not intend to appropriate the money when he took it, but subsequently formed the intent, he was not guilty, where all the evidence indicated that he had a present intent to appropriate it; an instruction requiring the jury to believe he intended to deprive the owner of the money before they could convict being sufficient. *Black v. State*, 52 Tex. Cr. App. 8, 104 S. W. 897.

(3) Taking for Temporary Use or Purpose.

Where, on a prosecution for the theft of a cow, the evidence showed that defendant's business was that of hunting for stray stock and returning the same to the owners, that he was in possession of the prosecutor's cow three days after it was missed, and returned it after the prosecutor had offered a reward, an instruction on the issue of defendant's taking the cow with the felonious intent of securing the reward was necessary. *Davis v. State*, 74 S. W. 544, 45 Tex. Cr. App. 132.

Where, on a prosecution for horse theft, defendant claimed that he took the horse merely for the purpose of using it, and with intent to return it, it having been turned over to him by one who stated that he had borrowed it from the owner, an instruction that, if accused took the horse with intent not to deprive the owner of the value of it, but merely to use it, the jury should acquit, was proper. *Windom v. State*, 72 S. W. 193, 44 Tex. Cr. App. 514.

Taking Crippled Animal for Purpose of Caring for It.—On an indictment for theft of a head of cattle, the evidence tended to show a fraudulent taking, but defendant testified that he found and cared for the animal, which was crippled, and sold it to pay for his care, because he could not find the

owner. The court charged that if, when he discovered it, it was crippled, and he cared for it, and sold it to repay himself, and not with intent to appropriate it, he should be acquitted; but that, if he took it fraudulently, he would be guilty, though he cared for it, and was entitled to pay therefor. Held that, in the absence of exception at the time, the charge was sufficient. *Key v. State*, 40 S. W. 296, 37 Tex. Cr. App. 511.

Taking Steer for Purpose of Fastening Board over Its Face to Keep It Out of Fields.—Where the only evidence as to the taking is that of a witness who testifies that he saw defendants driving the steer towards their pen, and that one of them told him that they were taking the steer for the purpose of fastening a board over its face to keep it out of the fields, and other witnesses testify that they saw the steer the day after, "loose on the range," with a board tied over its face, the jury should be instructed that, to constitute theft, the taking must be with fraudulent intent, and that if the steer was taken and driven away for the purpose mentioned, though without the owner's consent, it would not be theft. *Bryant v. State*, 25 Tex. Cr. App. 751, 8 S. W. 937.

Subject Matter Covered by General Charge.—It was proper to refuse an instruction applicable in case defendant took the horse for temporary use, as bearing on an issue raised by his testimony that he took it as a pledge, when the court charged that he should be acquitted if the taking was without fraudulent intent, or with the owner's consent. *Cerda v. State*, 33 Tex. Cr. App. 458, 26 S. W. 992.

(4) Taking under Claim of Right.

In a prosecution for hog theft a charge that, if the jury believed beyond a reasonable doubt that the hog belonged to prosecuting witness, yet that at the time defendant took the

animal he did so under a claim of right and in good faith, honestly believing that it belonged to him, he would not be guilty, was proper. *Hull v. State* (Cr. App.), 80 S. W. 380; *Vance v. State*, 34 Tex. Cr. App. 395, 30 S. W. 792; *McCary v. State* (Cr. App.), 80 S. W. 373; *Wilson v. State* (Cr. App.), 76 S. W. 434; *Miles v. State*, 1 Tex. Cr. App. 510; *Young v. State*, 34 Tex. Cr. App. 290, 30 S. W. 238; *Varas v. State*, 41 Tex. 527; *Criswell v. State*, 24 Tex. Cr. App. 606, 7 S. W. 337; *Sisk v. State*, 9 Tex. Cr. App. 246; *Reese v. State*, 44 Tex. Cr. App. 34, 68 S. W. 283; *Soria v. State*, 2 Tex. Cr. App. 297; *Hunter v. State* (Cr. App.), 37 S. W. 323; *Darnell v. State*, 43 Tex. Cr. App. 86, 63 S. W. 631; *Steed v. State*, 43 Tex. Cr. App. 567, 67 S. W. 328; *Black v. State*, 38 Tex. Cr. App. 58, 41 S. W. 606; *Lockett v. State*, 59 Tex. Cr. App. 531, 129 S. W. 627; *Britt v. State*, 21 Tex. Cr. App. 215, 17 S. W. 255; *Thompson v. State*, 43 Tex. 268, 273; *Roberts v. State*, 44 Tex. Cr. App. 267, 70 S. W. 423.

In a prosecution for cattle theft, an instruction that if defendant was requested by R. to look after and drive up cattle which had been left running on the range by M., and if defendant found the animal in the pasture, and took possession of it and placed it with R.'s cattle, and if at the time he took possession he honestly believed it belonged to M., and he placed it with R.'s cattle without any intention of appropriating it, or if they had a reasonable doubt on these matters, they should acquit, was not objectionable as placing a greater burden of proof on defendant than the law required, or as charging too strongly on defendant's good intent. *Chambers v. State*, 68 S. W. 286, 44 Tex. Cr. App. 61.

A charge that the state must prove fraudulent intent beyond a reasonable doubt, and, if defendant took the hogs in the honest belief that they were his

mother's, even if he were mistaken, or under a claim of right, no matter how unfounded, he should be acquitted; that it was not enough to prove that defendant took the hogs, but also, beyond a reasonable doubt, that he took them with fraudulent intent, knowing they were not his mother's—is favorable enough to defendant. *Simms v. State* (Cr. App.), 25 S. W. 771.

Where defendant claimed the property as of right, and sold it openly, it was error to instruct that the open and public manner in which property is taken and claimed will not in any manner lessen or excuse the offense, if the same was taken with a guilty knowledge and fraudulent intent, although said charge is correct in the abstract. *Ainsworth v. State*, 11 Tex. Cr. App. 339.

If, in a trial for theft, there is proof tending to show that the accused took the property in good faith, believing it to be his own, or that he took it by authority of another, whom he believed to be the owner, the jury should be instructed as to what facts would rebut the presumption of a fraudulent taking. *Miles v. State*, 1 Tex. Cr. App. 510.

Property of Codefendant.—The state's testimony tended to show that defendant and another went into prosecutor's pasture, roped the calf, conveyed it to a secret place, and there slaughtered it on the following morning. Defendant's evidence was that the calf slaughtered was the calf of a certain cow bought by his codefendant from one L., and that they were not in prosecutor's pasture. Held, that an instruction that, if the calf killed by defendant was the property of his codefendant, and was the calf of a certain cow bought from one L., he should be acquitted, should have been given. *Landers v. State* (Cr. App.), 63 S. W. 557.

Evidence Raising Reasonable Doubt as to Defendant's Belief.—On a trial

for the larceny of a horse which defendant took from P.'s field and sold, defendant testified that he bought a horse of P., which was killed, and P. agreed to sell him another at half price, but they had not agreed on what horse he was to have, nor the price to be paid. The jury was instructed that, if defendant believed from any agreement with P. that he had a right to take the animal, or if the evidence raised a reasonable doubt as to defendant's belief, he should be acquitted. Held, that the instruction was sufficiently favorable to defendant. *Sissell v. State* (Cr. App.), 20 S. W. 368.

In a prosecution for the theft of a pair of pants defendant testified that the principal witness for the state gave him the pants to wear on a certain trip, and did not tell him where he got them until they reached their destination. Held, that the defendant was entitled to a charge that, if this were true, or there was reasonable doubt as to its truth, the jury should acquit. *Jackson v. State*, 79 S. W. 521, 47 Tex. Cr. App. 85, judgment affirmed on rehearing, 80 S. W. 631.

In a prosecution for theft a charge that if the jury have a reasonable doubt as to whether the accused honestly and in good faith believed that he had a legal right to dispose of the stolen property, he should be given the benefit of the doubt and acquitted was erroneous, as tending to divert the minds of the jury from the primary issue, which was the fraudulent taking by accused. *Deering v. State*, 14 Tex. Cr. App. 599.

Special Instruction Covered by General Charge.—On trial of S. for theft of a mare, a general instruction was given to acquit him, if it be found that he took the mare under a bona fide, though mistaken, belief that the mare was the property of his wife. Held, that it was error to refuse to give a more specific instruction, asked by S,

to the effect that if the jury believe that S.'s wife owned the "22" brand, and had horses running in the range in that brand, and S. took up off the range the animal which he was charged with stealing under belief that it belonged to his wife, they will find S. not guilty. *Sigler v. State*, 9 Tex. Cr. App. 427.

Where Evidence Show Property Belonged to Either Prosecuting Witness or Defendant.—In a prosecution for hog theft, where the evidence showed that the hog belonged to either prosecuting witness or defendant, and there was no evidence that it belonged to any other person, or that the hog was an estray, there was no necessity for a charge that though the property might never have belonged to defendant, or might even have belonged to prosecuting witness, yet, if defendant took the hog under an honest claim of right, he should be acquitted. *Hull v. State* (Cr. App.), 80 S. W. 380.

Defendant's Belief in Trade.—On a prosecution for theft, where defendant claimed that he traded for the property, and the state contended that defendant stole it, it was proper not to charge as to defendant's good faith in making the trade. *Glass v. State*, 34 Tex. Cr. App. 299, 30 S. W. 556.

Where, in a prosecution for hog theft, there was no issue as to defendant's taking the hog, and the court fully charged on reasonable doubt, an instruction that if, before defendant took the hog, he had made a trade with prosecutor's son, in which the latter agreed to give defendant the hog for a stove, and defendant took the hog in payment for the stove in the belief that he had a right to do so, defendant should be acquitted, was not erroneous, as relieving the state from the burden of proving a fraudulent taking of the hog by defendant, beyond reasonable doubt. *Pollard v. State* (Cr. App.), 79 S. W. 26.

Authority under Case.—Where defendant was charged with theft be-

cause of his removal of certain improvements from land of which he was lessee, he was entitled to have the jury instructed that if he, in good faith, believed that he had a right under his lease to remove the property from the leased premises, he was entitled to an acquittal, whether such right existed or not. *Meerschlat v. State* (Cr. App.), 57 S. W. 955.

Right to Remove under Contract.—Defendant was charged with theft because of the removal, from lands of which he was the lessee, of certain improvements thereon, which had been erected by him under an agreement that, in case of his default in the payment of rent, the improvements should remain on the land, and become the property of the lessor. Held, that the jury should have been instructed that if the property alleged to have been stolen was, at the time of removal, in the possession of defendant, they should acquit him. *Meerschlat v. State* (Cr. App.), 57 S. W. 955.

Taking to Secure Debt.—An instruction that one charged with stealing a watch is not guilty if the owner was indebted to him, or defendant so believed, and defendant, in good faith, took the watch, believing he had a right to take it to secure his debt, and without any intention to deprive the owner of its value and appropriate it to his own use, is not erroneous on the ground that the latter portion of the charge negatives all that precedes it. *Young v. State*, 34 Tex. Cr. App. 290, 30 S. W. 238.

Taking by Authority of One Believed to Be Owner.—Where, on an indictment for theft, defendant claims that the property stolen belonged to a person who authorized him to take it, an instruction that the jury, if they believe that the defendant honestly, though mistakenly, believed that it belonged to such person, must acquit him, is sufficient. *Phillips v. State* (Cr. App.), 31 S. W. 644.

Where, in a prosecution for theft of a head of cattle belonging to an unknown owner, accused testified that he had authority from Y. to take cattle alleged to have been lost by him in the county, refusal of an instruction that, if the jury found that accused took the animal believing it to be Y.'s, they should acquit, was error. *Melton v. State* (Cr. App.), 56 S. W. 67.

On indictment for theft of oats there was testimony that a son of the alleged owner was interested in the oats and authorized defendant to take them, and defendant testified that he took them in the belief that he had such authority from the son. The court charged that, if defendant believed that the oats were the property of father and son, and that he had the consent of either, "and" took them without intent to deprive the owner, the fraudulent intent necessary to convict would be absent. Held, that the charge was not objectionable as requiring for acquittal not only the consent, but absence of fraudulent intent. *Beabout v. State*, 40 S. W. 405, 37 Tex. Cr. App. 515.

The court having charged that, if defendant took the steer mistakenly believing it to belong to a brand purchased by him, he was innocent, it was error to add that the transfer must have been a bona fide transfer of the animal he was charged with stealing. *Lockwood v. State* (Cr. App.), 26 S. W. 200.

An instruction, on a trial for horse stealing, that defendant was not guilty if he had authority from the owner to take the horse, does not fully embody the theory that he is not guilty if he took it without intent to steal, though defendant testified that he had authority from the owner to take it, and so stated shortly after taking it, since such testimony and declaration might be false, and defendant nevertheless not have intended to steal the

horse; it appearing that he used it openly for a time. *Harrell v. State*, 40 S. W. 799, 37 Tex. Cr. App. 612.

In a prosecution for hog theft, the state's evidence established a conspiracy to steal, and theft of a hog, while defendant's testimony was that he claimed no interest in the hog, thought it was his brother's, was merely aiding him to catch it, and was in fact not immediately present when the hog was captured. On this theory the court charged that if he, in good faith, believed the hog to be the property of his brother at the time of the taking, he would not be guilty, although he might afterwards have found that it was not his brother's, and also that, if defendant was ignorant of any fraudulent intent on the part of his brother, he could not be guilty, although he assisted in dragging the hog after it was caught. Held to sufficiently present defendant's theory of the case. *Newberry v. State* (Cr. App.), 74 S. W. 774.

Taking by Hired Hand under Orders from Employer.—Where the evidence tends to show that defendant killed the animal alleged to have been stolen, for beef, at the direction of his employer, believing it to be his, the court should submit the matter to the jury, under proper instructions. *Myers v. State*, 24 Tex. Cr. App. 334, 6 S. W. 194.

Where the defense on a trial for stealing cattle was that defendant was a hired hand of the real criminal, an instruction that, to convict, it must be shown that defendant knew that the party by whom he was employed was stealing said cattle, and that he participated in the taking, is sufficient. *Ray v. State*, 35 Tex. Cr. App. 354, 33 S. W. 869.

On the trial of a joint indictment of two persons for the larceny of a cow, which was butchered and sold, when there is evidence tending to show that one of the accused simply acted as the hired man of the other, and assisted

him in driving and butchering the cow under the belief that it was his, and in ignorance of the fact that it had been stolen, it is error to refuse an instruction to the effect that if the jury believe that evidence, the defendant should be acquitted. *Wiley v. State*, 22 Tex. Cr. App. 408, 3 S. W. 570. See, also, *Burdett v. State*, 51 Tex. Cr. App. 345, 101 S. W. 988.

Assistance of Relative in Driving Hogs.—Where, on a trial for the larceny of hogs, the evidence showed that accused had disclaimed any interest in the hogs, and had merely assisted a relative whom he believed to own them in driving them, and the court submitted the case on the theory that accused and his relative were principals, the refusal to charge that if accused was merely assisting his relative in driving the hogs, believing that they belonged to him, he should be acquitted, was reversible error. *Johnson v. State*, 90 S. W. 633, 49 Tex. Cr. App. 106.

In a prosecution for cattle theft, where it was alleged that defendant aided in stealing the animal after it had been killed by another person, and there was testimony that such other person said the animal belonged to him, an instruction that if the jury should find that the person alleged to have killed the animal charged to have been stolen owned the animal, or believed it was his, at the time he took it, it was not theft, although it was not his in fact, was improperly refused. *Steed v. State*, 67 S. W. 328, 43 Tex. Cr. App. 567.

Taking by Authority of One Believed to Have Borrowed from Owner.—On a prosecution for horse theft defendant claimed that a person allowed him to take the horse, stating that he had borrowed it from the owner; and the court charged that if the jury believed that another person borrowed the horse from the owner, and placed it in possession of defendant, or if they entertained a reasonable doubt whether defendant's connection with the horse

arose in such manner, they should acquit. Held, that the instruction was not erroneous because it limited the jury to the consideration of the belief of accused. *Windom v. State*, 72 S. W. 193, 44 Tex. Cr. App. 514.

d. Nature and Value of Property.

(1) Nature.

Where the description of the property stolen was not an issue, a charge calling attention to the count of the indictment on which defendant was being tried is not erroneous because it describes the property, where there is no variance between it and the description given in the indictment. *Hurley v. State*, 36 Tex. Cr. App. 73, 35 S. W. 371.

In a prosecution for theft of \$1, current money of the United States, the court should charge that the evidence must show that the money taken was current money of the United States, in order to convict. *Johnson v. State*, 58 Tex. Cr. App. 442, 126 S. W. 597.

The information charging the theft of a male hog, the defendant asked the court to charge that "a male hog is one which has not been changed from a boar to a barrow by castration—that is, by depriving said hog of its seed." A barrow, as defined by Webster, is "a hog, especially a male hog, castrated." Held, that the special charge was correctly refused. *Williams v. State*, 17 Tex. Cr. App. 521.

(2) Value.

In a theft prosecution the trial court should charge upon the standard of value, which is the market value of the article if it have such value, and, if not, the amount it would cost to replace it. *Saddler v. State*, 20 Tex. Cr. App. 195.

Where Value Material.—In a prosecution for theft, under Pen. Code 1895, art. 869, declaring that theft of property of the value of \$50 or over shall be punished by confinement in the penitentiary not less than two nor more

than ten years, a charge failing to require the jury to find the value of the property taken was erroneous. *Johnson v. State*, 57 Tex. Cr. App. 308, 122 S. W. 877. See, also, *Lacey v. State*, 22 Tex. Cr. App. 657, 3 S. W. 343; *Clark v. State*, 26 Tex. Cr. App. 486, 9 S. W. 767; *Stallings v. State*, 29 Tex. Cr. App. 220, 15 S. W. 716; *Cody v. State*, 31 Tex. Cr. App. 183, 20 S. W. 398; *White v. State*, 33 Tex. Cr. App. 94, 25 S. W. 290; *Hilliard v. State*, 37 Tex. 358, 359; *Flynn v. State*, 47 Tex. Cr. App. 26, 83 S. W. 206; *Barnes v. State*, 43 Tex. Cr. App. 355, 65 S. W. 922; *Keipp v. State*, 51 Tex. Cr. App. 417, 103 S. W. 392.

In a trial for theft of a second hand safe, alleged to be worth \$15, and \$41 in money, an instruction that if the jury believed, etc., that accused took the safe and money, etc., he should be found guilty of the theft of property worth \$50 or more, etc., was erroneous, as precluding the jury from passing on the value of the safe, though according to the testimony it was worth \$15. *Schwartz v. State*, 53 Tex. Cr. App. 449, 111 S. W. 399.

Value Immaterial.—Where, on a trial for theft of a lap robe, there was no controversy that it was worth a dollar, and the court submitted a misdemeanor to the jury, there was no error in failing to submit some proved value to the jury. *Thompson v. State* (Cr. App.), 78 S. W. 941.

Theft from the Person.—Where, in a prosecution for theft from the person, the property alleged and proven to have been stolen had value, it was immaterial what such value was, and therefore it was not necessary to charge on the question of value. *Chitwood v. State*, 71 S. W. 973, 44 Tex. Cr. App. 439; *Green v. State*, 28 Tex. Cr. App. 493, 494, 13 S. W. 784.

Where information charges theft of several articles, separately set out and separate value given for each, a charge

is not objectionable which warrants conviction on proof of theft of any one set of articles of which value was given. *Howard v. State*, 8 Tex. Cr. App. 612, 613.

Assuming Value When Proved Beyond Reasonable Doubt.—Where, on a prosecution for larceny, the value of the property is proven beyond doubt, as where the property is United States coin, it is not error for the court to assume the value of the property in an instruction. *Nelson v. State*, 35 Tex. Cr. App. 205, 32 S. W. 900.

Instruction That Bill Is Money.—Where an indictment for theft charges the taking of a "twenty-dollar bill, in money, of the value of twenty dollars," it is proper to charge the jury that the \$20 bill was money. *Still v. State* (Cr. App.), 50 S. W. 355.

2. Ownership and Possession of Property.

(1) In General.

Ownership Should Be Proved as Laid in Indictment.—Where testimony is conflicting as to the ownership of stolen property, accused is entitled to a charge that, unless the jury are satisfied beyond a reasonable doubt of the ownership as charged, they should acquit. *Kay v. State*, 40 Tex. 29; *Spencer v. State*, 34 Tex. Cr. App. 65, 29 S. W. 159; *Green v. State* (Cr. App.), 30 S. W. 220; *Armstead v. State*, 48 Tex. Cr. App. 304, 87 S. W. 824; *Melton v. State* (Cr. App.), 56 S. W. 67; *Williams v. State*, 4 Tex. Cr. App. 5.

In a prosecution for hog theft a charge that, in order to convict, the evidence must satisfactorily establish beyond a reasonable doubt that the hog alleged to have been stolen was the property of prosecuting witness at the time it was taken, and that, if the evidence raised a reasonable doubt whether or not the hog belonged to such witness at the time it was taken, defendant should be acquitted, was not open to the criticism of authorizing the

jury to find defendant guilty if he failed to establish his title to the hog. *Hull v. State* (Cr. App.), 80 S. W. 380.

A portion of a charge submitting the issue of the owner's possession of stolen sacks authorized a conviction if the jury were satisfied that defendant, at or about the time charged in the indictment, "fraudulently took from the possession of the sacks the property described in the indictment, and that they were the property of J. J. McQ., without the consent of said J. J. McQ., with intent to deprive the owner of the value of the same," etc. Held, that it was wholly meaningless and defective, in that the jury were not required to find that the property was taken from possession of the person as laid in the indictment. *Eubanks v. State*, 57 Tex. Cr. App. 153, 122 S. W. 35.

Where Evidence Circumstantial.—Where the evidence in a prosecution for theft is purely circumstantial, a charge that the ownership of property in question may be shown by circumstances sufficient to satisfy the jury beyond a reasonable doubt that the property belonged to the alleged owner is insufficient. *Roebuck v. State*, 51 S. W. 914, 40 Tex. Cr. App. 689.

Where Evidence Does Not Raise Issue of Ownership.—Failure to submit by express instruction that the jury should find the ownership of the property as charged was not reversible error, when there was no dispute as to the ownership, and no requested instruction to that effect, and where the jury were charged as to the necessity of finding all the other essential elements and ingredients of the theft. *Cunningham v. State*, 27 Tex. Cr. App. 479, 11 S. W. 485; *Fenner v. State* (Cr. App.), 20 S. W. 355.

In a prosecution for the theft of horses, evidence that the owner of the horses had placed them in a pasture belonging to another person, but still retained control of them, and visited

the pasture from time to time to look after the animals, did not raise the issue of possession in the owner of the pasture instead of the owner of the horses. *Byrd v. State*, 93 S. W. 114, 49 Tex. Cr. App. 279.

Where defendant, accused of stealing a mule alleged to be the property of S., set up in defense that G. was the owner, and had given defendant authority to take and sell the mule, but S. had the actual control of the mule, and G. denied giving such authority to defendant, and these issues were properly submitted to the jury, it was not error to refuse to instruct that, if S. was not the owner, the defendant should be acquitted. *Homer v. State* (Cr. App.), 68 S. W. 999.

Repetition.—A charge that, before there could be a conviction for theft of a calf, the jury must believe that it was the property of Y., renders unnecessary an affirmative charge to acquit if they believed it was the property of defendant, as testified by him. *Thurmond v. State*, 37 Tex. Cr. App. 422, 35 S. W. 965.

On trial for theft, where defendant introduced evidence showing the property belonged to another than the prosecuting witness, an instruction to acquit if such was the fact was sufficient, without further charge to acquit if it belonged to any other than prosecuting witness, there being no evidence on which to base it. *Wright v. State*, 48 S. W. 191, 40 Tex. Cr. App. 45.

Instruction That Property in Question Was That of Alleged Owner.—Where the court instructs the jury "that, before they could convict the defendant, they must believe that the animal in question was the property of D." the question whether the animal was the property of D. or the defendant is properly submitted. *Brite v. State* (Cr. App.), 43 S. W. 342.

Loan of Money.—Where, in prosecution for theft, prosecutor testified

that T. obtained the money in order to bet on a fake foot race by a false pretense, and under the direct statement that he (T.) would not lose the money, but would pay it back even if he lost the race, defendants were not entitled to a charge that, if prosecutor loaned the money to T., then it was no longer his property. *Glasgow v. State*, 50 Tex. Cr. App. 635, 100 S. W. 933.

Joint Ownership.—Where, in a prosecution for theft, the evidence clearly showed that prosecutrix was entitled to the possession of the property at the time, an instruction given, that if the property was partnership property between prosecutrix and defendant, or the jury had a reasonable doubt of such fact, they would, acquit, was more favorable to defendant than justified by White's Ann. Pen. Code, art. 865, declaring that, if a person accused of theft be a part owner of the property, the taking does not constitute theft unless the person from whom it is taken be wholly entitled to the possession at the time. *Warren v. State*, 51 Tex. Cr. App. 99, 100 S. W. 952.

Unknown Ownership.—Where the first count of the indictment alleges ownership in P., and the second in some person unknown to the grand jury, to warrant conviction under the first count, the state must prove ownership in P., and, under the second count, that ownership was unknown to the grand jury, and that they used reasonable diligence to ascertain the fact of ownership; and a charge that the jury need not believe that the property stolen belonged to P., but must believe that the property was taken, as alleged, as the property of some person unknown to the grand jurors, is erroneous, as failing to state separately the law as applicable to the two counts. *Mixon v. State*, 28 Tex. Cr. App. 347, 13 S. W. 143.

Larceny by Owner from Bailee.—Where, in a prosecution for theft of a

pistol belonging to defendant, which he had pawned to prosecutor, defendant offered no proof that he took the pistol openly under color of right, or that prosecutor refused to receive his tender of the amount due on the debt, and the court charged that, if defendant, at the time he took the pistol, had a fair color of title thereto and believed that the pistol was his property, the jury should acquit, it was not error to refuse to charge that if defendant at any time before he was indicted tendered prosecutor the charges or money due on the pistol to acquit him. *Lewis v. State*, 50 Tex. Cr. App. 331, 97 S. W. 481.

(2) Possession.

Possession Must Be Proved as Laid in Indictment.—An indictment for theft must aver possession of the property stolen, and that it was taken from possession of the owner or person holding for him, and in submitting the issue of possession it should be substantially in the terms of the indictment. *Eubanks v. State*, 57 Tex. Cr. App. 153, 122 S. W. 35; *Cannon v. State* (Cr. App.), 24 S. W. 517; *White v. State*, 33 Tex. Cr. App. 94, 25 S. W. 290; *Tankersley v. State*, 51 Tex. Cr. App. 224, 101 S. W. 997; *York v. State*, 42 Tex. Cr. App. 528, 61 S. W. 128.

Where, in a prosecution for cattle theft, only a count alleging possession in H., was submitted to the jury, and the proof did not conclusively show an abandonment of possession by N., under a contract to care for the cattle between N. and H., or a termination of his possession at the time of the theft the court erred in refusing to charge that possession of the person so unlawfully deprived of property is constituted by the exercise of actual control or management of the property, and if at the time the cattle were in the possession of N. the jury should find defendant not guilty. *Bonner v.*

State, 59 Tex. Cr. App. 350, 128 S. W. 1102.

Where an indictment for theft alleged that the ownership and possession of the stolen property was in B., but the evidence tended to show that it was in the possession of another as his agent, it was error to refuse to submit to the jury the question whether the agent had possession of the property at the time it was stolen, and also refuse to charge that, if he had such possession, defendant should be acquitted. *White v. State*, 33 Tex. Cr. App. 94, 25 S. W. 290.

In a prosecution for theft, where ownership was alleged in the person having charge of the freight department of a depot, where there was evidence that the property was taken from the department in the immediate charge of an underclerk, an instruction that, if the jury entertained a reasonable doubt as to whether the head of the freight department had actual custody of the property, they should acquit on the ground of variance, was properly refused. *King v. State* (Cr. App.), 100 S. W. 387.

In a larceny case, in which defendant was charged with stealing one head of cattle, the property and in possession of D., there was evidence that P. was requested by D. to feed the animal, and he would pay him for his trouble, as it was running near him; that P. did look after it; and that, when it was missed, P. reported the fact to D. Held, that it was not error to refuse to submit to the jury the issue as to possession by P. at the time of the larceny. *Strickland v. State* (Cr. App.), 35 S. W. 169.

Possession of One's Own Money.—An instruction that if the jury believed that defendant had in her possession money which belonged to defendant, and which came into her possession by picking the same up from the ground, or from some place other than the person of the prosecuting witness, then

to acquit her, was not objectionable as requiring the jury to believe that defendant had in her possession money belonging to herself, which she had acquired by other means than from the prosecuting witness, before they could acquit. *Jasper v. State* (Cr. App.), 61 S. W. 392.

Necessity of Charge on Theory of Son's Special Ownership Where His Control Was under His Father's Direction.—Where an indictment charged possession of a stolen horse in a certain person, whose son lived with him as a part of his family, and had control of the horse under his immediate direction, the son was not a special owner, and it was not error to refuse an instruction on that theory. *Gentry v. State*, 56 S. W. 68, 41 Tex. Cr. App. 497.

Necessity of Using "Actual" as Descriptive of Care, Control and Management.—On a trial for theft of cattle the ownership and possession of which a count of the indictment charged to be in C., and of which, according to the evidence, he had the exclusive care, control, and management, and the actual control, failure of the charge submitting such count to use the word "actual" as descriptive of care, control, and management, is not prejudicial. *Kennon v. State*, 82 S. W. 518, 46 Tex. Cr. App. 359. See *Alexander v. State*, 24 Tex. Cr. App. 126, 5 S. W. 840; *Conner v. State*, 24 Tex. Cr. App. 245, 6 S. W. 138; *Williams v. State*, 26 Tex. Cr. App. 131, 9 S. W. 357; *Littleton v. State*, 20 Tex. Cr. App. 168.

(3) Brands.

Unrecorded Brand as Evidence of Ownership.—On a trial for theft of cattle, the testimony of the prosecutor, who examined the hides of slaughtered cattle which defendants had sold, left it doubtful as to whether he knew the particular cattle in question to be his from an unrecorded brand on the hides, or knew it independently of the ex-

istence of the brand. Held, that the court erred in refusing to charge that ownership was not proven if the evidence thereof depended upon the unrecorded brand. *Tittle v. State*, 30 Tex. Cr. App. 597, 17 S. W. 1118; *Wyers v. State*, 21 Tex. Cr. App. 448, 2 S. W. 816; *S. C.*, 22 Tex. Cr. App. 258, 2 S. W. 722.

Where, on a trial for the theft of cattle, it appears that a certain company for several years prior to the theft was the owner of the brand by which the cattle were marked, a charge that if it had actual possession of the stock of cattle so marked, claiming, controlling, and selling the same as its own, for two years prior to the crime, a cow so branded would be its property and subject to theft, was not erroneous. *Brooks v. State*, 38 Tex. Cr. App. 167, 31 S. W. 410.

Where Ownership Not Disputed, Charge Limiting Effect of Unrecorded Brand to Question of Identity Not Necessary.—Where, in a prosecution for horse stealing, it was undisputed that prosecutor owned the horse, and the only evidence given in regard to the brand on the horse was that offered in an incidental description of it, a charge that such evidence could only be considered for the purpose of identifying the horse, and not as evidence of ownership, was properly refused. *Hays v. State* (Cr. App.), 72 S. W. 598.

Effect of Recorded Brand as Evidence.—A recorded brand is admissible in evidence upon the question of the ownership of an animal, but is not of itself proof of such ownership. An instruction, therefore, upon the effect of such evidence, would be upon the weight of evidence, and for that reason the requested charge in this case was properly refused. *Alexander v. State*, 24 Tex. Cr. App. 126, 5 S. W. 840.

In a prosecution for the theft of a cow, there was proof that G. was the

special owner in control of the cattle for the party from whom she was stolen. The evidence showed a conflict between the latter's brand as recorded and the actual brand on the cow claimed as stolen. On the question of ownership the court instructed that a recorded brand is evidence thereof on animals on which it is placed, and that the recorded brand was to be considered, with the circumstances in evidence, and then, if the jury believed that the animals in question were at the time of the alleged offense the property of G. as owner or special owner, ownership was sufficiently proved. Held error, since it was enough to leave the question to the jury without calling attention to any particular part of the testimony, and, moreover, the jury might have felt authorized therefrom to regard the actual brand on the cow as proof of ownership, whereas it was merely a mark of identification. *Garrett v. State*, 61 S. W. 129, 42 Tex. Cr. App. 521.

f. Time and Place of Taking.

Necessity of Charging Exact Time.

—An instruction that, if the horse was stolen prior to the filing of the indictment, the jury might convict, is not error, where limitation is not an issue, and the horse was stolen only a short time prior to the filing of the indictment. *Barner v. State* (Cr. App.), 20 S. W. 559.

Necessity That Place of Taking Be Proved as Alleged in Indictment.

The indictment charged theft generally. The proof tended to show that, if defendant stole the watch, he took it from the person of the owner without his knowledge or consent. Held, that a charge to find for defendant if the watch was stolen privately from the person of the owner should have been given without qualification. *Dalton v. State* (Cr. App.), 27 S. W. 259.

Where the jury had a reasonable doubt as to the ownership of the ani-

mal in the county of the first taking, an instruction to acquit was improperly refused. *Steed v. State*, 43 Tex. Cr. App. 567, 67 S. W. 328.

Accustomed Range.—In a prosecution for theft, where it is shown that the animal stolen belonged to S., and was in the pasture of P. at the time of the theft, but that S.'s cattle were frequently in P.'s pasture, which joined S.'s pasture, the court did not err in refusing to charge as to the animal being in its accustomed range, since P.'s pasture might be regarded as the range of the animal. *Brown v. State*, 58 S. W. 131, 42 Tex. Cr. App. 176.

Property Stolen in Coahuila Sufficient to Support an Instruction as to Theft in Coahuila.—Where an indictment charged that defendant stole certain horses in the state of Coahuila, Mexico, and brought them into Texas, testimony showing that, though the owner of the horses lived in the state of Chihuahua, his ranch was in Coahuila, and that the horses were being herded on the ranch when stolen, was sufficient to support an instruction that if the property was stolen in Coahuila, and brought into Texas without the owner's consent, the defendant should be convicted. *Granado v. State*, 37 Tex. Cr. App. 426, 35 S. W. 1069.

g. Taking and Asportation.

A charge in a prosecution for theft, that the jury must believe, beyond a reasonable doubt, that the defendant alone, or with others, took the property, is sufficient in regard to the taking. *Smith v. State* (Cr. App.), 44 S. W. 520.

Participation of Defendant in Original Taking.—An instruction that, to convict, the evidence must show beyond a reasonable doubt that defendant was an original taker of the animal in the county in which the prosecution took place, and not an accomplice or a receiver of stolen property, was improperly refused. *Steed v. State*, 67 S. W. 328, 43 Tex. Cr. App.

567; *Guinn v. State*, 39 Tex. Cr. App. 257, 45 S. W. 694; *Black v. State*, 38 Tex. Cr. App. 58, 41 S. W. 606; *Collins v. State*, 24 Tex. Cr. App. 141, 5 S. W. 848.

An instruction that, if defendant did not participate in the original stealing of the hogs, no subsequent connection therewith would justify his conviction of theft, even though he knew they were stolen, was not prejudicial to defendant. *Wheeler v. State*, 41 S. W. 615, 38 Tex. Cr. App. 71.

The evidence on a trial for theft being conflicting as to whether defendant, who was not present at the time of the taking, but received the article from the person who took it, had anything to do with the original taking, he was entitled to a charge that, if he had nothing to do therewith, the jury should acquit him, though he obtained it from the thief knowing it had been stolen. Judgment, 79 S. W. 521, 47 Tex. Cr. App. 85, affirmed on rehearing. *Jackson v. State*, 80 S. W. 631, 47 Tex. Cr. App. 85.

Instruction Sufficiently Informing Jury of Defendant's Presence at Original Taking.

—In a prosecution for theft, in which there was no evidence that another who acted with defendant took the property in the absence of defendant, a charge requiring the jury to find that defendant actually participated in the original taking of the property sufficiently informed the jury that defendant must have been present at the original taking. *Beard v. State*, 83 S. W. 824, 47 Tex. Cr. App. 183.

Receiving Stolen Property.—On a trial for theft, a requested charge submitting the issue, presented by the evidence, of defendant having been a receiver of stolen goods, instead of being connected with the original taking, should be given. *Mickey v. State*, 91 S. W. 587, 49 Tex. Cr. App. 255.

Where, in a prosecution for larceny of coffee, the court charged that if the coffee was not taken by defend-

ant, but was received by him from another, to be conveyed to a place designated by the latter, then defendant was not guilty, such instruction was sufficiently broad to embrace defendant's defense of being a receiver, and not having participated in the actual theft. *Williams v. State* (Cr. App.), 85 S. W. 1142.

Obtaining Access to Money by False Pretense.—An instruction on the obtaining of money by false pretext is not called for where defendant's false pretenses merely gave him the opportunity to get at the money, and he took possession of the money without prosecutor's consent. *Pones v. State*, 63 S. W. 1021, 43 Tex. Cr. App. 201.

What Constitutes Two Separate Takings.—On a prosecution for theft of two bales of cotton, each bale being worth less than \$50, where the evidence did not show affirmatively that both bales were stolen in the same transaction, although they might have been so stolen, defendant was entitled to have the jury charged upon the question of what constitutes two separate takings, and what would be considered as a taking in the same transaction. *Barnes v. State*, 65 S. W. 922, 43 Tex. Cr. App. 355.

In a prosecution for the felonious theft of two bales of cotton, defendants' own testimony showed that they were taking on the same expedition and without leaving the spot, and substantially at the same time, though there was considerable discussion between them, after taking the first bale, whether they should take another, and if they had been taken at different times the offense would have been a misdemeanor, and not felony. The court, however, instructed the jury that if defendant took the bales at two different times, or took one bale and at such time did not intend to take the other, but after the taking of the first bale was complete they then formed a

design to take another bale from the same yard, and afterwards did so, then they would constitute two separate misdemeanors, and they could not be convicted, and, if they had a reasonable doubt whether one bale or two was taken, they should find defendants not guilty. Held, that the instruction was fully as favorable as defendants were entitled to. *McAllister v. State*, 56 Tex. Cr. App. 188, 120 S. W. 420.

Theft from the Person.—Where the state, in a prosecution for theft of money from the person, relies solely on circumstantial evidence to identify the bills taken, the evidence must reasonably show that the bills traced to defendant's possession were taken from the injured party, and it is error to refuse a charge to this effect. *Felts v. State*, 53 Tex. Cr. App. 48, 108 S. W. 654.

Where defendant, in a prosecution for theft of money from the person, testified that he did not take the money, but received it from a codefendant some time after the theft, it was error to refuse to charge that, if he received the money after it was stolen, he would not be guilty of theft, but of receiving stolen property. *Felts v. State*, 53 Tex. Cr. App. 48, 108 S. W. 654.

Where, in a trial for theft of money from the person, evidence for the state shows that the accused seized the money from the hand of the owner, and ran away with it, while evidence for the accused shows that the owner of the money delivered it to him to get it changed, and that he then appropriated it, a refusal to charge that, if the money was delivered to him as shown by his evidence, he could not be convicted of theft from the person, was error. *Clark v. State*, 34 Tex. Cr. App. 120, 29 S. W. 382.

Where, in a prosecution for theft from the person, the indictment alleged that the property was taken "so suddenly as not to allow time to make

resistance before said property was carried away," and the prosecuting witness testified that he was awakened by some one putting his hands in his pocket, but did not know that the money was taken until the person had gone, an instruction that the jury should find defendant guilty, not only if he took the property "so suddenly," etc., but also if he took it "without the knowledge" of the owner, is ground for reversal though no exception was taken thereto. *Swartz v. State* (Cr. App.), 27 S. W. 136. See, also, *McLin v. State*, 29 Tex. Cr. App. 171, 172, 15 S. W. 600.

Pen. Code, art. 879, defines theft from the person as a theft committed without the knowledge of the person from whom the property is taken, or a taking so suddenly as not to allow time to make resistance. On a prosecution for theft from the person, the court defined the crime as given in the statute, and then instructed that the jury should convict if they believed defendant fraudulently and privately took from the person of the prosecutor the property described in the indictment, without his consent, and so suddenly as to allow no time for resistance, and that it was an essential element, before they could convict, that the proof should show the property taken so suddenly as to allow no time for resistance. Held, that a contention that the jury were instructed that accused would be guilty if he took the property from the possession of the plaintiff privately and without his knowledge—which was not a phase of the case arising from the evidence—was without merit, but that the charge meant that the jury must believe that the private theft consisted of taking the property so suddenly as to allow no resistance. *Mathis v. State* (Cr. App.), 65 S. W. 523.

On a prosecution, under Penal Code, art. 879, for theft from the person, an instruction as to the taking, held not

erroneous as a submission of issue not suggested by the evidence. *Mathis v. State* (Cr. App.), 65 S. W. 523.

5. Effect of Possession of Property Stolen and of Explanation Thereof.

a. Form and Requisites in General.

In every case of theft in which recent possession of stolen property figures, it is the duty of the court to charge thereon. *McWhorter v. State*, 11 Tex. Cr. App. 584, 585.

Necessity of Making Direct Application of Rule to Facts.—It is not necessary that, in instructing the jury upon the rule as to the recent possession of stolen property being presumptive evidence of guilt, the court should make a direct application of the rule to the facts of the case. *Hart v. State*, 22 Tex. Cr. App. 563, 3 S. W. 741.

Charge on Circumstantial Evidence.—Where the state relies solely on recent unexplained possession, defendant is entitled to a charge on the law of circumstantial evidence. *Sullivan v. State*, 18 Tex. Cr. App. 623.

And where the court gives a full charge on circumstantial evidence, he need not give a special charge, asked by defendant, on the possession of property recently stolen. *Bonnors v. State* (Cr. App.), 35 S. W. 650.

On a trial for stealing a horse the only evidence offered by the state made the case one of possession of property recently stolen. The court's charge to the jury was: "In this case the state relies on circumstantial evidence, and to justify a conviction upon such evidence alone, the facts relied upon must be absolutely incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of guilt." Held, that such charge was erroneous, since it furnished no aid to the jury in determining what weight should be given to such testimony, and on what hypothesis they should

convict. *Williamson v. State*, 30 Tex. Cr. App. 330, 17 S. W. 722.

b. Province of Court and Jury.

It is error for the court in its charge to give undue prominence to the fact of possession of property recently stolen, and to say that such evidence is against the defendant. *Bryant v. State*, 16 Tex. Cr. App. 144.

Charge upon Weight of Evidence.—

It is error to charge that "if a person is found in possession of property recently stolen, and if the circumstances are such as to call upon him for an explanation, and he fails to give any explanation of such possession, then these facts would authorize his conviction, if a presumption of guilt has arisen in the minds of the jury." *Stockman v. State*, 24 Tex. Cr. App. 387, 6 S. W. 298, 5 Am. St. Rep. 894; *Lee v. State*, 27 Tex. Cr. App. 475, 11 S. W. 483; *Spillman v. State*, 38 Tex. Cr. App. 607, 608, 44 S. W. 149; *Pollard v. State*, 33 Tex. Cr. App. 197, 26 S. W. 70; *Franks v. State*, 36 Tex. Cr. App. 149, 35 S. W. 977; *McCarty v. State*, 36 Tex. Cr. App. 135, 35 S. W. 994; *Hopperwood v. State*, 39 Tex. Cr. App. 15, 20, 44 S. W. 841; *Rice v. State*, 3 Tex. Cr. App. 451; *Lunsford v. State*, 9 Tex. Cr. App. 217; *Stephens v. State*, 10 Tex. Cr. App. 120; *Stone v. State*, 22 Tex. Cr. App. 185, 186, 2 S. W. 585; *Williams v. State*, 4 Tex. Cr. App. 178; *Martinez v. State*, 41 Tex. 164; *Merritt v. State*, 2 Tex. Cr. App. 177; *Edmonds v. State* (Cr. App.), 51 S. W. 393; *Trail v. State* (Cr. App.), 57 S. W. 92; *Berry v. State*, 37 Tex. Cr. App. 44, 46, 38 S. W. 812; *York v. State*, 42 Tex. Cr. App. 528, 61 S. W. 128; *Grande v. State*, 37 Tex. Cr. App. 51, 54, 38 S. W. 613; *Sitterlee v. State*, 13 Tex. Cr. App. 587, 593; *McWhorter v. State*, 11 Tex. Cr. App. 584, 585; *Payne v. State*, 21 Tex. Cr. App. 184, 188, 17 S. W. 463; *Williams v. State*, 11 Tex. Cr. App. 275, 276; *Lockhart v. State*, 29 Tex. Cr. App. 35, 36, 13 S. W. 1012; *Perry v. State*, 41 Tex. 483, 484; *Thompson*

v. State, 43 Tex. 268; *Foster v. State*, 1 Tex. Cr. App. 363; *Chapman v. State*, 1 Tex. Cr. App. 728; *Alderson v. State*, 2 Tex. Cr. App. 10, 12.

After instructing the jury that if a reasonable account of his possession of a stolen horse, consistent with his innocence, was given by defendant when first charged with the theft, the burden was upon the state to show the falsity of the explanation, it is error to add that, if defendant did not reasonably account for his possession of the horse when so accused, the jury should find him guilty. *Arispe v. State*, 26 Tex. Cr. App. 581, 10 S. W. 111.

Existence of Other Evidence than Possession.—It is error to charge that the defendant may be convicted of larceny on the mere fact of being found in possession of recently stolen property, where there was other evidence in the case to show that such possession might have been lawful. *Pace v. State* (Cr. App.), 31 S. W. 173.

Where other facts and circumstances besides possession of the stolen property are relied on by the prosecution, an instruction that recent unexplained possession is not sufficient to sustain a conviction, unless defendant was called upon at the time to explain such possession, or unless his right to it had been challenged, is properly refused. *Brooks v. State*, 47 S. W. 640, 39 Tex. Cr. App. 622.

Bill of Sale Made as Sham to Cover Crime.—In a prosecution for the theft of cattle when defendant introduced a bill of sale for the cattle to him, held that a charge that if the jury believed such bill of sale was made by defendant as a sham to cover the crime, they should convict was on the weight of evidence. *Arismendis v. State*, 41 Tex. Cr. App. 378, 54 S. W. 600.

Possession of Animal without Bill of Sale Describing It.—Although the statute provides that possession of an animal recently stolen, in the absence

of a bill of sale specifically describing it, shall be deemed prima facie evidence of illegal possession, it is error so to charge abstractly. The jury should be told that such evidence is not conclusive, and may be rebutted. *Gomez v. State*, 15 Tex. Cr. App. 64; *Garcia v. State*, 12 Tex. Cr. App. 335; *Gilleland v. State*, 24 Tex. Cr. App. 524, 7 S. W. 241.

Where Fact of Possession Is Corroborated.—Where instructions on the law of recent possession all tended to impress the jury with the idea that, if the mere fact of possession was corroborated, guilt was shown, they are erroneous. *Tucker v. State*, 16 Tex. Cr. App. 471.

Charges Held Not upon Weight of Evidence.—An instruction that, to warrant an inference of guilt from "possession of recently stolen property (if such property was stolen), such possession must be personal and exclusive, unexplained, and must involve a distinct and conscious assertion of property by the defendant," was correct, and is not a charge upon the weight of evidence. *Sisk v. State* (Cr. App.), 42 S. W. 985.

Where, on trial for the theft of hogs, the court charged that if defendant was found in the possession of the stolen hogs, and made a reasonable and probably true explanation, the jury should acquit, but if, on the contrary, the explanation was unreasonable, and did not account for possession in a manner consistent with innocence, they should consider such possession together with the explanation, and, if they believed defendant guilty, should so find, was not erroneous as a charge on the evidence. *Wheeler v. State*, 41 S. W. 615, 38 Tex. Cr. App. 71.

c. Applicability to Issues and Evidence.

Instruction Must Be Made Applicable to Facts in Case.—On trial of an indictment for theft, it appeared that

the defendant, after being employed by the owner of the property to recover it, was found with it in his possession, and alleged that he had recovered it. The court, in response to a question by the jury, after their retirement, as to what weight should be given the fact of the possession of stolen property in establishing the guilt or innocence of the defendant, replied, "When a party is found in possession of property after it is recently stolen, the law presumes such person so found in possession is the party who stole it." Held error. The answer should have been made applicable to the facts of the case. *Newman v. State*, 43 Tex. 525.

Where There Was Evidence Tracing Money to Defendant.—On a trial for the larceny of money, where the prosecutor testified that bills produced by an officer he thought were his, and there was evidence tracing the money to the defendant, an instruction as to the possession of property recently stolen was proper. *Bucker v. State* (Cr. App.), 26 S. W. 65.

Where No Evidence as to Demand or Explanation.—On trial for theft, where there is no evidence as to the demand of an explanation of possession of the stolen property, a charge as to the failure to explain was erroneous. *Moore v. State* (Cr. App.), 33 S. W. 980.

Where Manner of Obtaining Possession Not an Issue.—In a trial for theft, where there was no evidence that the accused came into possession of the property in question in a lawful manner, it is unnecessary to charge the statute with reference to possession of property which the party has acquired in a lawful manner. *Byrd v. State* (Cr. App.), 45 S. W. 804.

Innocence as an Issue.—On a trial for theft, instructions that the possession of the property might be considered in establishing the guilt or innocence of defendant held erroneous, as

presenting the innocence of defendant as an issue. *Smith v. State*, 13 Tex. Cr. App. 507.

Exclusiveness of Possession.—In a prosecution for theft, a witness testified that he bought the stolen animals from accused, and gave him a check therefor. The accused made no explanation of his possession of the property. Held, that it was not error to fail to charge that in order to warrant an inference of guilt from the possession of the stolen goods such possession must be shown to have been exclusive, personal, and recent, and to involve an assertion of property. *Ellison v. State* (Cr. App.), 72 S. W. 188.

On a trial for theft of two horses, the state having proved their disappearance, and that they were seen in defendant's possession the next night, and also a month later in a distant county, the brands having been changed, an instruction that, to warrant an inference of guilt, "from the circumstance of possession of recently stolen property, such possession must be unexplained, under circumstances requiring an explanation, and must involve a distinct and conscious assertion of property by defendant," correctly states the law of the case; and where the evidence also shows that defendant was seen using one of the horses as his own property, in company with another person, who had possession of the other horse, and that he immediately thereafter left the county with such other person, and went to a distant county, the court properly refused to charge that his possession must be personal and exclusive. *Brookin v. State*, 26 Tex. Cr. App. 121, 9 S. W. 735.

d. Issues and Evidence Requiring Instructions as to Possession of Property.

Where the evidence shows an unexplained possession of property recently stolen, it is error not to instruct

on that point. *Coward v. State*, 24 Tex. Cr. App. 590, 7 S. W. 332; *Taylor v. State*, 27 Tex. Cr. App. 463, 465, 11 S. W. 462; *Boyd v. State*, 24 Tex. Cr. App. 570, 6 S. W. 853; *Curlin v. State*, 23 Tex. Cr. App. 681, 5 S. W. 186; *Williamson v. State*, 30 Tex. Cr. App. 330, 17 S. W. 722; *Fernandez v. State*, 25 Tex. Cr. App. 538, 8 S. W. 667; *Florez v. State*, 26 Tex. Cr. App. 477, 9 S. W. 772.

Where the chief inculpatory fact on a trial for theft of cattle was possession of the stolen property soon after the theft, it was error to refuse an instruction that such possession was not, of itself, sufficient to warrant a conviction. *Dreyer v. State*, 11 Tex. Cr. App. 503.

In a prosecution for theft, evidence held not to require a charge on possession of recently stolen property. *Frazier v. State*, 61 Tex. Cr. App. 640, 138 S. W. 620.

Where accused offered an explanation when first arrested with the horse, it was proper to charge on recent possession of stolen property. *Clark v. State*, 55 Tex. Cr. App. 343, 116 S. W. 581.

Possession of Shipping Agent, Possession of Accused.—An instruction that, if the property was found recently after being stolen in defendant's possession, etc., he could be convicted, was not improper because the property was found in possession of the railway company to which accused had delivered it for shipment. *Davis v. State* (Cr. App.), 140 S. W. 349.

Charge on Recent Possession Not Necessary Where There Is Other Circumstances in Case.—Where the stolen animal showed that it had been ear-cropped recently, and since being stolen, a charge to the effect that recent possession was the only inculpatory evidence in the case was properly refused. *Brite v. State* (Cr. App.), 43 S. W. 342; *Bennett v. State*, 32 Tex. Cr. App. 216, 22 S. W. 684.

Where Only Evidence Is Declaration Made by Defendant before He Acquired Possession.—On trial for larceny where the only evidence that defendant was in possession of recently stolen property was a declaration, made by defendant, before he acquired possession of the property, and before he was called upon to make an explanation in regard thereto, a charge on possession of recently stolen property was unwarranted. *Wilson v. State* (Cr. App.), 34 S. W. 284.

Disposition of Stolen Property Shortly after Theft.—Where a house servant, on trial for stealing a watch from a room, was not in possession of the stolen property, though the evidence showed that he had disposed of it shortly after the alleged theft, an instruction upon the presumption arising from the possession of the recently stolen property is unnecessary. *Dixon v. State*, 62 Tex. Cr. App. 53, 136 S. W. 462, 463.

Statement of Codefendant as to Purchase of Property from Third Person.—Where accused is found in possession of recently stolen property, and there is no explanation by him of its possession, the court may not charge on reasonable explanation in connection with accused's recent possession, merely because a codefendant stated, in absence of accused, that had been bought from a third person. *Davis v. State*, 55 Tex. Cr. App. 495, 117 S. W. 159.

Evidence Showing Accused Borrowed Bridle.—In a prosecution for theft of a horse, where the evidence showed no theft of a bridle, but that accused borrowed one, it was not necessary to instruct with reference to the accused's possession of it. *Hammock v. State*, 93 S. W. 549, 49 Tex. Cr. App. 471.

Where No Evidence Accounting for Possession.—Where, on a trial for theft, defendant offers no testimony accounting for his possession of the

property, recently stolen, error can not be predicated on the court's failure to charge on the law applicable to the possession of such property. *Baldwin v. State*, 31 Tex. Cr. App. 589, 21 S. W. 679.

Where the court charged sufficiently on the defense of purchase set up by one accused of stealing hogs, he was not entitled to a charge on recent possession and explanation. *Reed v. State* (Cr. App.), 46 S. W. 931.

e. Issues and Evidence Requiring Instructions as to Explanation of Possession.

(1) In General.

Where defendant has made a reasonable and probable statement with regard to his possession of stolen property, he is entitled to have the law applicable thereto charged to the jury. *Miller v. State*, 18 Tex. Cr. App. 34; *Heath v. State*, 7 Tex. Cr. App. 464; *Reed v. State*, 8 Tex. Cr. App. 40; *Vincent v. State*, 9 Tex. Cr. App. 303; *Henry v. State*, 9 Tex. Cr. App. 358; *Ruston v. State*, 10 Tex. Cr. App. 644; *Ray v. State*, 13 Tex. Cr. App. 51; *Wilson v. State*, 14 Tex. Cr. App. 205; *Windham v. State*, 19 Tex. Cr. App. 413; *Shultz v. State*, 22 Tex. Cr. App. 16, 2 S. W. 599; *Shuler v. State*, 23 Tex. Cr. App. 182, 4 S. W. 581; *Curlin v. State*, 23 Tex. Cr. App. 681, 5 S. W. 186; *Guest v. State*, 24 Tex. Cr. App. 530, 7 S. W. 242; *Fernandez v. State*, 25 Tex. Cr. App. 538, 8 S. W. 667; *White v. State*, 28 Tex. Cr. App. 71, 73, 12 S. W. 406; *Connors v. State*, 31 Tex. Cr. App. 453, 20 S. W. 981; *James v. State*, 32 Tex. Cr. App. 509, 24 S. W. 642; *Brown v. State*, 34 Tex. Cr. App. 150, 29 S. W. 772; *Young v. State*, 34 Tex. Cr. App. 290, 30 S. W. 238; *Wheeler v. State*, 34 Tex. Cr. App. 350, 30 S. W. 913; *Teague v. State* (Cr. App.), 31 S. W. 401; *Wright v. State*, 35 Tex. Cr. App. 470, 34 S. W. 273; *Wheeler v. State*, 38 Tex. Cr. App. 71, 41 S. W. 615; *Selph v. State*, 49 Tex. Cr. App. 18, 90 S. W. 174; *Carter*

v. State (Cr. App.), 12 S. W. 740; *Fleming v. State* (Cr. App.), 15 S. W. 173; *Navarrow v. State* (Cr. App.), 17 S. W. 545; *Gentry v. State* (Cr. App.), 20 S. W. 551; *Hays v. State*, 36 Tex. Cr. App. 533, 38 S. W. 171; *Ray v. State* (Cr. App.), 43 S. W. 77; *Russell v. State* (Cr. App.), 43 S. W. 81; *Farias v. State* (Cr. App.), 45 S. W. 721; *May v. State* (Cr. App.), 51 S. W. 242; *Wingo v. State* (Cr. App.), 75 S. W. 29; *Parks v. State* (Cr. App.), 89 S. W. 1064; *Green v. State* (Cr. App.), 90 S. W. 1114; *Williams v. State* (Cr. App.), 98 S. W. 246; *Coleburn v. State*, 61 Tex. Cr. App. 26, 133 S. W. 882.

Explanation Must Be Reasonable.

—On a charge of theft, to require an instruction in relation to the explanation given by defendant of his possession of property recently stolen, such explanation must be a reasonable one. *Conners v. State*, 31 Tex. Cr. App. 453, 20 S. W. 981.

A request to charge that if defendant "took" the horse alleged to be stolen, and, when his right to it was questioned, he gave the reasonable explanation that he bought it, the state must prove that his explanation was false, should be refused; for, if he took the horse, an explanation that he bought it would not be reasonable. *Ray v. State* (Cr. App.), 43 S. W. 77.

Reasonable Doubt as to Truth of Explanation.—On a trial for theft, the jury was instructed that, if "defendant was found in possession of one of the horses described in the indictment, recently after the alleged taking, and you further believe that he acquired said horse by trading for him, or if you have a reasonable doubt of the truth of such explanation, then you will acquit." Held, a sufficient instruction on the subject of explanation of possession. *Bazan v. State* (Cr. App.), 24 S. W. 100.

On a prosecution for theft of a horse, the refusal of an instruction to

acquit if defendant, when first accused, gave a reasonable and probably true account of his possession, which was not shown to be false, was not error, where the court directed an acquittal if the jury had a reasonable doubt whether defendant got the horse from the owner to pledge for a loan. *Gilmore v. State* (Cr. App.), 33 S. W. 120. See *Gentry v. State* (Cr. App.), 20 S. W. 551.

Instructions Sufficiently Charging Defendant's Explanation of Possession.

—In prosecution for theft, where defendant admitted the possession of the stolen property and stated when he turned it over to the officers that he received it from another, an instruction charging the jury not to find defendant guilty of theft, but to acquit him if they believed that he did not take the property from the alleged owner, but came into possession of it as explained by him to the officers, directly and sufficiently charged defendant's explanation of possession. *Ramon v. State* (Cr. App.), 98 S. W. 872.

In a prosecution for theft, an instruction that defendant's explanation accounted for his possession of the property in a manner consistent with his innocence, and, if the jury believed the explanation, to acquit defendant, but, if they believed it unreasonable and not to account for his possession in a manner consistent with his innocence, or if they believed that the same accounted for defendant's possession in a manner consistent with his innocence but believed the explanation was untrue, they should take his possession, together with his explanation, in connection with all the facts and circumstances, if any, in evidence, and, if they believed beyond a reasonable doubt that defendant was guilty, to so find, otherwise to acquit, was a correct instruction. *Williams v. State* (Cr. App.), 98 S. W. 246.

Where, in a prosecution for hog

theft, it appeared that, when defendant's possession of the hogs was first questioned, he gave an explanation thereof, it was proper to charge that if the hogs were found in defendant's possession recently after they were stolen, and when his possession was first questioned he made an explanation as to how he came by them, and the jury believed such explanation was probably true, they should acquit; but if such explanation was unreasonable, or the jury believed that the same had been shown to be false, then they were entitled to take defendant's possession, together with his explanation in connection with other circumstances in evidence, and if they believed defendant guilty beyond a reasonable doubt they should so find. *Green v. State* (Cr. App.), 90 S. W. 1114.

The instruction was not open to the objection that "it imposed on defendant a greater burden than the law does; that the law requires the state to show the falsity of any account given by defendant, if the account is in itself reasonable and probable;" the effect of the instruction being that if the jury believed the explanation was reasonable and probably true, and the state had not proved its falsity, the fact of such possession must not be considered as in any manner tending to establish defendant's guilt. *Hil-scher v. State*, 88 S. W. 227, 48 Tex. Cr. App. 357.

Instructions Held Erroneous.—*Hannah v. State*, 27 Tex. Cr. App. 623, 11 S. W. 781.

Special Instruction Not Necessary Where Issue Covered by General Charge.—In a prosecution for cattle theft, where accused claimed that the heifer in question had been purchased by his daughter from a certain person, a charge that, if the heifer had been purchased from such person, the jury should acquit, and should acquit if they had any reasonable doubts of such fact, was sufficient, and it was

not necessary to charge as to the explanation of accused when first accosted, and that if his explanation of his possession of the property was reasonable and probably true, they should acquit, unless the state disproved it; the issue being clearly presented by the charge given, and the other charge tending rather to confuse the jury than to throw light upon the transaction. *Hinsley v. State*, 60 Tex. Cr. App. 565, 132 S. W. 779.

Necessity of Charge When No Explanation Made by Accused.—On trial for theft, an instruction on recent possession in connection with defendant's explanation thereof is unnecessary, where defendant made no explanation when the property was found in his possession, but fled. *Olibare v. State* (Cr. App.), 48 S. W. 69; *Ballew v. State* (Cr. App.), 34 S. W. 616, 617; *Grande v. State*, 37 Tex. Cr. App. 51, 38 S. W. 613; *Davis v. State*, 55 Tex. Cr. App. 495, 117 S. W. 159.

Where defendant offered no explanation of his possession of the property alleged to have been stolen until the trial, when he swore that he obtained it from D., the evidence did not raise the issue of explanation of possession of property recently stolen, and the court was not required to charge thereon. *Cleveland v. State*, 57 Tex. Cr. App. 356, 123 S. W. 142.

Where Explanation Not Given until Next Day.—Where one is arrested at night for larceny, and does not, till after giving bond the next day, give any explanation of his possession of the property, a charge on explanation in connection with recent possession of stolen property is not required. *Smotherman v. State*, 83 S. W. 838, 47 Tex. Cr. App. 309.

Necessity of Instruction Where Testimony Considered No Explanation.—Where, as an explanation of possession of property claimed to have been stolen, accused is credited with having stated to an accomplice that he bought

two cattle—either that he got them from the Hahn place or from some one on the Hahn place—and, upon being warned by one Echols, an officer, and asked where he got the cattle he and his accomplice butchered for their emancipation barbecue, answered that he got them from Hahn, and, asked by the accomplice, "What do you mean—that you got them from old Fred Hahn out here?" he replied, "Mr. Echols, you are going to prosecute me, and I have nothing to say to you"—held no explanation, and not necessary for court to instruct jury as to its effect. *Brown v. State*, 53 S. W. 866, 41 Tex. Cr. App. 232.

Where Explanation Was Inculpatory.—Where, on trial for stealing a cow, it is shown that a quantity of fresh beef was found at defendant's house, and that on being asked where he got it he replied, defiantly, that he stole it, it is error to charge that if, when called on to explain his possession of the beef, defendant "explains it otherwise than by the unlawful acquisition thereof, and his explanation is a reasonable and probably true one," he should be acquitted, unless the prosecution has proved such explanation to be false. *Ewing v. State*, 29 Tex. Cr. App. 434, 16 S. W. 185.

There is no error in refusing to charge with reference to an explanation one accused of theft as an accomplice may have made regarding the possession of stolen property, where the evidence showed he was clearly cognizant of the theft and was a participes criminis. *Holt v. State*, 45 S. W. 1016, 39 Tex. Cr. App. 282.

Where There Was Other Evidence to Explain Possession.—A charge that, if defendant's explanation of his possession of recently stolen property was not reasonable, he may be convicted on the fact of his possession alone, is error, where there was other evidence to give lawful color to his possession. *Pace v. State* (Cr. App.), 31 S. W. 173; *Chambers v. State* (Cr. App.), 31 S.

W. 173; *Brooks v. State*, 39 Tex. Cr. App. 622, 623, 47 S. W. 640.

Where Identical Property Not Found in Accused's Possession.—It is a well-settled proposition of law, that, where the identical property charged to have been stolen is not found in the possession of appellant, then it is error to charge upon the law of recent possession of stolen property. *Mayfield v. State*, 23 Tex. Cr. App. 645, 649, 5 S. W. 161; *Baldwin v. State*, 31 Tex. Cr. App. 589, 21 S. W. 679; *Roy v. State*, 34 Tex. Cr. App. 301, 30 S. W. 666; *Smith v. State*, 44 Tex. Cr. App. 81, 68 S. W. 510.

Where, on the trial of defendant for stealing a hog, he claimed that the meat found in his possession was his own, and made no explanation of his possession, it was error to charge on the law of recent possession of stolen property, and of accused's explanation thereof. *Smith v. State*, 68 S. W. 510, 44 Tex. Cr. App. 81.

Accused Not Required to Account for His Innocence.—On trial for cattle theft, where defendant's explanation of his possession of the cow alleged to have been stolen was that he bought it from a negro, an instruction that if accused, when his possession was first questioned, explained that he bought the cow from the negro, then, if such explanation "accounted for defendant's innocence," the jury should consider such explanation as true, and acquit the defendant, held erroneous; accused not being required to account for his innocence. *Cagle v. State*, 52 Tex. Cr. App. 307, 106 S. W. 356.

Error to Charge Accused Possession as a Circumstance against Him When His Explanation Is Reasonable.—Where the gist of the defense to a charge of theft of cattle consisted in defendant's explanation when charged with the offense, an instruction which the jury might have construed to mean that if accused was found in possession of recently stolen property, and failed to give a reasonable explanation,

tion of such possession, or if he gave a reasonable explanation, and the state had shown a falsity thereof, such possession would not be evidence against him, but that, if he gave a reasonable explanation of his possession, they might take it as a circumstance against him, was reversible error. *Coleman v. State* (Cr. App.), 55 S. W. 836.

Declarations of Defendant.—In a prosecution for theft, declarations of the defendant, introduced in evidence in explanation of his possession of the stolen property, were sufficient to authorize a charge on the law of explanation of the possession of recently stolen property. *Bacon v. State*, 61 Tex. Cr. App. 206, 134 S. W. 690.

Explanation Should Not Be Confined to Any Particular Time.—On a trial for theft of a cow, a charge that possession of the cow recently after the theft, if stolen, was not alone sufficient to warrant a conviction, but was only a circumstance to be considered with all the other facts in evidence; and if defendant, while in possession, made any reasonable and satisfactory explanation of such possession, unless shown to be false, it will rebut any presumption of guilt arising from such possession, was not a charge upon the weight of evidence, but was erroneous in confining the explanation to the very time when defendant had possession of the cow. *McCall v. State*, 14 Tex. Cr. App. 353.

Court Should Not Suggest What Particular Explanation Was Referred to.—With a charge on explanation in connection with recently stolen property, the court should not suggest what particular explanation was referred to, further than to inform the jury that they were to consider such explanation as they might believe defendant may have made when his possession was first questioned. *Clayton v. State* (Cr. App.), 44 S. W. 165.

In a prosecution for theft from the person, an instruction that if the ex-

planation by defendant as to his possession of the property, i. e., that he found the same, was reasonable and probably true, it would be taken as true and go to defendant's acquittal, was in defendant's favor, and not erroneous. *Hilscher v. State*, 88 S. W. 227, 48 Tex. Cr. App. 357.

In a prosecution for theft from the person, an instruction as follows: "If you find * * * that any of the property mentioned * * * was privately stolen from the person of J. at the time and place charged, * * * and that subsequently any of the property so stolen was found in the possession of the defendant, then if the defendant, when such possession was called in question, stated that he had found the property in S., then, if you find that such explanation * * * is reasonable and probably true, it devolves upon the state to prove its falsity, and if you so find, and the state has not proven the falsity of such explanation, then the possession of such property by the defendant (if he had such possession) must not be considered by you as tending to establish the guilt of the defendant"—was not vague, confusing, or misleading. *Hilscher v. State*, 88 S. W. 227, 48 Tex. Cr. App. 357.

(2) Falsity of Explanation.

Error to Authorize Conviction if Explanation False.—An instruction that if the property alleged to have been stolen was so stolen and recently thereafter found in defendant's possession, and defendant gave an explanation of his possession which appeared reasonable and probably true, then, before he could be convicted of larceny, the jury must be satisfied beyond a reasonable doubt that the other testimony in the case established the falsity of the explanation made by defendant and that if the state had failed to satisfy the jury that such explanation was false they should acquit—was erroneous, as mak-

ing defendant's guilt depend on the falsity of his explanation of possession. *Bernal v. State* (Cr. App.), 95 S. W. 118; *James v. State*, 32 Tex. Cr. App. 509, 24 S. W. 642; *Thompson v. State* (Cr. App.), 78 S. W. 941; *Pollard v. State*, 33 Tex. Cr. App. 197, 26 S. W. 70; *Armstrong v. State* (Cr. App.), 50 S. W. 346. See *Wheeler v. State*, 34 Tex. Cr. App. 350, 30 S. W. 913; *Kenneda v. State*, 16 Tex. Cr. App. 258, 261.

Where Explanation of Possession Unreasonable and Inconsistent When First Questioned.—Where defendant was charged with stealing a horse, a charge that if the horse described in the indictment was stolen, and soon after found in defendant's possession, and his explanation when such possession was first questioned was unreasonable or inconsistent with innocence, or, if consistent with innocence, the state proved it to have been false, the jury should consider such possession and explanation in determining defendant's guilt, was unobjectionable. *Isham v. State* (Cr. App.), 49 S. W. 581.

Showing Explanation False by Circumstantial Evidence.—It is proper, where applicable, to instruct that the explanation of one charged with larceny as to his possession of the stolen property may be shown to be false by circumstantial evidence. *Franklin v. State*, 39 S. W. 680, 37 Tex. Cr. App. 312.

(3) Purchase.

On a trial for larceny wherein defendant claimed to have purchased the property three days after it was stolen, a failure to give a distinct charge as to the purchase, and the interval which elapsed between the time of the theft and the time when the property came into defendant's possession, although not requested, is reversible error. *Wheeler v. State*, 34 Tex. Cr. App. 350, 30 S. W. 913. See, also, *Heath v. State*, 7 Tex. Cr. App. 464; *Smith v. State*, 7 Tex. Cr. App. 382, 383; *Ray v.*

State, 13 Tex. Cr. App. 51, 56; S. C., 43 S. W. 77; *Russell v. State* (Cr. App.), 43 S. W. 81; *Vincent v. State*, 9 Tex. Cr. App. 303; *Henry v. State*, 9 Tex. Cr. App. 358; *Murphy v. State*, 17 Tex. Cr. App. 645; *Ballow v. State* (Cr. App.), 69 S. W. 513; *Ruston v. State*, 10 Tex. Cr. App. 644.

Sufficient to Charge on Purchase without Charging in Regard to Explanation.—On a trial for theft, where it appeared that the property was found in defendant's possession, and his explanation was that he purchased it of a third person, it was sufficient to charge on the purchase of the property, without charging in regard to explanation made by defendant. *Thomson v. State* (Cr. App.), 41 S. W. 638; *Hays v. State*, 36 Tex. Cr. App. 533, 38 S. W. 171; *Reed v. State* (Cr. App.), 46 S. W. 931.

Use of Word "Bought" Instead of "Traded."—In a prosecution for theft of cattle, an instruction to acquit defendant if he bought them is sufficient, as bearing on his testimony explaining his possession of the cattle by stating that he traded for them, where no objection is made to the use of the word "bought" instead of "traded." *May v. State* (Cr. App.), 51 S. W. 242.

f. Recent Possession.

Necessity of Charge That Possession Be Recent.—Where it is not clear that the defendant's possession of the alleged stolen animal was recent, it should be left to the jury to determine that question, and the jury should be explicitly instructed that unless they found such possession was recent, they would indulge no presumption of defendant's guilt. *Curlin v. State*, 23 Tex. Cr. App. 681, 5 S. W. 186; *Boyd v. State*, 24 Tex. Cr. App. 570, 6 S. W. 853. See, also, *Gose v. State*, 6 Tex. Cr. App. 121.

Acquisition by Defendant's Wife Prior to Theft.—Where evidence tended to show acquisition of the alleged stolen goods by the defendant's

wife long prior to the theft, the court should charge on such defense. *Howard v. State*, 8 Tex. Cr. App. 612, 614.

Necessity That Defendant Be in Possession When Making Explanation as Rendering Instructions Inapplicable.—Where, in a prosecution for cattle theft, defendant had been in possession of the cattle as a hired man, and had driven them some twelve or thirteen miles before his arrest, the fact that he was not in possession at the time he made a statement to the officers that he had been merely hired to drive the cattle did not render a charge on recent possession of stolen property inapplicable. *Taylor v. State* (Cr. App.), 75 S. W. 35.

6. Matters of Defense.

Kleptomania.—On appeal from a conviction of theft, the defendant contended it was error not to have given a definition of "kleptomania," but it appeared the court had instructed the jury to apply the "right and wrong" test to the particular facts. Held, that there was no error, since, if kleptomania is a disease depriving one of the sense of right and wrong as to theft, the charge was sufficient, and if it is merely an irresistible impulse to steal it is no defense. *Lowe v. State*, 70 S. W. 206, 44 Tex. Cr. App. 224.

Mistake.—In a prosecution for theft of a steer, where it was shown that the animal belonging to the prosecutor and one which belonged to the defendant's father-in-law were very much alike, and defendant claimed that he had taken the one belonging to his father-in-law with his consent, a charge should have been given on the law applicable to mistake. *Hazlett v. State* (Cr. App.), 96 S. W. 36.

Where, in a prosecution for cattle stealing, it seems that the defense of honest mistake was not set up by defendant, but it also appears that, but for certain evidence for the state, the defendant would have set up such de-

fense, and from the record it appears that the defendant intended to raise such defense, but it was rendered unavailing by the evidence of the state, that the court charged upon that theory is not error. *Brite v. State* (Cr. App.), 43 S. W. 342.

Where, in a prosecution for cattle theft, the defendant introduced evidence that he was directed by a third person to drive away certain cattle belonging to the latter, and the description of one of the animals was very similar to the one charged to have been stolen, and that the latter was taken by mistake, a conviction will be reversed, where the instructions do not clearly state that, if the animal was taken by mistake, there could be no conviction. *Chambers v. State* (Cr. App.), 59 S. W. 261.

Receiving Sheep from One's Brother.

—In a prosecution for stealing sheep, there was evidence that accused had bought sheep from another person than the prosecuting witness, and that he had also obtained sheep from his brother, and the court charged that if accused was an accomplice or a receiver of stolen property then he could not be convicted under the indictment. Held, that it was error not to further instruct that if accused received the sheep from his brother, even knowing they were stolen, he would be entitled to an acquittal under the indictment, and that if he had received them from the person from whom he claimed to have purchased them he would be entitled to an acquittal. *Mazureczk v. State*, 59 Tex. Cr. App. 211, 128 S. W. 136.

Ownership.—In a prosecution for theft, a charge that, if the property alleged to have been stolen was the property of accused and that he had exercised actual control, care and management over it prior to the alleged taking, accused should be acquitted was erroneous, where the evidence tended to show that accused was

the lawful owner of the property, since the effect of the charge was to destroy such defense, unless accused could show that he exercised actual control, care and management of the property prior to the taking. *McNair v. State*, 14 Tex. Cr. App. 78.

Check Given as Part Consideration for Larger Check.—In a prosecution for theft of a check it appeared that prosecuting witness had been gambling with accused and another, that accused had won a check for \$75 given by prosecuting witness to the third player, and that prosecuting witness had borrowed money of accused to continue playing, giving him a check for \$125 and taking up the other check, which he wadded up and threw on the floor. Accused subsequently cashed a check of prosecuting witness for \$75, which the state claimed was the discarded check. Accused contended that two checks for \$75 had been executed, and that the one he cashed was given to him by prosecuting witness. Held, that a charge setting out the conflicting contentions, and instructing that if the check alleged to have been stolen was not given as part consideration for the \$125 checks, or if there was a reasonable doubt whether it was so given, accused should be acquitted, was not erroneous as to accused, where the court immediately preceding it defined theft, and required the jury to find that accused had fraudulently taken from prosecuting witness' possession the check in question as charged, and that no fraudulent intent of accused in relation to the check formed after he had taken it would authorize his conviction. *Worsham v. State*, 56 Tex. Cr. App. 253, 120 S. W. 439.

Purchase.—Evidence on a trial for theft of a heifer held sufficient to go to the jury on the defense of purchase, and therefore requiring a charge thereon. *Tankersley v. State*, 51 Tex. Cr. App. 224, 101 S. W. 997. See *Shuler v. State*, 23 Tex. Cr. App. 182, 4 S. W. 581.

An instruction in a trial for cattle theft held not erroneous as limiting the defense to a purchase from a third person. *Taylor v. State*, 62 Tex. Cr. App. 611, 138 S. W. 615.

On a trial for theft and for receiving stolen property, an instruction to acquit accused if he bought the property from one whom he in good faith believed authorized to sell, regardless of such person's actual authority, is not prejudicial. *Houston v. State* (Cr. App.), 47 S. W. 468.

In a prosecution of a person as accessory to the crime of theft of cattle, an instruction that, if defendant did no more than purchase and receive the stolen animal from a third party, he should be acquitted, should have been given. *Gann v. State*, 57 S. W. 837, 42 Tex. Cr. App. 133.

An instruction that if defendant knew, when he bought and took certain cattle, that they were not the property of the seller, such purchase is no defense to a charge of theft, is erroneous, since defendant would only be guilty of receiving stolen property unless it was shown that he was connected with the theft as principal, or that after such purchase he had gone on the range and taken possession of the cattle without delivery by the seller. *Hodge v. State*, 53 S. W. 862, 41 Tex. Cr. App. 229.

Defense to a prosecution for theft was purchase, upon which phase of the case the court charged, in substance, that the purchase would not entitle defendant to an acquittal, unless such purchase endowed him with an honest and bona fide claim to the property. Held, error, inasmuch as it authorizes a conviction for theft without a showing of defendant's complicity in the fraudulent taking of the property. *Prator v. State*, 15 Tex. Cr. App. 363.

7. Burden of Proof.

It is not error to instruct on a trial for theft that, if the jury have a reasonable doubt as to the honest or

felonious intent, they shall acquit. *Bray v. State*, 44 Tex. 132.

In a trial for theft, it being in proof that the accused claimed to have bought the property from a third party, the court instructed for acquittal if the jury believe that to be true, and also gave in charge the reasonable doubt, but refused to instruct that the state must disprove the alleged purchase. Held, proper. *Harrall v. State*, 4 Tex. Cr. App. 427.

Purchase.—In a prosecution for theft of a cow, there being evidence tending to show that defendant had purchased the animal from one Baker, the court charged the jury as follows: "If you believe that defendant had possession of said cow, then if you have a reasonable doubt as to whether or not he purchased said cow from Baker, in good faith, believing that Baker had a right to sell the cow to him, you will acquit the defendant." Held, that the charge was erroneous. As giving the benefit of a reasonable doubt, upon this issue, to the state as well as to the defendant. *Barrett v. State*, 18 Tex. Cr. App. 64, 68.

Ownership of Property.—Where the evidence in a trial for theft of a beef is conflicting as to the ownership of such beef, it is error for the court not to instruct that unless the jury were satisfied beyond a reasonable doubt that the ownership of the animal was as alleged in the indictment, they should acquit. *Robinson v. State*, 5 Tex. Cr. App. 519, 520.

Identity of Property.—On a trial for theft, a charge that, if the jury believe that the property alleged to have been stolen was not the property of the person alleged beyond a reasonable doubt, they should acquit was erroneous, as announcing the very converse of the correct rule, as requiring the jury to believe beyond a reasonable doubt that the property was not the property of the person in whom it was alleged. *McNair v. State*, 14 Tex. Cr. App. 78.

8. Grade or Degree of Offense.

a. In General.

If there is evidence tending to prove a theft, but it is doubtful whether the theft, if proved, constituted a felony or a misdemeanor, the court, in charging the jury, should submit the issue to them. *Lee v. State*, 14 Tex. Cr. App. 266; *Jack v. State*, 20 Tex. Cr. App. 656.

Time or Manner of Taking.—Where defendant is charged with the theft of two bales of cotton found in his possession, and there is no suggestion that it was taken at separate times, a request for an instruction on misdemeanor is properly refused. *Donaho v. State* (Cr. App.), 47 S. W. 469.

Defendant, at whose house were found articles taken from his employer's store, no one of which was worth \$50, is entitled to a charge on misdemeanor, on the theory that the articles may have been taken at different times, he admitting the theft, but there being no testimony that all were taken at one time, and he having had opportunities to take them at various times. *White v. State* (Cr. App.), 72 S. W. 185.

On a trial for the theft of leather belting of the value of over \$20, where the evidence showed that the belting consisted of five pieces, three of which were worth \$24 each, the other two being of less value, and there was no evidence as to the exact time, or as to the manner, of the taking, it merely appearing that on two occasions, about two weeks apart, defendant sold a quantity of the belting, it was proper to refuse to submit the issue whether the belting was all taken at once, and whether belting of the value of \$20 was taken at any one time. *White v. State*, 33 Tex. Cr. App. 94, 25 S. W. 290.

Theft and Theft from the Person.—Where, on a trial for ordinary theft and for theft from the person, the evidence showed that the prosecutor at the time of the offense was drunk, and

the evidence was circumstantial, and the state was unable to show the precise means and method of the taking, the court did not err in charging on theft from the person, especially where the jury found accused guilty of ordinary theft only. *Hooten v. State*, 53 Tex. Cr. App. 6, 108 S. W. 651.

b. Value as Affecting Degree.

Where, on a trial for larceny, the undisputed evidence shows the property to have been worth over \$20, failure to charge as to misdemeanor theft is not error. *Cannon v. State* (Cr. App.), 24 S. W. 517; *Young v. State*, 34 Tex. Cr. App. 290, 292, 30 S. W. 238; *Fenner v. State* (Cr. App.), 20 S. W. 355; *Cunningham v. State*, 27 Tex. Cr. App. 479, 11 S. W. 485.

On a prosecution for larceny, where the evidence shows that \$585 were placed in a locked closet, that \$310 thereof disappeared, that defendant admitted taking \$45.60 of said sum, and that no one but defendant had been within the room except members of the household, a charge as to the theft of property under the value of \$50 was properly refused. *Ellis v. State* (Cr. App.), 38 S. W. 205.

Defendant was indicted under a statute making the theft of \$10 a misdemeanor, and the theft of \$30 a felony. On the trial there was evidence that defendant took three \$10 bills from the pocket of a sleeping traveler, and, when the latter awoke, defendant dropped two of the bills, and fled with the other one. Held, that the court properly refused to charge that, if defendant intended to appropriate one of the bills only, he should be convicted of a misdemeanor. *Fenner v. State* (Cr. App.), 20 S. W. 355.

Where the only witness as to the value of coffee alleged to have been stolen stated that the market value thereof was twelve and a half cents, that the coffee stolen weighed four hundred and eighteen pounds, and that he might have sold it as low as

twelve cents to the purchaser of a large bill, failure of the court to charge on misdemeanor theft of property of less value than \$50 was not error. *Williams v. State* (Cr. App.), 85 S. W. 1142.

Where the statute makes it a felony to steal property of the value of \$20 or over, an instruction that, if the jury have a reasonable doubt whether the value was over \$20, they should convict of misdemeanor, is error, and, though favorable to defendant, is reversible error, if exceptions are properly reserved. *Cunningham v. State*, 27 Tex. Cr. App. 479, 11 S. W. 485.

A charge with respect to theft of property of less value than \$20, upon the trial of an indictment for theft of a larger amount, where no issue is raised as to the amount, though it is favorable to the accused if excepted to, is cause for reversal. *White v. State*, 28 Tex. Cr. App. 71, 12 S. W. 406.

In a prosecution for the theft of a watch alleged in the indictment to be worth \$50, and shown by the evidence to be worth more than \$20, an instruction that if the jury believe the watch to be worth less than \$20 they should acquit of the felony, and convict of a misdemeanor, is properly refused. *Haskins v. State* (Cr. App.), 20 S. W. 832.

Market Value.—In a larceny trial, it was proper to instruct that before convicting of felony it must be found beyond reasonable doubt that the bicycle stolen was of the reasonable cash market value of \$50 or over, and that if accused was deemed guilty beyond reasonable doubt, but the jury had reasonable doubt as to such value, he should be convicted of petty theft. *Robinson v. State* (Cr. App.), 140 S. W. 228.

In a prosecution for theft, an instruction that, in order to convict accused of felony, the jury must find that the value of the property amounted to \$50 or over, and that, if they believed

beyond a reasonable doubt that the property was not of such value, they should convict accused of misdemeanor, was sufficient, in the absence of an exception for failure to instruct that such value must be the reasonable market value of the property. *Osborne v. State* (Cr. App.), 56 S. W. 53.

Theft from the Person.—On indictment for theft from the person the court need not instruct the jury on the question of value, since under Pen. Code, art. 744, providing that one convicted of such crime shall be punished "by confinement in the penitentiary not less than two, nor more than seven, years," such offense is per se a felony, and it is not necessary to allege or prove the value of the stolen property. *Green v. State*, 28 Tex. Cr. App. 493, 13 S. W. 784.

9. Assumption of Facts.

Defendant's Taking Should Not Be Assumed.—An assumption in the charge that defendant took the property alleged to have been stolen, instead of presenting that issue hypothetically to the jury, is error. *Owens v. State*, 28 Tex. Cr. App. 122, 12 S. W. 506.

Effect Where Matter Assumed Favorable to Defendant.—The evidence of theft of a calf was circumstantial, and showed that defendant and a twelve year old boy went hunting on the day the calf was killed; that two persons were present at the killing; and that defendant brought home strips of freshly-cut veal, and the boy brought home nothing. Held, that a charge that the jury must acquit defendant unless they believe beyond reasonable doubt that he did the killing was favorable to defendant, and affords no ground for disturbing a conviction. *Lopez v. State* (Cr. App.), 20 S. W. 395.

10. Punishment.

a. In General.

A charge in a prosecution for horse

theft stated the punishment as provided by Pen. Code 1895, art. 881, as amended by Acts 1897, p. 83, c. 67, relating to the punishment for stealing horses, and it was objected that it incorrectly stated the penalty under art. 858, relating to theft in general. Held, that the latter article did not apply to horse theft, and the court's charge was correct. *Beard v. State*, 78 S. W. 348, 45 Tex. Cr. App. 522.

Under a statute fixing the punishment for cattle stealing at confinement for not less than two nor more than four years, there is no error in an instruction that, if guilty, defendant should be confined for a "term of years" not less than two nor more than four. Pen. Code, art. 882. *Aris-mendis v. State*, 54 S. W. 599, 41 Tex. Cr. App. 374.

Under White's Ann. Pen. Code, art. 870, the penalty for a petty theft is not to exceed two years' imprisonment in the county jail or a fine of \$500; hence an instruction authorizing a conviction for a misdemeanor, by charging that, if the jury find accused guilty of a petty theft, they should assess his punishment at imprisonment in the county jail not exceeding one year and by a fine not exceeding \$500, is erroneous. *Peck v. State*, 54 Tex. Cr. App. 81, 111 S. W. 1019.

Instruction Stating Different Offense.—The penalty for stealing sheep of the value of \$20 or over (Pen. Code, art. 748) being different from that prescribed for theft generally of property of the value of \$20 or more (Pen. Code, art. 735), a charge on a trial for the former crime giving the penalty prescribed for the latter crime is fatally erroneous, notwithstanding, the penalty being greater in the former case, the charge inures to the benefit of the accused. *Spradling v. State*, 30 Tex. Cr. App. 595, 17 S. W. 1117, overruling *Work v. State*, 3 Tex. Cr. App. 233, on this point. See, also, *Graham v. State*, 29 Tex. Cr. App. 31, 13 S.

W. 1013; *Williams v. State*, 25 Tex. Cr. App. 76, 7 S. W. 661; *Keesee v. State*, 1 Tex. Cr. App. 298.

b. Voluntary Return of Property.

Return before Prosecution.—Where defendant had voluntarily returned the stolen property to the owner before prosecution, he is entitled to a special instruction on the subject. *Anderson v. State*, 25 Tex. Cr. App. 593, 9 S. W. 43; *Schultz v. State*, 20 Tex. Cr. App. 315.

Where the issue of theft was raised by the state's case, and defendant admitted the manual taking, but claimed it was done under circumstances not imputing crime to him, but in pursuance of purchase, it was error to submit the issue of voluntary return of stolen property, as that doctrine necessarily implies there has been, in the first place, a criminal taking, and this charge was calculated to create a belief in the minds of the jury that the original taking was wrongful. *Eubanks v. State*, 122 S. W. 35, 57 Tex. Cr. App. 153.

Pen. Code, art. 738, provides that if property, taken under such circumstances as to constitute theft, be voluntarily returned within a reasonable time, and before prosecution as commenced, the punishment shall be by fine not exceeding \$1,000. Held that, if the evidence shows such a return of the stolen property to the owner, the failure of the court to give the provisions of said article in charge to the jury is reversible error. *Bennett v. State*, 28 Tex. Cr. App. 342, 13 S. W. 142.

Return Made after Defendant Charged with Offense.—Where it was shown by all the testimony that no offer of return was made till accused was found in possession and charged with the theft, a charge on voluntary return of stolen property was not demanded. *Petty v. State*, 59 Tex. Cr. App. 586, 129 S. W. 615; *Moxie v. State*, 54 Tex. Cr. App. 529, 114 S. W. 375.

Instances Where Return Not Voluntary.—On a prosecution for cattle theft, it was not necessary to charge the law applicable to a voluntary return of the stolen property, where accused was not in possession after he sold it to another, from whom it was recovered. *Lane v. State*, 55 S. W. 831, 41 Tex. Cr. App. 558.

Defendant was indicted for stealing a \$10 bill. It appeared that he snatched a pocketbook, which he returned, but it did not appear that he returned the bill. Held, that he was not entitled to demand that the jury be charged concerning the law of the voluntary return of stolen property. *Wheeler v. State*, 15 Tex. Cr. App. 607.

Where defendant unlawfully takes another's watch, and when detected hands it to the owner, it is not a voluntary return of the property; and in such case, where there was evidence to warrant a conviction of theft, the court properly declined to charge the jury on the question of voluntary return. *Boze v. State*, 31 Tex. Cr. App. 347, 20 S. W. 752.

Refusal of defendant's instruction that if his taking of cattle constituted a theft, and he voluntarily returned them a reasonable time before the prosecution, the jury should assess his punishment at a sum not greater than \$1,000, was proper—it appearing that the prosecutor took possession of the cattle without defendant's knowledge or consent—though defendant testified that he paid back money received by him from the party to whom he had sold the cattle, since such facts did not show a voluntary return thereof, within the meaning of the statute. *Johnson v. State* (Cr. App.), 55 S. W. 576.

In a prosecution for theft of a horse, the evidence showed that the horse was stolen at night from the owner's inclosure, and the next day was found in defendant's possession, some miles from the point at which he was taken, and that, when discovered, defendant requested the person discovering him

to return the horse to its owner. Defendant testified that he found the horse in the road, apparently having been ridden; that he took him in charge, and tied him in a field, requesting the proprietor to return the horse to its owner. Held, the court properly refused to submit the issue of voluntary return of the property. *Hyatt v. State*, 32 Tex. Cr. App. 580, 25 S. W. 291.

C. VERDICT.

See, generally, the title VERDICT.

1. Verdict Must Conform to Indictment.

A verdict finding the defendant "guilty of the theft of property of the value of twelve dollars" held not to be responsive to an indictment charging the theft of two hogs. *Collins v. State*, 6 Tex. Cr. App. 647.

Under an indictment for the theft of a gelding, a verdict of "guilty of horse stealing" did not find defendant guilty of the offense for which he was indicted. *Gibbs v. State*, 34 Tex. 134, 135.

2. Certainty of Verdict.

Though under an indictment charging theft of cattle, in the usual form, a conviction may be had, either for the theft defined in Pen. Code, art. 549, or for the misdemeanor of driving cattle from their customary range prohibited by art. 757, the verdict to be sufficient, must show with reasonable certainty of which offense, whether the felony, or misdemeanor, the accused was convicted. *Guest v. State*, 24 Tex. Cr. App. 530, 7 S. W. 242.

Verdicts Held Sufficient.—In a prosecution for stealing hogs, under Pen. Code, art. 748, providing that if any person shall steal any sheep, hog, or goat, where the value of the property is under \$20, he shall be punished, etc., a verdict that "the jury find the defendant guilty of theft of property of value less than \$20" is sufficiently definite and certain. *Lawrence v. State*, 20 Tex. Cr. App. 536. See, also, *Hutto*

v. State, 7 Tex. Cr. App. 44, 47; *Coha v. State*, 11 Tex. Cr. App. 153.

On trial for horse theft, a verdict that "We, the jury, find defendant guilty as charged, and assess his penalty at confinement in the penitentiary for the term of five years," is sufficiently specific. *Moore v. State* (Cr. App.), 33 S. W. 971.

The indictment charged accused with the theft of a watch of the value of \$135 and also \$31 in money. The court submitted two phases of theft—first, theft of property over \$50; second, that under \$50. The following verdict was returned. "We, the jury, find the defendant guilty as charged in the indictment and assess his punishment at four years' confinement in the penitentiary." Held, that the verdict showed that the defendant had been convicted of a felony. *Burton v. State*, 62 Tex. Cr. App. 648, 138 S. W. 1019.

The Penal Code prescribes in art. 764 imprisonment of from five to fifteen years for theft of a horse, and in art. 749 imprisonment of from two to five years for willfully driving stock of another from its accustomed range. Held, that where, under an indictment in ordinary form for theft of horses, the proofs showed that defendant had unlawfully and willfully removed them from their accustomed range, a verdict of "guilty of theft as charged in the indictment," assessing the punishment at two years' imprisonment, was valid. *Foster v. State*, 21 Tex. Cr. App. 80, 17 S. W. 548.

Under an indictment charging a theft of \$1,800 in United States notes of certain denominations, a verdict finding the accused "guilty of theft of more than twenty dollars" was good as against the objection that it was not for the offense charged in the indictment. *Chester v. State*, 1 Tex. Cr. App. 702.

Verdict Held Insufficient.—A verdict finding defendant "guilty of fraudulently taking the coal described in the indictment," and a judgment that de-

fendant is "guilty of the offense of fraudulently taking coal described in the indictment," do not find defendant guilty of theft, which is defined by Pen. Code, art. 724, to be the fraudulent taking of corporeal personal property belonging to another from his possession, or the possession of one holding it for him, without his consent, with intent to deprive him of its value, and to appropriate it to the taker's use. *Johnston v. State*, 25 Tex. Cr. App. 731, 9 S. W. 48.

Where an indictment charged the theft of a horse (a stallion) a verdict finding defendant guilty of the theft of a horse (a gelding), is not responsive to the indictment. *Persons v. State*, 3 Tex. Cr. App. 240, 242.

A verdict on a trial for the theft of cattle, finding "defendant guilty of a misdemeanor," etc., is insufficient to support a judgment, since it does not appear that the misdemeanor of which he is found guilty is that charged in the indictment. *Howell v. State*, 10 Tex. Cr. App. 298; *Senterfit v. State*, 41 Tex. 186, 188.

3. Construction of Verdict.

In a prosecution for theft, where the jury do not find the value of the property stolen, nor the grade of the offense, but assess the punishment, the charge of the court, defining the grades of the offense and stating to them limits of the punishment, may be used in construing the verdict. *Vincent v. State*, 10 Tex. Cr. App. 330.

4. Finding as to Value of Property.

On trial of an indictment charging larceny of property worth \$24, a verdict finding the defendant "guilty of felony," and assessing the penalty at two years, etc., held to be fatally defective. The primary issue, whether the property was of the value of \$20 or more, must be determined before fixing the penalty. *Miles v. State*, 3 Tex. Cr. App. 58.

5. Assessment of Punishment.

A verdict in a trial for theft assess-

ing the punishment "at five year, confinement in the penitentiary," fixes the duration and place of confinement with all the particularity required. *Williams v. State*, 5 Tex. Cr. App. 226, 233. See, also, *Henderson v. State*, 5 Tex. Cr. App. 134, 140; *Lindsay v. State*, 1 Tex. Cr. App. 327; *Franklin v. State* (Cr. App.), 140 S. W. 1091.

Assessing Punishment Not Warranted by Law.—Under Pen. Code, art. 736, on a trial for theft of property worth less than \$20, a verdict assessing a fine alone, without any imprisonment, will not support a conviction. *Fowler v. State*, 9 Tex. Cr. App. 149.

6. Correction of Verdict.

A verdict on a trial for theft which was insufficient in substance because it failed to determine whether defendant was guilty of the theft of property of the value of \$20 or more might have been corrected with the consent of the jury, as provided by Code of Cr. Proc., art. 627, Pasch. Dig., art. 3092, otherwise the jury should have been sent back for further deliberation, as directed by Code of Cr., art. 628, Paschal's Dig., art. 3093. *Miles v. State*, 3 Tex. Cr. App. 58.

D. NEW TRIALS.

See the title NEW TRIAL AND ARREST OF JUDGMENT.

E. APPEAL AND ERROR.

See, generally, the title APPEAL, ERROR AND CERTIORARI, vol. 1, p. 87.

1. In General.

Where, on trial for theft from the person, there is sufficient evidence that defendant committed the theft, and that the money taken from the defendant by the officers belonged to the prosecutor, the objection that the evidence neither identifies the money taken from the defendant as the money of which the prosecutor was robbed, nor shows the character of the money, is immaterial, since it goes to a question of pleading, rather than of evi-

dence. *Strange v. State* (Cr. App.), 20 S. W. 401.

Where the jury fixed the value of certain stolen property according to the highest estimate of the majority of the witnesses, the verdict will not be disturbed, even though there is a suggestion that the question of value was somewhat affected by the fact of the theft. *Lane v. State* (Cr. App.), 28 S. W. 202.

Bill of Exceptions.—A conviction of larceny will not be reversed because the owner of the stolen property did not testify positively, as he might have done, to his want of consent to the taking where such want of consent was proved by circumstances, and no bill of exceptions was reserved to the admission of the evidence of such circumstances. *Aller v. State* (Cr. App.), 24 S. W. 30.

If, in the prosecution of a theft, committed in Oklahoma Territory, of a horse, which defendant brought into the state, the statement of facts on appeal does not contain the laws of the territory, it does not authorize a conviction under Pen. Code 1895, art. 952, declaring that, to render a person guilty in such case, it must appear that by the law of the territory the act committed would also have been theft there. *Beard v. State*, 78 S. W. 348, 45 Tex. Cr. App. 522.

2. Harmless Error.

Where Instruction as to Possession of Property Not Requested.—It was harmless error not to instruct as to defendant's possession of certain stolen property, in the absence of a request for such an instruction, where he was charged only with the theft of a horse. *Harris v. State*, 34 Tex. Cr. App. 494, 31 S. W. 388.

Where Failure to Give Charge Does Not Affect Verdict.—Where defendant, charged with stealing a horse, gives at different times various explanations of his possession and owner-

ship, one of them being that he won it at a game of poker, a failure of the court to charge that, if the jury believed defendant won the horse at poker, they should acquit him, is not error when it appears from the testimony that there is not the slightest probability that the charge, if given, would have affected the verdict. *Teague v. State* (Cr. App.), 20 S. W. 367.

Testifying as to Value of Property without First Qualifying.—Where, in a prosecution for larceny, the uncontradicted evidence shows the value of the hogs stolen to have been sufficient to render the crime a felony, it is not reversible error to permit the owner of the hogs to testify as to their value without first qualifying. *Rial v. State* (Cr. App.), 33 S. W. 226.

Misnomer of Offense.—On a trial for theft, where the court correctly charged the jury on the law of theft, and told them that if they found certain facts to exist they must find defendant "guilty of theft, as charged," but in one place inadvertently called the offense "burglary," the error was harmless. *Oxford v. State*, 32 Tex. Cr. App. 272, 22 S. W. 971.

Charge Containing Word Not in Statute, but Favorable to Defendant.—In a prosecution for theft from the person, under Pen. Code, art. 745, subd. 2, providing that, to constitute such offense, it must be committed so suddenly as not to allow time for resistance before the property is carried away, a charge that the property must have been taken so suddenly as not to allow time for the person from whom the property is stolen to resist, and prevent the taking of such property from his person, is not objectionable because the word "prevent," in the latter clause of the charge, is not in the statute, and such charge was, as to the last clause thereof, beneficial to defendant. *Brown v. State* (Cr. App.), 22 S. W. 24.

XV. Sentence and Punishment.

A. STATUTORY PROVISIONS.

Under art. 765, Penal Code, theft of a gelding is theft of a particular kind of property whose punishment is specially prescribed, and is therefore not within the purview of arts. 756, 757. Penal Code. *Keese v. State*, 1 Tex. Cr. App. 298.

The act of August 21, 1876, amendatory of art. 757, Penal Code, relative to the punishment of theft of property under the value of twenty dollars does not repeal art. 758. *Spence v. State*, 1 Tex. Cr. App. 541, 547.

The sole object of art. 2408, Paschal's Digest, was to prescribe the punishment for the offense of theft from a house and not to define that offense. *McGee v. State*, 11 Tex. Cr. App. 520, 523.

Punishment prescribed for theft from a house by art. 2408, Paschal's Digest, could not be imposed, after the repeal of that article, to the offense committed prior to its repeal, nor could punishment for ordinary theft be inflicted because greater than that prescribed by the repealed article. *McGee v. State*, 11 Tex. Cr. App. 520, 525.

B. NATURE AND EXTENT OF PUNISHMENT.

Theft of property, other than of such as has such a definite punishment prescribed, is punished as felony or as misdemeanor according to its value as shown by testimony. *Gerard v. State*, 10 Tex. Cr. App. 690, 692.

Theft of property of the value of twenty dollars or over is punishable as felony by confinement in penitentiary not less than two nor more than ten years. *Simpson v. State*, 10 Tex. Cr. App. 681, 683; *Gerard v. State*, 10 Tex. Cr. App. 690.

If property stolen is under the value of twenty dollars, theft thereof is punished as a misdemeanor. *Gerard v. State*, 10 Tex. Cr. App. 690, 692.

On conviction of theft of property

under the value of twenty dollars, imprisonment is a necessary part of the punishment. *Sager v. State*, 11 Tex. Cr. App. 110, 114.

For theft of property worth less than twenty dollars, a fine without imprisonment is a punishment not prescribed or authorized by law. Hence, where such a penalty is imposed, the conviction can not stand. *Johnson v. State*, 18 Tex. Cr. App. 7, 8; *Fowler v. State*, 9 Tex. Cr. App. 149; *Sager v. State*, 11 Tex. Cr. App. 110.

Theft of property under the value of twenty dollars is punished by imprisonment in the county jail not exceeding one year, during which time the prisoner may be put to hard work, and by fine not exceeding five hundred dollars, or by imprisonment without fine. *Simpson v. State*, 10 Tex. Cr. App. 681, 684.

Punishment for Stealing Slave.—

One who steals a slave is punishable under the act of March 20, 1848, providing for the punishment of all simple grand larceny not otherwise specially provided for. *Alexander v. State*, 12 Tex. 540.

Where an indictment for stealing a slave was found and the conviction of accused was had under Hart. Dig., art. 523 (Act 1848, § 27) a punishment at confinement in the penitentiary for one year was erroneous, in the absence of evidence showing that the slave was of the value of \$20.00. *Langford v. State*, 8 Tex. 115.

C. MITIGATION ON RESTITUTION OR RECOVERY OF PROPERTY STOLEN.

1. In General.

Under Penal Code, art. 738, if one voluntarily before prosecution, and within a reasonable time, returns property which he has stolen, the offense is reduced to a misdemeanor. *Bird v. State*, 16 Tex. Cr. App. 528.

Application of Statute Where Character of Property Is Charged.—The statute reducing theft to a misde-

meanor (Pasch. Dig., art. 2397), upon the voluntary return of the property stolen before prosecution, does not apply where the character of the property has been changed, as from live hogs to pork. *Horseman v. State*, 43 Tex. 353; *Bird v. State*, 16 Tex. Cr. App. 528; *Grant v. State*, 2 Tex. Cr. App. 163, 166.

The provisions of Pasch. Dig., art. 2397, for a mitigation of punishment for larceny, if the property is voluntarily returned within a reasonable time, etc., does not apply where, before the offer to return, the thief has changed the character of the thing stolen, or has been caught in possession—as where he stole a live hog, and killed and dressed it, but, on being arrested, offered to return the pork. *Grant v. State*, 2 Tex. Cr. App. 163.

2. What Constitutes Voluntary Return.

Voluntary return of stolen property, within the meaning of art. 738, Penal Code, must be a return not made under fear of punishment alone, but with a desire to make reparation; it must be within a reasonable time after the theft and before prosecution; it must be actual, not merely constructive; the property returned must be that stolen, unchanged and entire. *Bird v. State*, 16 Tex. Cr. App. 528, 533; *Moore v. State*, 8 Tex. Cr. App. 496, 500; *Grant v. State*, 2 Tex. Cr. App. 163; *Allen v. State*, 12 Tex. Cr. App. 190; *Elkins v. State*, 35 Tex. Cr. App. 206, 32 S. W. 1046; *Ware v. State*, 47 Tex. Cr. App. 541, 84 S. W. 1065; *Stephenson v. State*, 4 Tex. Cr. App. 591; *Petty v. State*, 59 Tex. Cr. App. 586, 129 S. W. 615; *Stepp v. State*, 31 Tex. Cr. App. 349, 20 S. W. 753.

Giving up Property of Own Accord

—One who has stolen a watch, and denied knowledge of it when questioned, but who, nevertheless, has given it up of his own accord before prosecution commenced, is within the protection of the statute mitigating the penalty

where there has been a voluntary return of the stolen property. *Bennett v. State*, 17 Tex. Cr. App. 143.

Returning the property on the evening of the day on which it was stolen is such a voluntary return, within a reasonable time, as will operate to reduce the punishment under the statute, allowing a mitigation of punishment under such circumstances. *Ingle v. State*, 1 Tex. Cr. App. 307.

A return of stolen property, influenced by a threat of prosecution is not voluntary within the meaning of art. 738, Penal Code, reducing the theft to a misdemeanor, where stolen property is so returned. *Bird v. State*, 16 Tex. Cr. App. 528, 531; *Owen v. State*, 44 Tex. 248; *Ware v. State*, 47 Tex. Cr. App. 541, 84 S. W. 1065; *Elkins v. State*, 35 Tex. Cr. App. 206, 32 S. W. 1046.

Return Induced by Fear of Discovery.

—Under a statute providing that if one voluntarily returns stolen property within a reasonable time, and before the commencement of a prosecution, he shall be punished by a fine only, a return induced by fear of discovery and prosecution is voluntary. *Allen v. State*, 12 Tex. Cr. App. 190.

In order to secure the benefit of the mitigation provided for in Pasch. Dig., art. 2397, where stolen property is "voluntarily returned within a reasonable time," it must appear that the return was not prompted by consciousness of unconcealed evidences of guilt, and apprehensions of its discovery. *Stephenson v. State*, 4 Tex. Cr. App. 591.

Where Accused Detected in Theft.—

Where one knows that he has been detected in theft, and the property stolen has been discovered in his possession, it is too late to make a voluntary return, under Pen. Code, art. 738, providing a lighter punishment when the stolen property is returned within a reasonable time, and before any prosecution is commenced. *Elkins v. State*, 35 Tex. Cr. App. 206, 32 S. W.

1046; *Harris v. State*, 29 Tex. Cr. App. 101, 104, 14 S. W. 390; *Boze v. State*, 31 Tex. Cr. App. 347, 20 S. W. 752; *Stepp v. State*, 31 Tex. Cr. App. 349, 20 S. W. 753.

Return When Arrested.—A return of stolen property, after having been caught with it in possession, is not such a voluntary return, within a reasonable time, as will operate to reduce the punishment under the statute, allowing a mitigation of punishment under such circumstances. *Brill v. State*, 1 Tex. Cr. App. 572; *Grant v. State*, 2 Tex. Cr. App. 163; *Stepp v. State*, 31 Tex. Cr. App. 349, 20 S. W. 753; *Elkins v. State*, 35 Tex. Cr. App. 206, 32 S. W. 1046; *Stephenson v. State*, 4 Tex. Cr. App. 591; *Petty v. State*, 59 Tex. Cr. App. 586, 129 S. W. 615, 618; *Taylor v. State* (Cr. App.), 75 S. W. 35.

Where \$40 in money are stolen, a return by defendant, when arrested, of \$28.75, some of which is in different denomination and kind from that stolen, is not a voluntary return, within the meaning of Pen. Code, art. 738, which provides that if stolen property is returned within a reasonable time, and before any prosecution is commenced therefor, the punishment shall be by fine not exceeding \$1,000. *Powell v. State* (Cr. App.), 24 S. W. 515.

After stealing certain money, defendant was accosted by the prosecutor and accused of the theft. He denied the accusation, although he was told that if he would return the money nothing would be said about it. Subsequently he was taken in charge by the officers. While permitted by them to talk with the prosecutor, the prosecutor told him that, if he would then admit the taking and return the money, it would go lighter with him. Thereupon he told where the money was concealed, and went with the officers and produced it. Held, that the production of the money was not a vol-

untary return. *Dalton v. State*, 50 Tex. Cr. App. 523, 98 S. W. 855.

Offer to Sell Property and Give Owner Proceeds.—Evidence that one on trial for stealing hogs, when found in possession of them, with their ears freshly cut and marks changed, offered to sell them, and pay the owner the proceeds, and that he afterwards returned them, does not bring these offers and the return within Pen. Code, art. 738, reducing the punishment where stolen property is voluntarily returned. *Blount v. State*, 34 Tex. Cr. App. 640, 31 S. W. 652.

Turning Property Loose on Range.—Where defendant took another's hog, defaced the owner's mark, and placed thereon his own mark, he thereby asserted possession over it; and the mere fact of turning it loose on the range, where it was afterwards found by the owner, is not such a voluntary return of the hog as constitutes a defense to a prosecution for its theft. *Thorne v. State*, 52 Tex. Cr. App. 309, 107 S. W. 831.

Return Made as Owner Desired.—A return of stolen property may be voluntary if it is such a return as the owner desired, although not a return into his actual possession. *Bird v. State*, 16 Tex. Cr. App. 528, 533.

3. Evidence.

Evidence Sufficient to Raise Issue on Voluntary Return before Prosecution.

—Where there was evidence that neighboring cattle followed defendant's herd in spite of his efforts, and he at length drove on, deciding to pay the owner or replace them with others, and afterwards, having sent word to the owner, at his request helped to drive them part of the way home, the issues of a voluntary return of the cattle by defendant before prosecution, and his explanation of his possession, should have been submitted to the jury. *Guest v. State*, 24 Tex. Cr. App. 530, 7 S. W. 242. See, also, *Dupree v. State*, 17 Tex. Cr. App. 591.

Evidence Insufficient to Raise Issue of Voluntary Return.—In a prosecution for cattle theft, evidence held insufficient to raise the issue of voluntary return of stolen property. *Taylor v. State* (Cr. App.), 75 S. W. 35. See, also, *Purcell v. State*, 29 Tex. Cr. App. 1, 13 S. W. 993.

Lascivious Cohabitation.

See the titles ADULTERY, vol. 1, p. 35; BIGAMY, vol. 1, p. 659; FORNICATION, vol. 3, p. 345; INCEST, vol. 4, p. 227; MISCEGENATION; PROSTITUTION.

Lascivious Conduct.

See the title OBSCENITY,

Law.

See the titles CRIMINAL LAW, vol. 2, p. 168; STATUTES.

Lawful Age.

See the title INFANTS, vol. 4, p. 374.

Law Office.

See the title GAMING, vol. 3, p. 353.

Lawyers.

See the titles ATTORNEY AND CLIENT, vol. 1, p. 569; DISTRICT AND PROSECUTING ATTORNEYS, vol. 2, p. 253.

Leading Questions.

See the titles EVIDENCE, vol. 2, p. 324; WITNESSES.

Lead Pencil.

See the title VERDICT.

Lease.

Of penitentiary, see the title PRISONS.

Legal Holiday.

See the title SUNDAYS AND HOLIDAYS.

Legislative Construction.

See the title STATUTES.

Legislative Intent.

See the titles STATUTES; SUNDAYS AND HOLIDAYS.

Legislature.

See the titles CONSTITUTIONAL LAW, vol. 2, p. 9; STATUTES.

Legitimacy.

See the title BASTARDS, vol. 1, p. 657.

Lesser Offenses.

See the title JEOPARDY, ante, p. 1, as to former conviction or acquittal of. As to conviction of lesser offense than that charged, see the title INDICTMENT AND INFORMATION, vol. 4, p. 239.

Letters.

See the title EVIDENCE, vol. 2, p. 324.

LEWDNESS.

CROSS REFERENCES.

See the titles ADULTERY, vol. 1, p. 35; FORNICATION, vol. 3, p. 345; INCEST, vol. 4, p. 227; post, LIBEL AND SLANDER, or other specific heads.

<p>Indictment Charging Obscene Exhibition of the Person.—Under Paschal's Dig., art. 2030, an indictment which alleges that defendant did designedly make an obscene and indecent exhibition of his own person in a public road is fatally defective. The exhibition as defined by the article be-</p>	<p>ing confined to exhibition before the public as persons and not as to public locality. <i>Moffit v. State</i>, 43 Tex. 346.</p> <p>An indictment for making "an indecent exhibition of the person" is sufficient if it follow the language of the statute. <i>Moffit v. State</i>, 43 Tex. 346; <i>State v. Griffin</i>, 43 Tex. 538.</p>
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LIBEL AND SLANDER.

BY L. R. BUSKEY.

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See the titles CRIMINAL LAW, vol. 2, p. 87; EVIDENCE, vol. 2, p. 324; INDICTMENT AND INFORMATION, vol. 4, p. 239; MALICIOUS PROSECUTION; PRIVILEGED COMMUNICATIONS; TRIAL; WITNESSES.

I. Distinctions and General Considerations.

Common Law and Statutory Libel.

—The distinction between libel at common law and libel as defined by the Texas statute is, that libel at common law is punishable because of its tendency to provoke a breach of the peace, while under the Texas statute it is punishable as well because of its tendency to injure the reputation of a person. *Coulson v. State*, 16 Tex. Cr. App. 189.

Gist of Offense.—In criminal prosecution for slander, intention of person uttering words charged is the gist of the offense. *Dickson v. State*, 34 Tex. Cr. App. 1, 28 S. W. 815, 30 S. W. 807.

II. Actionable Quality of Words.

A. WORDS IMPUTING DELINQUENCY IN PAYING BILLS.

An information for libel alleged that

defendant published a circular stating that a traveling salesman, in an effort to sell goods to defendant, told him that, if a competing house would fill his order for similar goods at the price they had quoted, he (the salesman) would pay defendant \$50, and that, after the order was filled, defendant made repeated attempts to collect the money, but gave it up, thinking that his time was too valuable to spend in trying to collect money from an unprincipled salesman. Held, that the facts alleged charged an offense. *Lockard v. State*, 63 S. W. 566, 43 Tex. Cr. App. 61.

B. WORDS EXPOSING ANOTHER TO CONTEMPT.

Issuing a circular letter falsely purporting to be signed and issued by a nominee for office, whereby such nominee is represented as abnegating the

principles of the party he is openly espousing, declaiming his belief in the principles of the opposing party, and requesting its support, constitutes libel, as calculated to bring such nominee into contempt of honorable persons, but not as representing him to be a person unworthy of holding public office. *Squires v. State*, 45 S. W. 147, 39 Tex. Cr. App. 96, 73 Am. St. Rep. 904. See post, "Words Imputing Unfitness for Office," II, C.

C. WORDS IMPUTING UNFITNESS FOR OFFICE.

In order that published matter may be libelous as to a candidate for office, there must be imputation that he is dishonest and therefore unworthy of office. *Squires v. State*, 39 Tex. Cr. App. 96, 107, 45 S. W. 147. See ante, "Words Exposing Another to Contempt," II, B; post, "Imputations of Unfitness for Office," VIII, C, 2.

D. WORDS IMPUTING FALSEHOOD AND TALEBEARING.

An indictment for libel is sufficient where it charges matter imputing to prosecutor that he is a scandal-monger of the worst type, and a common liar. *Smith v. State*, 39 Tex. Cr. App. 320, 321, 45 S. W. 1013.

E. WORDS IMPUTING COMMISSION OF CRIME.

A person publishing a criminal charge against any person does so at his peril; if false, he will be guilty of libel. *Johnson v. State*, 31 Tex. Cr. App. 456, 463, 20 S. W. 985.

Pen. Code, art. 721, declares that he is guilty of "libel" who, with intent to injure, makes, publishes, or circulates any malicious statement affecting the reputation of another as to any matter or thing pointed out in the chapter; and art. 727 declares that the written, printed, or published statement, to come within the definition of "libel," must convey the idea that the person to whom it refers has

been guilty of some penal offense, etc. Held, that an indictment for libel, alleging that defendant published a malicious statement concerning complainant, reciting that he was a United States federal guard, that he was a highwayman and cowardly assassin, and the murderer of a certain person who on the morning of March 19, 1906, was cowardly assassinated on a public highway, etc., sufficiently charged complainant with a penal offense, and was therefore sufficient. *Gonzales v. State*, 58 Tex. Cr. App. 141, 124 S. W. 937.

To charge a person with being a "hireling murderer," if falsely and maliciously made, is actionable slander. *Smith v. State*, 32 Tex. 594, 597.

A newspaper article calling one a mail thief, scoundrel, mail robber, and indicted thief, is libelous per se. *Woody v. State*, 16 Tex. Cr. App. 252.

F. WORDS IMPUTING FATHERHOOD OF BASTARD.

Pen. Code, § 742, provides that when any person, by virtue of his office, is required to record the proceedings of any religious body, he shall not be charged with libel for any entry so made; the following article provides that if a false statement is entered, which would be libelous if circulated by an individual, the one assenting to and directing such statement is guilty; and the next article provides that the statements are not to be presumed to have been made with intent to injure unless such fact appears. Held, that where a minister, required by a custom of his church to make entries of the names of parents of those baptized, knew that plaintiff had been acquitted of seduction in a suit by the mother of a bastard confirmed by him, yet he entered plaintiff's name as that of the bastard's father—insisting on making the entry unless the mother would consent to its not being done—the evidence showed malice, rendering defendant liable under the statute. *Kubricht v. State*, 69 S. W. 157, 44

Tex. Cr. App. 94, 58 L. R. A. 959, 100 Am. St. Rep. 842.

G. WORDS IMPUTING WANT OF CHASTITY.

Object of Statute.—The object of art. 645, Penal Code, was merely to make it a penal offense to impute want of chastity to a female, and to bring such offense within the law governing slander and libel. *Lindsey v. State*, 18 Tex. Cr. App. 280, 281.

Persons Protected by Statute.—The statute regarding slander is intended only for protection of the chaste woman, whether married or unmarried. *Baxter v. State*, 34 Tex. Cr. App. 516, 519, 31 S. W. 394.

Gist of Offense.—The gist of the offense of slander is the imputation of want of chastity on the part of the female alleged to be slandered. *Van Dusen v. State*, 34 Tex. Cr. App. 456, 458, 30 S. W. 1073; *Baxter v. State*, 34 Tex. Cr. App. 516, 518, 31 S. W. 394.

Statement Concerning Married Woman.—A statement that a woman will consent to sexual intercourse means that she is lewd, and therefore it is slanderous, though the woman be married. *Wallace v. State* (Cr. App.), 49 S. W. 395.

Woman Previously Unchaste.—A charge by a husband, who had carnal intercourse with his wife before marriage, that another is the father of her child, is not ground for a conviction of slander; the wife not being a chaste woman within the statute. *Baxter v. State*, 34 Tex. Cr. App. 516, 31 S. W. 394, 53 Am. St. Rep. 720.

Words Imputing Want of Chastity.—A statement that a man could get in with an unmarried woman, and that the man could let another man catch them, and that both men could have a good time with her, is slanderous, as imputing to the female a want of chastity. *Kyle v. State*, 55 Tex. Cr. App. 360, 116 S. W. 598.

To say of any woman that she is a bitch and permitted a man to visit

her in bed and commit disgraceful conduct with her is to impute want of chastity to her. *Kelly v. State*, 37 Tex. Cr. App. 641, 642, 40 S. W. 803.

In a prosecution for slander, the allegations of an information held not to charge statements imputing a want of chastity to a female. *Fox v. State* (Cr. App.), 101 S. W. 808.

Words Not Directly Imputing Unchastity.—It is not slanderous for a man in speaking of a woman to say that he has "had a big time with her." *Gooing v. State* (Cr. App.), 98 S. W. 857.

H. WORDS IMPUTING BAD CHARACTER TO A CLASS.

An article charging that the conductors of a city railroad, as a class, were foul characters, may be libelous, though not mentioning any conductor by name. *Jones v. State*, 43 S. W. 78, 38 Tex. Cr. App. 364, 70 Am. St. Rep. 751.

III. Publication.

See post, "Publication," VIII, D.

A. IN GENERAL.

"We say of an author that he has published a book when he has given its contents to the world; and we speak of the publication of a will, without meaning to denote that the contents of the instrument have been actually communicated. So it is with a libel. 'Publication,' says Best, J., in *Rex v. Burdett*, 4 Barn & Ald. 95, 'is nothing more than doing the last act for the accomplishment of the mischief intended by it. The moment a man delivers a libel from his hands, his control over it is gone. He has shot his arrow, and it does not depend upon him whether it hits the mark or not. There is an end of the locus penitentiae; his offense is complete; all that depends upon him is consummated; and from that moment, upon every principle of common sense, he is liable to be called upon to answer

for his act.' So, then, the mere delivering over or parting with the libel is a publication. There need be no averment or proof of the actual communication of the contents of the paper." *Mankins v. State*, 41 Tex. Cr. App. 662, 57 S. W. 950, 952.

"Mr. Bishop says, 'One publishes a libel who sends it to a single individual;' and this, we are of opinion, is the law with us, provided the private letter or instrument be of such character as that if made public it would affect the reputation of the party about whom it was written." *Mankins v. State*, 41 Tex. Cr. App. 662, 57 S. W. 950, 952; *Coulson v. State*, 16 Tex. Cr. App. 189, 196.

Libel is published when it is written or printed and sent and delivered to the person defamed or any other person, unless the matter so sent and delivered comes under the class of privileged communications. *Smith v. State*, 32 Tex. 594, 598.

B. DEPOSITING LETTER IN POST OFFICE.

The writing of a letter and the deposit of it in the post office for transmission to the party addressed constitute the publication of a libel within the meaning of the law, provided such letter be of such character that, if made public, it would affect the reputation of the party about whom it was written. *Coulson v. State*, 16 Tex. Cr. App. 189; *Smith v. State*, 32 Tex. 594, 598; *Mankins v. State*, 41 Tex. Cr. App. 662, 57 S. W. 950.

IV. Malice.

A. AS AN ESSENTIAL ELEMENT.

To constitute slander, the statement must be either malicious or wanton. *Duke v. State*, 19 Tex. Cr. App. 14, 17; *Van Dusen v. State*, 34 Tex. Cr. App. 456, 459, 30 S. W. 1073.

To constitute the offense of slander under art. 645, Penal Code, the imputation of unchastity in a female must be either "falsely and maliciously" or

"falsely and wantonly" made; it is not sufficient that it be merely falsely made. *McMahan v. State*, 13 Tex. Cr. App. 220, 223.

Under Pen. Code 1901, art. 750, making malice a necessary ingredient of the offense of slander, the court should in a prosecution for slander, in which malice was proved by very slight testimony, not only charge that the jury might convict if they believed malice were proven, but that, even though the imputation was false, they could not convict unless they found that it was malicious. *Stayton v. State*, 78 S. W. 1071, 46 Tex. Cr. App. 205, 108 Am. St. Rep. 988.

B. PRESUMPTION FROM FALSITY OF WORDS.

See post, "Presumption and Burden of Proof," IX, A, 1.

V. Privileged Communication.

A. ABSOLUTE PRIVILEGE.

Judicial Proceedings.—"At common law, 'no action will lie for defamatory statements made or sworn to in the course of a judicial proceeding before any court of competent jurisdiction. Everything that a judge says on the bench, or a witness in the box, or counsel in arguing, is absolutely privileged, so long as it is anyway connected with the inquiry. So are all documents necessary to the conduct of the cause, such as pleadings, affidavits, and instructions to counsel. This immunity rests on obvious grounds of public policy and convenience.'" *Lindsey v. State*, 18 Tex. Cr. App. 280, 281.

No statement made in the course of a legislative or judicial proceeding, whether true or false, although made with intent to injure, and form malicious purposes, comes within the definition of libel. *Lindsey v. State*, 18 Tex. Cr. App. 280, 281.

Immunity of defamatory words, spoken or written in the course of

a judicial proceeding, from lay of slander and libel rests on grounds of public policy, and the courts will not presume that a statute making it a penal offense to impute want of chastity to a female was intended to work a result contrary to public policy. *Lindsey v. State*, 18 Tex. Cr. App. 280, 281.

False Affidavit.—An information charging defendant with unlawfully imputing to a certain female a want of chastity, by going before a justice of the peace and voluntarily making a false affidavit in which he charged her with being a common prostitute, does not charge any offense against law, where such affidavit is set out in the information, and is a sworn complaint in due form of law. *Lindsey v. State*, 18 Tex. Cr. App. 280, 281.

Statements Made During Judicial Proceedings.—In a prosecution for slandering two women, where it appears that defendant, being angered at a charge against his servant girl by the prosecuting witnesses, openly charged them with being prostitutes, and demanded their arrest, and that he subsequently appeared before an officer and made complaint against them for "disorderly action," it is proper to charge that the jury should convict if the words were maliciously and wantonly spoken, but to acquit if the alleged slanderous statements were made, in substance, only in the course of a judicial proceeding, and such statements were reasonably pertinent to such proceeding. *Hix v. State* (Cr. App.), 20 S. W. 832.

B. QUALIFIED PRIVILEGE.

1. Confidential Communications.

Communication is not privileged simply because it is confidentially made. *Smith v. State*, 32 Tex. 594, 598.

2. Statements Made in Discharge of Moral Duty.

"A communication, which would otherwise be slanderous and action-

able, is privileged, if made in good faith upon a matter involving an interest or duty to the party making it, though such duty be not strictly legal, but of doubtful obligation, to a person having a corresponding interest or duty." *Hix v. State* (Cr. App.), 20 S. W. 550; *Richmond v. State*, 58 Tex. Cr. App. 435, 126 S. W. 596, 597; *Stayton v. State*, 46 Tex. Cr. App. 205, 78 S. W. 1071.

To make a communication privileged, there must be some considerations of moral duty or public policy connected with it. *Smith v. State*, 32 Tex. 594, 598.

3. Proceedings for Church Discipline.

Where defendant, on trial on indictment for slander, requested an instruction that, if the statements charged were made by defendant, yet if the jury should have a reasonable doubt as to whether they were made maliciously or wantonly, they should acquit, such charge should have been given; it having appeared that the statement in question was made by defendant to a person who had been sent to see him by the pastor of a church of which all parties concerned were members, and that under the circumstances it was the duty of defendant to speak. *Tippens v. State* (Cr. App.), 43 S. W. 1000.

4. Answers to Inquiries.

Inquiry by Father of Slandered Person.—Statements by defendant, which would otherwise be slanderous, are privileged, where they were made to the father of the person alleged to have been slandered, at a meeting by appointment for the purpose of investigating the alleged slander, or after being pressed by him to speak. *Hix v. State* (Cr. App.), 20 S. W. 550; *Davis v. State* (Cr. App.), 22 S. W. 979; *Richmond v. State*, 58 Tex. Cr. App. 435, 126 S. W. 596, 597; *Stayton v. State*, 46 Tex. Cr. App. 205, 78 S. W. 1071.

When no Inquiry Made.—Where, on a trial for imputing to a female a want

of chastity, the evidence showed that accused and the father of prosecutrix were talking about a matter not relating to prosecutrix, and that during the conversation accused began the conversation touching the prosecutrix, and uttered the slanderous words, the language of accused was not privileged. *Richmond v. State*, 58 Tex. Cr. App. 435, 126 S. W. 596.

Accusations by Husband Against Wife.—In a prosecution for slander it appeared that defendant went to a friend to get him to take charge of defendant's children, and in answer to a question as to why defendant wanted to leave the children defendant said he was leaving the country, and accused his wife of infidelity. Held, that the communication was not privileged. *Stayton v. State*, 78 S. W. 1071, 46 Tex. Cr. App. 205, 108 Am. St. Rep. 988.

C. LIBERTY OF THE PRESS.

Constitutionality of Statutes.—Texas laws defining and punishing libelous publications are not in derogation of "the freedom of the press" or violative of constitutional provisions securing to all the freedom of Speech. *Morton v. State*, 3 Tex. Cr. App. 510, 518.

Reason for Privilege.—It is policy of law to suppress publication of all scandalous matter which simply tends to bring disgrace and trouble upon citizen, but it is not its policy to suppress discovery of crime, whereby the state may be duly notified of its existence. It is a matter "proper for public information." *Johnson v. State*, 31 Tex. Cr. App. 464, 465, 20 S. W. 980.

Limitations of Privilege.—A freedom of the press which will permit the press to become an engine for the purpose of vilifying and disturbing the public peace can not be asserted in a prosecution for libel. *Smith v. State*, 39 Tex. Cr. App. 320, 45 S. W. 1013; *Morton v. State*, 3 Tex. Cr. App. 510, 518.

The Texas statutes defining and punishing libelous publications clearly distinguishes the offense from just and

legitimate criticism. *Morton v. State*, 3 Tex. Cr. App. 510, 518.

VI. Persons Liable

Author of Article.—It was immaterial whether defendant was responsible because he was the financial manager of the paper in which the article was published, where it appeared that he had admitted the writing of such article. *Noble v. State*, 43 S. W. 80, 38 Tex. Cr. App. 368.

Publisher.—Where the defendant advisedly and deliberately publishes a libelous pamphlet for the purpose of challenging an investigation of his charges, he can not claim an innocent intention in the writing and publication thereof. *McArthur v. State*, 57 S. W. 847, 41 Tex. Cr. App. 635.

Typesetter and Part Owner of Newspaper.—A part owner of a newspaper, who set the type for the libelous publication in such paper, is guilty of libel, though he had nothing to do with the writing of the article. *Baldwin v. State*, 45 S. W. 714, 39 Tex. Cr. App. 245.

Husband and Wife.—"At common law, one of the spouses could not maintain a civil suit against the other for slander. *Amer. & Eng. Ency. of Law*, vol. 18, p. 1053, sub. 'D,' and authorities there cited. However, our statute on the subject is all-embracing, and does not exclude slanders perpetrated by the husband against the wife, and we accordingly hold that such prosecution can be maintained." *Stayton v. State*, 46 Tex. Cr. App. 205, 78 S. W. 1071, 1072.

VII. Defenses.

A. IN GENERAL.

In a prosecution for libel, a charge that "the truth of any statement charged as a libel may be shown in justification by the defendant, where it is charged in the information that said statement is false," is erroneous, as being unwarranted by Pen. Code, art. 642, which provides in what cases proof of the truth is admissible in pros-

ecutions for libel. *Johnson v. State*, 31 Tex. Cr. App. 464, 20 S. W. 980.

It is no defense to a prosecution for libel that defendant, a part owner of the newspaper in which it was published, protested against the publication, and only agreed to it on his partner agreeing to assume the responsibility therefor, where defendant then set the type for the article. *Baldwin v. State*, 45 S. W. 714, 39 Tex. Cr. App. 245.

B. GENERAL REPUTATION OF PERSON DEFAMED.

In *Baldwin v. State*, 39 Tex. Cr. App. 245, 45 S. W. 714, 716, it is said: "It is permissible, in trials of this character (i. e. criminal libel), to prove the general reputation of the alleged libeled party."

But in *McArthur v. State*, 41 Tex. Cr. App. 635, 57 S. W. 847, 849, it is said that: "The object in a criminal prosecution is not to recover damages, but rather to preserve the peace and good order of society; and so proof that the libelee bore a bad reputation in regard to the trait of character charged against him would be no answer to the criminal prosecution."

And in *Smith v. State*, 32 Tex. 594, 598, the court said: "It is only in prosecutions for the publication of papers investigating the conduct of officers, or of persons acting in a public capacity, and where the matter is proper for public information, that the truth may be given in evidence. In libels upon private individuals, however true the charges may be, their publication against private individuals incites and provokes the mischief designed to be repressed by the public prosecution of libels." See post, "Imputations of Malfeasance to Public Officers," VII, D.

C. WHERE TIME, PLACE, AND NATURE OF OFFENSE ARE SPECIFIED.

Under the statute, when libel charged a penal offense, and states

the time, place, and nature of the offense the truth of the libel may be offered in evidence in a prosecution for such libel, but if a penal offense is charged generally, the truth of the libel can not be proved. *Johnson v. State*, 31 Tex. Cr. App. 464, 465, 20 S. W. 980.

Pen. Code, art. 642, provides that where it is stated in the libel that a person has been guilty of some penal offense, and the time, place, and nature of the offense are specified in the publication, the truth may be shown in justification. Held, that a libel which charged that the libelee lived with a prostitute for a year at a certain designated house, and that he had, in a fit of anger with the prostitute, broken up her furniture, and otherwise acted in a disorderly manner, defining such acts to be offenses against the penal laws, is sufficiently specific as to the offense charged to entitle the person publishing the libel to prove the truth of the charges as a justification. *Johnson v. State*, 31 Tex. Cr. App. 464, 20 S. W. 980.

D. IMPUTATIONS OF MALFEASANCE TO PUBLIC OFFICERS.

In an indictment for libel for charging the county attorney and his assistants with bribery and other disgraceful conduct in spiriting away defendant's witnesses in a case pending against defendant, where the alleged libel made such charge by innuendo only, defendant had a right to show that any of his witnesses were intimidated or induced to leave by any of the officers charged to be libeled, and it was error to confine his evidence to the acts or the personal conduct of the county attorney; Pen. Code, art. 642, § 4, providing that, where the publication charges an officer with malfeasance, the truth may be shown in justification. *Johnson v. State*, 31 Tex. Cr. App. 569, 21 S. W. 541; *Smith v. State*, 32 Tex. 594, 595.

E. IMPUTATIONS OF UNCHASTITY.

"It has been quite uniformly held by this court that, where, in a prosecution for slander, an inquiry into the reputation of the female for chastity establishes that such reputation is bad, the defendant is entitled to an acquittal. *Crane v. State*, 30 Tex. Cr. App. 464, 17 S. W. 939; *Shaw v. State*, 28 Tex. Cr. App. 236, 12 S. W. 741; *Val. Dusen v. State*, 34 Tex. Cr. App. 456, 30 S. W. 1073." *Richmond v. State*, 58 Tex. Cr. App. 435, 126 S. W. 596, 597; *Collins v. State*, 39 Tex. Cr. App. 30, 33, 44 S. W. 846; *Dobbs v. State*, 55 Tex. Cr. App. 483, 117 S. W. 799; *McMahan v. State*, 13 Tex. Cr. App. 220; *Patterson v. State*, 12 Tex. Cr. App. 458.

Where, in a prosecution for slander, the state has established that the slanderous words were used falsely and maliciously, or falsely and wantonly, the only defense under the statute will be proof by the defendant of the truth of the imputation, or that the general reputation of the female for chastity is bad. *McMahan v. State*, 13 Tex. Cr. App. 220.

On a prosecution for charging an innocent woman, with a specific act of sexual intercourse, defendant may show the truth of the charge. *Wood v. State*, 32 Tex. Cr. App. 476, 24 S. W. 284.

Under Pen. Code, art. 646, providing that, in a prosecution for slander in imputing to a female want of chastity, defendant may, in justification, show the truth of the imputation, and that the general reputation of the female may be inquired into, a conviction can not be had where it appears that her reputation was that of a prostitute, and that she had indulged in indiscriminate intercourse. *Lasky v. State* (Cr. App.), 18 S. W. 465.

Limitation of Proof.—Pen. Code 1895, art. 751, providing that, in a prosecution for imputing to a female a want

of chastity, the state need not show that the imputation was false, but accused may in justification show the truth, and the general reputation of the female may be inquired into, limits the inquiry into the reputation of the female to the time of the uttering of the slander, or at least to a time reasonably approximating the date of such uttering; and, where evidence of her good reputation long after the alleged uttering was given, accused was entitled to a charge that the reputation must relate to the reputation at the time of the alleged slanderous words. *Richmond v. State*, 58 Tex. Cr. App. 435, 126 S. W. 596.

Patterson v. State, 12 Tex. Cr. App. 458, is as follows: "We therefore conclude that in a prosecution under this statute the defendant, in justification, may prove (1) that the particular imputation which he has made against the female is true; (2) that her general reputation for chastity at the time the slander was uttered by him was bad; but that he can not be permitted to prove any other acts of conduct imputing a want of chastity except those specifically embraced in the imputation made by him." *Crane v. State*, 30 Tex. Cr. App. 464, 17 S. W. 939.

VIII. Indictment and Information.

A. IN GENERAL.

See, generally, the title INDICTMENT AND INFORMATION, vol. 4, p. 239.

Caption.—It is unnecessary that an affidavit upon which information for libel was based should begin "In the name and by the authority of the state of Texas;" it is sufficient if information so begins. *Johnson v. State*, 31 Tex. Cr. App. 464, 465, 20 S. W. 980.

Charging Libel.—An information for criminal libel need not charge that the acts were libelous, nor that they were wickedly committed. *Baldwin v. State*, 45 S. W. 714, 39 Tex. Cr. App. 245.

B. INDUCEMENT COLLOQUIUM, AND INNUENDO.

1. In General.

At common law, complaint for libel must contain inducement, colloquium, fact of publication by defendant and words published, and innuendo. *Squires v. State*, 39 Tex. Cr. App. 96, 105, 45 S. W. 147.

2. Inducement.

The office of the inducement is to narrate the extrinsic circumstances which, coupled with the language published, affects its construction, and renders it actionable, where, standing alone and not thus explained, the language would appear either not to concern the plaintiff, or, if concerning him, not to affect him injuriously. *Squires v. State*, 39 Tex. Cr. App. 96, 45 S. W. 147, 149.

Place of Inducement.—It is immaterial in information for libel whether inducement precedes or follows the alleged libelous matter. *Squires v. State*, 39 Tex. Cr. App. 96, 106, 45 S. W. 147.

3. Colloquium.

The colloquium is a direct allegation that the language published was concerning the plaintiff or concerning the plaintiff and his affairs, or concerning the plaintiff and facts alleged as inducement. *Squires v. State*, 39 Tex. Cr. App. 96, 45 S. W. 147, 149.

4. Innuendo.

a. Definition and Function.

"The office of an innuendo is to aver the meaning of the language published. An innuendo means nothing more than giving point or meaning as explanatory of a matter sufficiently expressed before. It may serve for an explanation, to point a meaning where there is precedent matter, expressed or necessarily understood or known, but never to establish a new charge. It may apply what is already expressed, but can not add to nor enlarge nor change the sense of the previous words. If the words before the innuendo do not

sound in slander, no meaning produced by the innuendo will make the action maintainable, for it is not the nature of an innuendo to beget an action. An innuendo helps nothing unless the words precedent have a violent presumption of the innuendo. The business of an innuendo is, by a reference to preceding matter, to fix more precisely the meaning. The office of an innuendo is to explain, not to extend, what has gone before, and it can not enlarge the meaning of words, unless it be connected with some matter of fact expressly averred. The innuendo 'is only a link to attach together facts already known to the court.'" *Squires v. State*, 39 Tex. Cr. App. 96, 45 S. W. 147, 149.

"An innuendo is an explanatory averment of the meaning. It charges no fact, and it does not admit of being sustained by evidence; the pleader, having in the colloquium and elsewhere stated all the extrinsic and other facts desired, introduces into his recitation of the libelous words, when necessary, the expression 'meaning so and so,' and this is called an 'innuendo.' Alleging nothing, it neither adds to nor qualifies any previous allegation; but if, for example, a word has two significations, and the preceding averments have laid the foundation for the one claimed, the innuendo may say that this is the one meant." *Dickson v. State*, 34 Tex. Cr. App. 1, 28 S. W. 815, 30 S. W. 807, 808. See post, "Proof," VIII, B, 4, c.

"The office of the innuendo is to point out and refer to matter already expressed; to explain the meaning of the publication, when it is obscure; and to designate the persons alleged to have been libeled, when they are alluded to in covert and ambiguous terms. But, where the paper itself points out, with sufficient clearness, the persons of or concerning whom it is written, and likewise the purpose for which it was written, the office of the innuendo is superseded, no explanation is neces-

sary." *Mankins v. State*, 41 Tex. Cr. App. 662, 57 S. W. 950, 953.

The office of an innuendo is to define the defamatory meaning which the party seeks to put on the words complained of, to show how they have the particular meaning claimed for them, and to show how they relate to plaintiff, whenever it is not clear on the face of the words; but the innuendo must not introduce new matter or enlarge the natural meaning of the words. *Atchley v. State*, 56 Tex. Cr. App. 569, 120 S. W. 1010.

"Innuendo" means nothing more than the words "id est," "scilicet," "meaning," or "aforesaid," as explanatory of a matter sufficiently expressed before. It is in the nature of a praedict. *Atchley v. State*, 56 Tex. Cr. App. 569, 120 S. W. 1010.

b. Necessity.

Meaning Not Obscure.—Where the statement in a publication was so plain and unmistakable that no intelligent person could fail to understand what was intended by it, no innuendoes were required in the indictment. *Jones v. State*, 43 S. W. 78, 38 Tex. Cr. App. 364, 70 Am. St. Rep. 751.

Meaning of Language Obscure.—If the meaning of the language as charged in an information for slander be obscure, the information should allege its meaning; otherwise the proof of its meaning is not admissible. *Rogers v. State*, 30 Tex. Cr. App. 462, 17 S. W. 548; *Berry v. State*, 27 Tex. Cr. App. 483, 11 S. W. 521.

Word in Common Use.—A word used in an information for slander does not require an innuendo averment to make its meaning clear, though it is not in the dictionary, where it is a word in common use, with a well-understood meaning. *Knight v. State* (Cr. App.), 49 S. W. 383.

Libel under Statute.—An indictment for libel is sufficient without innuendo where inducement is set out, and colloquium which sets out the instrument

complained of without explanatory averments, and which further sets out that such publication is libelous under the statute in two named respects. *Squires v. State*, 39 Tex. Cr. App. 96, 106, 45 S. W. 147.

c. Proof.

Having used an innuendo in charging slanderous words in an information, it is necessary to prove it as substantially as the slanderous words its meaning was intended to convey. *Riddle v. State*, 30 Tex. Cr. App. 425, 17 S. W. 1073.

In *Dickson v. State*, 34 Tex. Cr. App. 1, 28 S. W. 815, 30 S. W. 807, it is said: "It is held in this state that the truth of an innuendo may be proven * * *. It is true, Mr. Bishop says an innuendo does not admit of being sustained by proof. * * * This is where, under the rules of criminal pleading, the circumstances necessary to explain the meaning of slanderous words are stated in the indictment by way of inducement, and the only office of the innuendo is to refer to the libelous words and facts so set forth."

C. PARTICULARITY.

1. Setting Out Defamatory Matter.

a. In General.

Literal Language.—An indictment for libel should set forth the literal language of the libel. *Coulson v. State*, 16 Tex. Cr. App. 189.

"An indictment which charges that the libel is as follows, and then sets it forth verbatim, with sufficient innuendos, alleges the libel with sufficient certainty." *Coulson v. State*, 16 Tex. Cr. App. 189, 195.

"It is sufficient to set out the words which are material, and additional words, which do not diminish or alter the sense of the words directly alleged, may be omitted. But enough must be set forth to show the sense or connection in which the words set forth were used; otherwise, there will be a variance, even if the precise words

laid are proved to have been spoken." *Squires v. State*, 39 Tex. Cr. App. 96, 45 S. W. 147, 149.

The rules upon this character of cases, namely, slander and libel, are—First, the words used, assigned for slander, must be set out in the indictment or declaration; second, so much of the language as is necessary to constitute slander must be proved, third, a variation in the form of expression is immaterial. *Barnett v. State*, 35 Tex. Cr. App. 280, 33 S. W. 340.

Obscene Language.—The laws of this state do not recognize as an exception to the general rule that the libelous matter must be set forth *hæc verba*, the omission of the literal language of the libel when it is indecently obscene. If it be such as to invite the jurisdiction of the courts of this state, however obscene, it must be properly pleaded. *Coulson v. State*, 16 Tex. Cr. App. 189.

Hypercritical Objections.—In a prosecution for libel based on the publication of a libelous pamphlet, objections that excerpts from such pamphlet included in the indictment omit quotation marks in several places, and in others use the article "a" for "the," are hypercritical and not well taken. *McArthur v. State*, 57 S. W. 847, 41 Tex. Cr. App. 635.

b. Foreign Language and Translation.

Where alleged slanderous words were spoken in a foreign language, they must be so set forth, together with a translation thereof into English. *Stichtd v. State*, 25 Tex. Cr. App. 420, 425, 8 S. W. 477.

2. Imputations of Unfitness for Office.

See ante, "Wards Imputing Unfitness for Office," II, C.

An indictment alleging that defendant published and circulated a false statement purporting to be signed by a nominee of a political party for a public office, and addressed to another party, requesting its support, and declaring that he believed in its prin-

ciples, is sufficient, though it does not allege that there is any difference between the principles and the parties, or that the principles of the other party were such as to make one dishonest by adhering thereto. *Squires v. State*, 45 S. W. 147, 39 Tex. Cr. App. 96, 73 Am. St. Rep. 904.

3. Imputations of Moral Turpitude.

If an indictment or information for criminal libel by a fair inspection, conveys the idea that the defendant has charged prosecutor with some penal offense or with such conduct as is disgraceful to him as a member of society and the natural consequence of which is to bring him into contempt among honorable persons, then it is not necessary to allege that the language in the indictment or information charged prosecutor with a penal offense or did bring him into disgrace as a member of society, the natural consequence of which was to bring him into contempt among honorable persons. *Lockhard v. State*, 43 Tex. Cr. App. 61, 63 S. W. 566.

After alleging the writing and circulation of the instrument, the indictment avers that the said statement so made was then and there a libel, etc., and, "in substance, words and figures as follows, to wit," etc. Then follows the instrument in quotation marks, and the indictment concludes as follows: "The grand jurors, upon their oath, do say that the foregoing is the language and substance and meaning of said false and malicious statement, as near as they can give," etc. Held, that notwithstanding the writing appears to be set out in *hæc verba*, the concluding part of the indictment, i. e., "the foregoing is the language and substance and meaning of said false and malicious statement as near as they can give," etc., manifests the fact that the grand jury only attempted the substance and meaning as near as they could, and not the literal language of the alleged libel, which

alone was sufficient. *Coulson v. State*, 16 Tex. Cr. App. 189.

Pointing Out Defamatory Matter.—

It is not enough for an indictment to charge that defendant published a statement concerning prosecutor affecting his reputation and honesty, setting out the publication of five or six pages; but if it is claimed that it is libelous because conveying the idea that prosecutor has been guilty of some act which is disgraceful to him as a member of society, and the natural consequence of which is to bring him into contempt among honorable persons (Pen. Code 1895, art. 727, subd. 2), the indictment should point out such part of the publication as is claimed to impute such an act, and allege that it does impute an act disgraceful to him, etc. *Nordhaus v. State* (Cr. App.), 40 S. W. 804.

Where an article is lengthy, and contains matter that is libelous with much that is not, an information setting out the article in full, and charging criminal libel against the publisher, is insufficient unless the libelous matter is singled out and the prosecution based thereon. *Jackson v. State* (Cr. App.), 77 S. W. 223.

Reference to Particular Facts.—On a trial for libel, where the words complained of by the prosecuting witness are: "I denounce him as a black-mailer, a liar, and a scoundrel; a person who is ashamed to have exposed the four years of his life previous to him coming to E. It was an unlucky moment for him when he brought the name of woman into the question"—the information must by innuendo show that they refer to some particular act disgraceful to the witness, and the natural consequence of which is to bring him into contempt. *McKie v. State*, 40 S. W. 305, 37 Tex. Cr. App. 544.

Specific Grounds of Libel.—An indictment for libel setting out that the publication, which might convey sev-

eral different meanings, was made with intent to injure prosecutor, and that it was a malicious statement concerning him, which affected his reputation, is insufficient, as it must set forth that it conveyed the idea of one or more of the specific grounds for libel mentioned in Pen. Code 1895, art. 727. *Byrd v. State*, 44 S. W. 521, 38 Tex. Cr. App. 630.

4. Imputations of Intent to Provoke Breach of the Peace.

The distinction between libel at common law and libel as defined by the Texas statute is, that libel at common law is punishable because of its tendency to provoke a breach of the peace, while under the Texas statute it is punishable as well because of its tendency to injure the reputation of a person. Such being the case, if this intent is averred, the indictment is sufficient, without the additional averment of the tendency and intent to provoke a breach of the peace. *Coulson v. State*, 16 Tex. Cr. App. 189.

5. Imputations of Unchastity.

An indictment for slandering a woman by imputing want of chastity should set out the words used. *Hammers v. State*, 13 Tex. Cr. App. 344; *Wiseman v. State*, 14 Tex. Cr. App. 74; *Conlee v. State*, 14 Tex. Cr. App. 222; *Rogers v. State*, 30 Tex. Cr. App. 462, 17 S. W. 548; *Lagrone v. State*, 12 Tex. Cr. App. 426; *Melton v. State*, 12 Tex. Cr. App. 552; *Humbard v. State*, 21 Tex. Cr. App. 200, 208, 17 S. W. 126; *Berry v. State*, 27 Tex. Cr. App. 483, 11 S. W. 521; *Barnett v. State*, 35 Tex. Cr. App. 280, 33 S. W. 340; *Simer v. State*, 62 Tex. Cr. App. 514, 138 S. W. 388.

Information for slander by imputing unchastity to a woman, should allege, at least in substance, the language used and also its meaning. *Berry v. State*, 27 Tex. Cr. App. 483, 484, 11 S. W. 521.

Indictment for slander for imputing a want of chastity to a female, setting

forth the words constituting the alleged imputation, and otherwise conforming to No. 403, of Wilson's Criminal Forms, is sufficient to charge the offense of oral slander of a female as that offense is defined in art. 645, Penal Code of Texas. *Humbard v. State*, 21 Tex. Cr. App. 200, 17 S. W. 126.

An indictment for slander, the charging part of which states that defendant at a specified time and place "did orally, falsely, maliciously, and wantonly impute to a female in this state, to-wit, G., a want of chastity, to-wit, the said [defendant] did then and there in the presence of said L. and other persons, falsely, maliciously, and wantonly say of and concerning the said G. that she, the said G. was unchaste, and that he, the said (defendant) had had carnal intercourse and carnal knowledge of her, the said G., and of and concerning the said G., did falsely speak these words, to wit: 'I (meaning himself), have been cramming her' (meaning the said G.) and then and there by the word cramming as so used meaning carnal intercourse and carnal knowledge," is sufficient. *Shaw v. State*, 28 Tex. Cr. App. 236, 12 S. W. 741.

In an information charging defendant with slander, in that he alleged that certain persons were "nothing but a set of whores" no further innuendo averment was necessary. *Roberts v. State*, 51 Tex. Cr. App. 27, 100 S. W. 150.

Allegations of an indictment held sufficient to charge the offense of slander of a female, under Penal Code, art. 645. *Patterson v. State*, 12 Tex. Cr. App. 458.

An indictment for slander, charging that defendant "did falsely and maliciously impute a want of chastity to C., by saying that one H. was monkeying with C., and doing what he pleased with her, meaning that H. was having carnal knowledge of C.," is sufficient. *Dickson v. State*, 34 Tex. Cr. App. 1, 30 S. W. 807, 53 Am. St. Rep. 694.

Under Pen. Code, art. 727, providing that the written, printed, or published statement, to come within the definition of libel, must convey the idea either "that the person to whom it refers has been guilty of some act or omission which, though not a penal offense, is disgraceful to him as a member of society, and the natural consequence of which is to bring him into contempt, or," etc., an information which charges that defendant wrote prosecutrix a letter, the substance of which was that he had seen her in an act of sexual intercourse with a man, is sufficient, without charging that the language used was calculated to bring her into disgrace, and the natural consequence of which was to bring her into contempt. *Mankins v. State*, 57 S. W. 950, 41 Tex. Cr. App. 662.

An indictment for slander of one S. charged that defendant "did, in the presence and hearing of B. and divers other persons, falsely, maliciously, and wantonly say, of and concerning the said S., that he, the said M. [defendant] had met her, the said S., in the nighttime, in the bushes, and did then and there have carnal intercourse with the said S.," etc. The witness B. testified that defendant said that "he would meet S. there at night, and 'dick' her; meaning that he would have carnal knowledge of her." Held, that the words actually spoken being obscure, the indictment should have set them out, together with the necessary innuendo. *Rogers v. State*, 30 Tex. Cr. App. 462, 17 S. W. 548.

In an indictment for slander, the accused was charged with having told B. that he had seen the prosecutrix and one L. "getting there." Held, that the expression "getting there" did not impute a want of chastity to the prosecutrix, but was susceptible of that meaning by innuendo. *Whitehead v. State*, 45 S. W. 10, 39 Tex. Cr. App. 89.

"Not a Respectable Woman."—An indictment alleging that accused imputed to a married woman that she

"was not a respectable woman," without containing innuendo averments alleging what the language meant, and that as spoken and intended it meant that she was unchaste, does not state an offense under Pen. Code 1895, art. 750, making a person falsely imputing to a female a want of chastity guilty of slander. *Woods v. State*, 58 Tex. Cr. App. 103, 124 S. W. 918.

Failure to State What Was Imputed to Female or Who She Was.—An information charged that defendant did "falsely, maliciously, and wantonly impute to a female in this state, to wit, the said [defendant] did then and there, in the presence and hearing of [two named persons], and divers other persons, falsely, maliciously, and wantonly say of and concerning the said R. that T. was keeping her, the said R., and that T. was caught on R." Held, that the information was not sufficient to support a conviction, since it failed to state, except inferentially, what was imputed to the female, or who the female was. *Neely v. State*, 32 Tex. Cr. App. 370, 23 S. W. 798.

Addressee of Letter.—In a prosecution for libel, an information alleging that defendant wrote and circulated, by depositing in the United States post office, a libelous letter affecting the reputation of the prosecutrix, is sufficient, without alleging to whom the letter was addressed, since placing the letter in the mail is sufficient publication. *Mankins v. State*, 57 S. W. 950, 41 Tex. Cr. App. 662.

Excluding Fact of Lawful Pregnancy.—An indictment for slander, in stating that prosecutrix was pregnant, is defective if it fails to exclude the fact of lawful pregnancy. *Clark v. State*, 32 Tex. Cr. App. 412, 24 S. W. 29.

Slander Concerning Two Persons.—An information charging that defendant "did impute to a female in this state, to wit, M. E. C. and T. C., a want of chastity," was not objectionable, in that it used the singular num-

ber in the first instance and then set out a slander concerning two persons. *Roberts v. State*, 51 Tex. Cr. App. 27, 100 S. W. 150.

Matters of Proof.—An information for slandering "the Denton women," naming "Nancy Miller" among others, need not show how said Miller comes to be a Denton, that being a matter of proof. *Wallace v. State* (Cr. App.), 49 S. W. 395.

D. PUBLICATION.

Presence of Hearers.—The indictment or information for slandering a woman by imputing want of chastity should not only set out the words constituting the oral slander, but should charge, further, that such words were uttered or spoken in the presence of some one; and that the better practice would be to name the persons, or some of them, to whom the words were uttered. *Wiseman v. State*, 14 Tex. Cr. App. 74, 75; *McMahan v. State*, 13 Tex. Cr. App. 220.

An indictment charging the speaking of slanderous words in the presence of a certain person "and divers other persons" can be treated as surnames of such other persons. *Lefever v. State* (Cr. App.), 49 S. W. 383.

Proof of All Names Alleged.—Under an indictment which alleged that the slanderous language was uttered to B. and divers other persons not named, it need not be proven that any one other than B. was present at the time of the publication. *Collins v. State*, 44 S. W. 846, 39 Tex. Cr. App. 30.

Article in Newspaper.—Where information for circulating a libel alleges that defendant wrote and caused to be published and circulated, a defamatory and libelous article in a newspaper, setting it out, held that it was good. *Johnson v. State*, 31 Tex. Cr. App. 456, 20 S. W. 985; *Woody v. State*, 16 Tex. Cr. App. 252, 257.

Alleging Mode of Publication.—An information for libel need not allege the publication to have been in a

newspaper in order to admit proof of such a publication. *Baldwin v. State*, 45 S. W. 714, 39 Tex. Cr. App. 245.

E. SURPLUSAGE.

An indictment for slander is not bad because it alleges that the slander was spoken in the presence of and to a certain person named, and in the presence of divers other unnamed persons, since the slander consists in the statement to the person named, and "divers other persons" can be treated as surplusage. *England v. State* (Cr. App.), 49 S. W. 379.

In a prosecution for slander, if the indictment mentions the name of more than one person in whose presence the slander was uttered the allegations must be proven, since the names then become descriptive of the offense. *Neely v. State*, 32 Tex. Cr. App. 370, 23 S. W. 798.

F. DUPLICITY.

An information charging that defendant slandered more than one person is not duplicitous. *Roberts v. State*, 51 Tex. Cr. App. 27, 100 S. W. 150.

An information for slander in stating that four certain women were lewd is not bad as charging four slanders. *Wallace v. State* (Cr. App.), 49 S. W. 395.

G. VARIANCE.

Proof Must Correspond to Allegation.—"It being necessary that the slanderous words should be substantially alleged, it follows that they must be substantially proved. This means that the essential, important, material portion of the slander as alleged must be proved. All the words alleged need not be proved, but enough of them must be proved as laid to constitute the offense. It will not do to allege one imputation and prove another. Proof must correspond with allegation." *Simer v. State*, 62 Tex. Cr. App. 514, 138 S. W. 388; *Frisby v. State*, 26

Tex. Cr. App. 180, 9 S. W. 463; *Conlee v. State*, 14 Tex. Cr. App. 222; *Hum-bard v. State*, 21 Tex. Cr. App. 200, 17 S. W. 126; *Berry v. State*, 27 Tex. Cr. App. 483, 11 S. W. 521; *Riddle v. State*, 30 Tex. Cr. App. 425, 17 S. W. 1073; *Rogers v. State*, 30 Tex. Cr. App. 462, 17 S. W. 548; *Barnett v. State*, 35 Tex. Cr. App. 280, 33 S. W. 340; *West v. State*, 44 Tex. Cr. App. 417, 71 S. W. 967; *Kelley v. State*, 51 Tex. Cr. App. 151, 101 S. W. 230, 231; *Hasley v. State*, 57 Tex. Cr. App. 400, 123 S. W. 596; *Adams v. State*, 62 Tex. Cr. App. 426, 138 S. W. 117.

Where an indictment for slander, in violation of Pen. Code 1895, art. 750, for imputing to a female a want of chastity, specifically selected the imputation and charged it, the state was bound thereby as to the imputation, and the court could not permit the jury to convict accused for the imputation of want of chastity otherwise than as alleged. *Woods v. State*, 58 Tex. Cr. App. 103, 124 S. W. 918.

Words of Equivalent and Similar Import.—"The words alleged can not be proved by showing that the defendant published the same meaning in different words, even if equivalent and of similar import. * * * Proof of words spoken in the second person, will not support counts for words spoken in the third person and vice versa. Proof of a positive assertion is not admitted under an allegation of a hypothetical assertion." *Barnett v. State*, 35 Tex. Cr. App. 280, 33 S. W. 340.

Additional Language.—"There is no variance where the language imputed is proved, and, in addition thereto, other language is used not varying the same, or the meaning of that which was alleged." *Kelley v. State*, 51 Tex. Cr. App. 151, 101 S. W. 230. See *Gipson v. State* (Cr. App.), 77 S. W. 216; *Roberts v. State*, 51 Tex. Cr. App. 27, 100 S. W. 150; *Whitehead v. State*, 39 Tex. Cr. App. 89, 45 S. W. 10; *Lefever v. State* (Cr. App.), 49 S. W. 383;

Squires v. State, 39 Tex. Cr. App. 96, 45 S. W. 147.

There was no variance between the language, "— is a whore, and I can prove it," in an indictment for slander, and the language, "— is a dirty whore, and I can prove it, and is the cause of my wife leaving me," proven on the trial. *Kelley v. State*, 51 Tex. Cr. App. 151, 101 S. W. 230.

Idem Sonans.—There is no variance between indictment for slander alleging the name of the injured female to be July Chambliss and proof that her name is Julia Chambliss for July and Julia are idem sonans. *Dickson v. State*, 34 Tex. Cr. App. 1, 4, 28 S. W. 815, reversed on another point in 30 S. W. 807.

Omission of Sentence.—Since it is only necessary, in a prosecution for libel, to prove substantially the words alleged, the fact that the indictment omits a sentence from its quotation of the libelous matter does not constitute a variance, where such omission does not alter the meaning of the matter quoted. *McArthur v. State*, 57 S. W. 847, 41 Tex. Cr. App. 635.

In a prosecution for libel, the fact that the title-page of the libelous pamphlet, as set out in the indictment, omits the phrase, "For sale by N. J. McArthur, Austin, Texas," does not constitute a variance. *McArthur v. State*, 57 S. W. 847, 41 Tex. Cr. App. 635.

Misuse of Words.—The use of the word "bubbledupes" in an indictment for libel, where the pamphlet which is alleged to be libelous used the word "bubbledupe," does not constitute a variance between the indictment and the pamphlet. *McArthur v. State*, 57 S. W. 847, 41 Tex. Cr. App. 635.

Variance between English and German Words.—There is a fatal variance where an indictment alleges that the slanderous words were spoken in English, while the proofs show that they were spoken in German. *Stichtd v.*

State, 25 Tex. Cr. App. 420, 8 S. W. 477, 8 Am. St. Rep. 444.

Presence of Parties.—Where an information for slander recites that it was uttered in the presence and hearing of two persons named, proof that it was uttered in the presence of the parties named, but not in the presence of both at the same time, is insufficient. *Knight v. State* (Cr. App.), 49 S. W. 383.

There is a fatal variance between a complaint and an information for slandering a female where the former alleges that the words were spoken in the presence of G. and others, and the latter that they were spoken in the presence of P. and others. *Davis v. State* (Cr. App.), 22 S. W. 979.

Variance between Indictment and Words Imputing Want of Chastity.—There is no material variance between an indictment charging that defendant stated he had intercourse with prosecutrix, and evidence that he said he and another had intercourse with her. *Gipson v. State* (Cr. App.), 77 S. W. 216.

Under an indictment for slander, alleging that defendant said that he had carnal intercourse with a named woman, the admission of evidence that he said that he had a good time, or had a time with her, constitutes a fatal variance. *Hasley v. State*, 57 Tex. Cr. App. 400, 123 S. W. 596.

There was a variance, where the information charged accused with saying that B. was a woman of bad character, and had at some time been an inmate of a house of ill fame, and the proof was that accused, without mentioning names, asked witness if he "thought Mr. J., if he knew it, would let a woman stay at his house who was all wrong, or all out of order, and who was a whore," etc. *Dobbs v. State*, 55 Tex. Cr. App. 483, 117 S. W. 799.

In a prosecution for slander, defendant was charged with saying that

"C.'s folks (meaning thereby the said M. E. C. and T. C., wife and daughter, respectively, of C.) are nothing but a set of whores." The evidence showed that the language used was to the effect that C.'s folks, except one of his married daughters, who was named, were nothing but a set of whores. It also appeared that C. had several married daughters who were not excepted in defendant's remarks. Held, that there was a variance. *Roberts v. State*, 51 Tex. Cr. App. 27, 100 S. W. 150.

An information charged slander by saying that a woman "was in the family way, meaning thereby that she was with child, and that he believed her brother H. was the father of the child." It was proved that defendant had said that there was something wrong with the woman, and if his eyes did not deceive him "she was in that condition;" also, again, that it was reported that she was in a family way, and it was reported that her brother was the other party concerned. Held, that the slander, as alleged in the information, was not proved. *Berry v. State*, 27 Tex. Cr. App. 483, 11 S. W. 521.

A variance exists between an indictment for slander, charging accused with having stated, "in substance, as follows, 'I saw E. having intercourse with C. in your pasture,'" and evidence that accused said, "C. and E. came out in the pasture, and he done it to her right there. He played with her about half an hour." *West v. State*, 71 S. W. 967, 44 Tex. Cr. App. 417.

An indictment for slandering a female, under Pen. Code, § 645, by falsely imputing to her want of chastity, charging the language used as that "she was unchaste, and not virtuous," and that defendant "could at any time have carnal intercourse with her, if he could get her to a private, secluded place," is not sustained by proof that defendant said that "the whole M. family [to which she belonged] were whores," and that "on

one occasion he could have had carnal intercourse with her if he had had an opportunity." *Frisby v. State*, 26 Tex. Cr. App. 180, 9 S. W. 463.

An information for slander, charging defendant with saying that a certain woman was not virtuous, and that he had seen her at the back of a certain field in company with three men, is not sustained by testimony that defendant had said that he had seen her at the back of a certain field with three men named, but did not say that she was not virtuous. *Riddle v. State*, 30 Tex. Cr. App. 425, 17 S. W. 1073.

Slandorous words alleged in an indictment were that defendant had had carnal intercourse with Miss F. B., and that the character of Miss F. B. was bad. The proof was that defendant said to the witness that she, Miss F. B., "would have been a nice girl if he, defendant, had not done what he had done to her; and if he, the witness, did not believe it, to meet defendant at the gin house that night, and he, defendant, would prove it." Held, that there was a fatal variance between the allegata and the probata. *Conlee v. State*, 14 Tex. Cr. App. 222.

Where the indictment for slander alleged that the words used by defendant were that "C. and W. had knocked the said Nona M. up and had left the country and that O. was keeping them posted," while the proof was that he said that "C. & W. had knocked the M. girls up, and had left the country and that O. was keeping them posted," there was a fatal variance. *Simer v. State*, 62 Tex. Cr. App. 514, 138 S. W. 388.

Proof that defendant said that prosecutrix "is not a decent lady" was no proof that he stated that she was a whore. *Tippens v. State* (Cr. App.), 43 S. W. 1000.

On a trial for slander by imputation of unchastity proof that a witness stated that immoral relations existed between H. and "Becky Jane" does not

support an indictment for slander of R. J. H., there being no proof that "Becky Jane" was R. J. H. or that the latter was called "Becky Jane." *Humbarb v. State*, 21 Tex. Cr. App. 200, 209, 17 S. W. 126.

IX. TRIAL.

A. EVIDENCE.

1. Presumption and Burden of Proof.

a. Chastity.

See, generally, the titles EVIDENCE, vol. 2, p. 324; TRIAL.

Since the law presumes every woman to be chaste, the legislature has power to dispense with proof on the part of the state showing the falsity of a slanderous imposition of want of chastity. *Lagrone v. State*, 12 Tex. Cr. App. 426; *Shaw v. State*, 28 Tex. Cr. App. 236, 238, 12 S. W. 741.

It is not error in a prosecution for slander to charge, in the language of the statute, that the law presumes the chastity of every woman. *Collins v. State*, 44 S. W. 846, 39 Tex. Cr. App. 30.

Burden of Proof.—Burden of proof that general reputation of female for chastity is bad is upon defendant. *McMahan v. State*, 13 Tex. Cr. App. 220.

Proof Required.—In a prosecution for slander of a female it is not necessary for defendant, in order to entitle himself to an acquittal on the ground of the female's general reputation, to prove beyond a reasonable doubt that her reputation for chastity is bad. *Ballew v. State*, 85 S. W. 1063, 48 Tex. Cr. App. 46; *Manning v. State*, 37 Tex. Cr. App. 180, 39 S. W. 118.

b. Malice.

In a prosecution for slander, where the state proves the speaking of the words and their falsity, the jury may infer that they were maliciously spoken. *England v. State* (Cr. App.), 49 S. W. 379.

When libelous matter is printed or published, malice or intent to injure is presumed, and the burden is upon the party charged to show that the utter-

ance or publication was made under such circumstances as to bring it within the class of privileged communications. *Smith v. State*, 32 Tex. 594, 597.

But see *McMahan v. State*, 13 Tex. Cr. App. 220, 223, where it is said that, in a prosecution for slander, the state must show that imputation was wantonly or maliciously made.

c. Time.

Failure to prove the time of the offense is a fatal error. *Stichtd v. State*, 25 Tex. Cr. App. 420, 8 S. W. 477, 8 Am. St. Rep. 444.

2. Admissibility.

a. In General.

Propositions for Compromise.—On a trial for slander, it is harmless error to allow a witness for the state to testify that he had a conversation with defendant for the purpose of effecting a compromise. *Whitehead v. State*, 39 Tex. Cr. App. 89, 92, 45 S. W. 10.

Silence of Defendant.—On a trial for slander the state has a right to prove by a witness that when defendant uttered the slander complained of the witness told him that he, the witness, had been his friend but that he would have to quit him, that he thought he was very wrong, and if defendant remains mute same is evidence against him. *Kelly v. State*, 37 Tex. Cr. App. 641, 642, 40 S. W. 803.

Copy Charged Not Identical Copy Seen.—Where defendant was charged with having published a libelous pamphlet, evidence that certain witnesses had seen the pamphlet was not inadmissible because the pamphlet they had seen was not the identical copy the publication of which was charged on the information. *Lockhard v. State*, 63 S. W. 566, 43 Tex. Cr. App. 61.

Statements Subsequent to Institution of Prosecution.—Where defendant was charged with having published a libelous pamphlet, evidence that a witness had seen a pamphlet which was an exact copy thereof, and heard de-

fendant make a statement concerning it, was not inadmissible because the pamphlet was seen and the statement made after the time of publication as alleged in the information. *Lockhard v. State*, 63 S. W. 566, 43 Tex. Cr. App. 61.

Expulsion from Church.—Evidence as to the trial and expulsion of defendant from a church for uttering the alleged slanderous words is inadmissible in a criminal prosecution against him therefor. *Tippens v. State* (Cr. App.), 43 S. W. 1000.

Other Slanderous Statements Made to Witness and Latter's Comments Thereon.—Evidence of other slanderous statements made by accused to a witness for the state, together with what the witness had stated with reference to such statements to third persons, was inadmissible, though accused claimed that the case had been worked up by the witness. *Kyle v. State*, 53 Tex. Cr. App. 357, 116 S. W. 596.

Matters Not Charged in Libel.—On a prosecution for libel charging witness with gross immoralities, in that he was a man who dared to invade the society of reputable people while evil women visited his place of business with unpaid bills for services sold and delivered, and appealing to respectable people to aid the paper in which the libel appeared in its crusade against scamps, scoundrels, rascals, seducers to protect female virtue of the city, evidence that libelee was a terror to houses of prostitution was not admissible, there being no such charged in the libel. *Johnson v. State*, 31 Tex. Cr. App. 456, 20 S. W. 985.

Prior Suits.—On a prosecution for libel charging witness with gross immoralities in that he was a man who dared to invade the society of reputable people while evil women visited his place of business with unpaid bills for services sold and delivered, and appealing to respectable people to aid the paper in which the libel appeared in its crusade against scamps, scoun-

dreels, rascals, seducers to protect female virtue of the city, evidence that a suit or suits had been commenced by one of such evil women against the libelee and as to whether such suit had been compromised, was immaterial. *Johnson v. State*, 31 Tex. Cr. App. 456, 20 S. W. 985.

Statements by Third Parties Not Introduced as Witnesses.—On a trial for slander, evidence is properly excluded of statements by third parties not introduced as witnesses for the state nor shown to have acted with the prosecution. *Collins v. State*, 39 Tex. Cr. App. 30, 32, 44 S. W. 846.

Evidence as to Things Not in Issue.—Where, in a prosecution for libel, the person alleged to have been libeled is not a witness, and his reputation for truth and veracity is not in issue, it is proper to exclude evidence of his bad reputation in these respects. *McArthur v. State*, 57 S. W. 847, 41 Tex. Cr. App. 635.

The gravamen of a libel charged against the accused consisted of defamatory matter accusing one B. of embezzlement, and denouncing him as a person of notoriously bad and infamous character. On the trial, the accused was not allowed to ask his witnesses whether they knew B.'s general character. Held, that, under art. 643, Penal Code, the question should have been allowed as a legitimate introduction of proof showing it to be true that B. was a person of notoriously bad or infamous character. But if the accusation of embezzlement had been the only libelous matter charged, the question would not have been competent in so general a form. *Leader v. State*, 4 Tex. Cr. App. 162.

Financial Condition of Father.—In a prosecution for slandering a female, admitting evidence that her father was a renter, and had a wife and four children, is not ground for reversal. *Bowers v. State*, 45 Tex. Cr. App. 185, 75 S. W. 299.

b. Meaning of Words.

Facts and Circumstances.—On a trial for criminal slander, it is competent to prove facts and circumstances attending speaking of the words, relations of the parties and other portions of conversation, to determine in what sense the words were used. *Dickson v. State*, 34 Tex. Cr. App. 1, 28 S. W. 815, 30 S. W. 807.

Meaning Attached by Witness.—On a criminal trial for slander, it was error to permit a witness who heard the slanderous words to testify what he understood them to mean. *Dickson v. State*, 34 Tex. Cr. App. 1, 30 S. W. 807, reversing in 28 S. W. 815, 15 Am. St. Rep. 694.

In a prosecution for slander by imputing to a female want of chastity, it was error to permit a state's witnesses to testify that he understood defendant to mean by the words "that condition," that the female was in the family way. *Berry v. State*, 27 Tex. Cr. App. 483, 11 S. W. 521.

Where There Can Be Only One Meaning.—In a prosecution for slander, where the meaning of the language used was so manifest that it could have but one significance, it is not error to permit the witness to whom it was uttered to state what he understood the defendant to mean by the language used. *Collins v. State*, 44 S. W. 846, 39 Tex. Cr. App. 30; *Dickson v. State*, 34 Tex. Cr. App. 1, 28 S. W. 815, 30 S. W. 807, 808.

c. Intent and Malice.

Evidence showing the intent in making the imputation is admissible. *McMahan v. State*, 13 Tex. Cr. App. 220, 223.

Same or Similar Language.—"The same language or like language may be proved to have been spoken to another or others at a different time and place for the purpose of showing the motive and intent of the appellant in using the language charged to the person in the information or indictment;

but that such language spoken to other persons at a different time and place can not be used for any other purpose or, in other words, that the defendant can not be convicted upon speaking the same language to another person at a different time and place when not so charged in the indictment or information." *Adams v. State*, 62 Tex. Cr. App. 426, 138 S. W. 117, 118; *Knight v. State* (Cr. App.), 49 S. W. 383; *Collins v. State*, 39 Tex. Cr. App. 30, 44 S. W. 846; *Neely v. State*, 32 Tex. Cr. App. 370, 23 S. W. 798; *McMahan v. State*, 13 Tex. Cr. App. 220.

In a prosecution for slander, statements made by defendant at the same time, or shortly before or after, those charged in the indictment, are admissible to show intent. *Stayton v. State*, 78 S. W. 1071, 46 Tex. Cr. App. 205, 108 Am. St. Rep. 988; *Whitehead v. State*, 39 Tex. Cr. App. 89, 92, 45 S. W. 10.

In a prosecution for slander, statements made by defendant at different times, similar to those alleged in the indictment to have been made by him about the same time, were admissible. *Manning v. State*, 39 S. W. 118, 37 Tex. Cr. App. 180.

But in *McArthur v. State*, 41 Tex. Cr. App. 635, 637, 57 S. W. 847, it is said: Where, in a prosecution for libel, the state had offered proof of the declarations of defendant as to his motives in writing and publishing the libelous matter, it was not error to exclude proof of other declarations of defendant, which were not a part of the conversations and declarations introduced by the state.

Entire Paper.—The whole of a paper containing an alleged libel may be admitted in evidence when it is part of the same transaction, and, in connection with the libelous matter, would indicate the animus of defendant. *Byrd v. State*, 44 S. W. 521, 38 Tex. Cr. App. 630.

Improper Relations.—In a prosecution for slander consisting of an im-

putation of nonchastity to an unmarried female, evidence of improper relations with C was admissible on the issue of the intent of accused in uttering the alleged slander, i. e., whether he did so maliciously, wantonly, or with good reason to believe its truth. *Duke v. State*, 19 Tex. Cr. App. 14.

Corroboration of Statement of Friend.—Evidence that defendant's friend had said that defendant and the female alleged to have been slandered had been carnally intimate and that defendant made the alleged slanderous statement, in corroboration of his friend's statement, to save him from threatened violence, is inadmissible, as it has no tendency to rebut the inference of malice in defendant, or that he made the imputation wantonly. *Shaw v. State*, 28 Tex. Cr. App. 236, 12 S. W. 741.

General Rumor as to Reputation.—On an indictment for slander, under Pen. Code, art. 645, in imputing want of chastity to one R. J. Huckaby, an unmarried female, evidence that for three years, the report had been current in the neighborhood where the parties lived that a criminal intimacy existed between plaintiff and Ras. Huffman is admissible to show whether defendant uttered the alleged slander maliciously, or whether he believed it to be true. *Humbard v. State*, 21 Tex. Cr. App. 200, 17 S. W. 126.

General Rumor as to Specific Facts.—Evidence of the general rumor and conversation in the neighborhood in regard to the specific acts charged in the alleged libel is inadmissible to show want of malice in the publication. *Baldwin v. State*, 45 S. W. 714, 39 Tex. Cr. App. 245.

d. Imputations of Unchastity.

Where Imputation Is General.—Where imputation is general, defendant in a trial for slander may show in justification any succession of specific acts tending to establish truth of imputation or from which the jury might

find imputation to be true. *Wagner v. State*, 17 Tex. Cr. App. 554, 558.

In a trial for slander, where gravamen of the charge is that defendant, by words used, imputed want of chastity to prosecutrix and that he did so maliciously and wantonly, any evidence showing want of chastity in prosecutrix would be competent. *Van Dusen v. State*, 34 Tex. Cr. App. 456, 459, 30 S. W. 1073.

Reputation or Specific Acts.—In a trial for slander, that the woman is "a whore" may be proven by general reputation, or by evidence that she practiced unlawful sexual commerce with men. *Wagner v. State*, 17 Tex. Cr. App. 554, 558.

Prior Acts of Intercourse.—On a prosecution for slander, imputing to a woman want of chastity, evidence of distinct acts of unlawful commerce with men prior to the slander is admissible. *Van Dusen v. State*, 34 Tex. Cr. App. 456, 30 S. W. 1073; *Wagner v. State*, 17 Tex. Cr. App. 554, 558.

On a prosecution for slandering an innocent woman by charging her with a specific act of sexual intercourse, evidence as to prior acts of sexual intercourse between her and her paramour is admissible, as tending to prove truth. *Wood v. State*, 32 Tex. Cr. App. 476, 24 S. W. 284.

On a prosecution for slander, by charging an innocent woman with sexual intercourse, evidence that she has committed prior acts of sexual intercourse is admissible because it proves that she had ceased to be of chaste character, and was, therefore, not the subject of slander. *Wood v. State*, 32 Tex. Cr. App. 476, 24 S. W. 284.

In an indictment for calling an unmarried woman a whore, evidence that she has had unlawful carnal intercourse with another, while not complete proof of the charge, is admissible as tending to prove the charge. *Duke v. State*, 19 Tex. Cr. App. 14.

On the trial of an indictment for slandering a woman by calling her a whore, it is error to exclude the testimony of three persons to the effect that they told defendant that the woman to their knowledge had had illicit intercourse with one A. *Duke v. State*, 19 Tex. Cr. App. 14.

In a trial for slander where the alleged slander consisted in defendant's statement that he had caught a venereal disease from the prosecutrix, it is error to exclude testimony of a witness showing that they had had carnal intercourse with the prosecutrix prior to the alleged slander. *Van Dusen v. State*, 34 Tex. Cr. App. 456, 459, 30 S. W. 1073.

Error of Exclusion Cured by Verdict.—Where, in a prosecution for slandering M., the words uttered incidentally involved the chastity of P., it was not error to exclude evidence that P.'s general reputation for chastity was bad, where the jury were not actuated by what was said about P., and found the least punishment for slandering the prosecutrix. *Collins v. State*, 44 S. W. 846, 39 Tex. Cr. App. 30.

Intention to Enter House of Ill-Fame.—On a prosecution for saying of a woman that she was a whore, and was in a certain whorehouse, evidence that she had consulted with a witness as to the advisability of her entering said house was admissible for the defense. *McMahan v. State*, 13 Tex. Cr. App. 220.

Want of Chastity.—Proof that prosecutrix has lived in adulterous intercourse with a man whom she afterward married, would not tend to establish that she is a whore, and hence, is properly excluded in a trial for slander where imputation of want of chastity in prosecutrix consisted in defendant's assertion that she was "a whore." *Wagner v. State*, 17 Tex. Cr. App. 554, 558; *Duke v. State*, 19 Tex. Cr. App. 14.

Limitation of Proof.—One indicted

for slandering an unmarried female by imputing to her a want of chastity may justify by proving the truth of the particular imputation made by him, or by proving that her general reputation for chastity at the time the slander was uttered by him was bad; but he can not be permitted to prove any other acts or conduct imputing a want of chastity, except those specifically embraced in the imputation made by him. *Patterson v. State*, 12 Tex. Cr. App. 458; *Wagner v. State*, 17 Tex. Cr. App. 554, 558.

Social Standing of Prosecutrix.—Admission of evidence, on a trial for slander in charging prosecutrix with unchastity, as to how prosecutrix was treated and received in society at the time of the trial, is error. *Gipson v. State* (Cr. App.), 77 S. W. 216.

Permitting witnesses to state how they regarded the character of prosecutrix at the time of the trial, and to testify that their families associated with and received her, as did the neighbors, on terms of social equality, state's counsel remarking on the objection thereto that it was admissible to show that prosecutrix was so received notwithstanding the slanderous reports, whereby the good people said they did not believe them, and that he believed in the doctrine "Vox populi, vox Dei," was aggravated error. *Bowers v. State*, 75 S. W. 299, 45 Tex. Cr. App. 185.

Bad Reputation in Former Home.—In a prosecution for the slander of a female who has lately moved from one place to another, defendant is entitled to the benefit of the female's bad reputation in the neighborhood from which she came, as well as in that in which she is living. *Ballew v. State*, 85 S. W. 1063, 48 Tex. Cr. App. 46.

On a prosecution for slander of an unmarried female under the statute allowing defendant in justification to show the truth of the imputation and the general reputation for chastity of

the female, evidence of her reputation for chastity in another county, from which she removed six months before the perpetration of the alleged slander, is admissible. *Crane v. State*, 30 Tex. Cr. App. 464, 17 S. W. 939.

Subsequent Good Reputation.—In a prosecution for slander in accusing a female of unchastity, evidence that at the time of the trial, about a year later, prosecutrix's reputation for chastity was good, is inadmissible to show that the slander was discredited, and so indirectly impeach defendant's witnesses, who testified to acts and conduct indicating prosecutrix's unchastity. *Bowers v. State*, 75 S. W. 299, 45 Tex. Cr. App. 185.

Same Statements at Different Time and Place.—On prosecution for words falsely and maliciously imputing a want of chastity to a married woman, alleged to have been spoken in the presence of W., it was error to permit R. to testify that defendant made to him, at a different time and place, substantially the same statement alleged to have been made to W. *Porter v. State* (Cr. App.), 107 S. W. 817.

Statements Concerning Another Female.—In a criminal prosecution for slander by imputing to prosecutrix a want of chastity, evidence that defendant had said of a certain other female that "she had been pregnant a time or two" was inadmissible. *Tipens v. State* (Cr. App.), 43 S. W. 1000.

Statements by Defendant Concerning Slander Uttered by Another.—On a prosecution for slander, the state was permitted to prove by another witness and by defendant that when one G. had uttered a slanderous statement relative to the same girl, the defendant said that G. should not have said it and that if he were the girl's father he would shoot G. and that if he had a girl and a man should make such statement about her, he would hurt him. Held, that this was not a confession and was not pertinent to

the case and was prejudicial. *Bowers v. State*, 45 Tex. Cr. App. 185, 75 S. W. 299.

Statements of Others Subsequent to That of Defendant.—Where defendant, in a prosecution for slander, had stated that he had had sexual intercourse with the prosecutrix, it was proper to reject evidence that others had made the same statement; it appearing their statements were subsequent to that of the defendant. *Jackson v. State*, 60 S. W. 963, 42 Tex. Cr. App. 497.

Altercation by Defendant's Brother.—On a trial for slander, for charging C. with adultery with P., the state introduced, under objection, evidence of an altercation between defendant's brother and P. Held, that the admission of this testimony, the defendant not being shown to be connected with it, was reversible error. *Perry v. State* (Cr. App.), 20 S. W. 916.

Suspicious of Witness.—On a trial for slander, where defendant pleads the truth of his alleged slanderous statement that he had had carnal intercourse with prosecutrix, the testimony of a school teacher, whose school the prosecutrix and defendant attended a year before the prosecution, that he noticed acts of marked attention between them which aroused his suspicion, and caused him to warn defendant to be more circumspect in his conduct toward the prosecutrix, was too remote and indefinite to show improper relations between them. *Bowen v. State* (Cr. App.), 18 S. W. 464.

Opinion of Witness.—In a prosecution for slander, an offer to prove by a witness that he believed, from the manner and statements made by defendant in conversation about the alleged slander, that defendant had really seen some parties in the act of carnal intercourse, and believed they were the prosecutrix and one L., was not admissible. *Whitehead v. State*, 45 S. W. 10, 39 Tex. Cr. App. 89.

Hearsay.—Testimony by a witness,

in a criminal prosecution for slander, that he had traced the reports which he had heard concerning prosecutrix to defendant, was objectionable, as hearsay, where he had obtained his information from some one other than defendant. *Tippens v. State* (Cr. App.), 43 S. W. 1000.

In a prosecution for slander in charging a brother and sister with incestuous intercourse, accused's testimony that his wife told him that the sister had told her she was pregnant, and confessed to the intercourse, is inadmissible. *West v. State*, 44 Tex. Cr. App. 417, 71 S. W. 967.

Evidence beyond the Issues.—On a trial for imputing to an unmarried female a want of chastity, and that she had gone to a town to submit to an abortion, the testimony of a witness that she had seen nothing in prosecutrix's actions at that town indicating that she was not a virtuous woman was inadmissible, because beyond the issues. *Richmond v. State*, 58 Tex. Cr. App. 435, 126 S. W. 596.

3. Weight and Sufficiency.

Failure to Deny Truth of Statements.—A conviction of slandering a chaste woman is not sustained where she did not deny the testimony of several men that they had had carnal intercourse with her, though she bore a reputation for chastity before defendant accused her of unchastity. *Lefever v. State* (Cr. App.), 49 S. W. 383.

Obscene Language.—Obscene language referring only to the fact that a man and woman were in the habit of riding together in a single sulky, and not intended to charge that they were guilty of criminal intimacy, is not slander. *Hix v. State* (Cr. App.), 20 S. W. 550.

Proof of One of Several Allegations.—An indictment for libel in publishing that one of the conductors of a certain railroad caused a lady to be thrown to the ground while alighting from a street car, and imputing to all the con-

ductors of such road disgraceful acts, the nature and consequence of which were to bring them into contempt, and which attributed to said conductors infamous characters, was sustained on proof of any of the allegations. *Jones v. State*, 43 S. W. 78, 38 Tex. Cr. App. 364, 70 Am. St. Rep. 751.

Statements Not Understood by Hearers to Be Slanderous.—An innuendo in an information for slander, explaining the words spoken as meaning that the person mentioned was at a certain place for the purpose of carnal intercourse, is not proven where it does not appear that the impression received by the hearers was that she was at the place for such purpose. *Riddle v. State*, 30 Tex. Cr. App. 425, 17 S. W. 1073.

B. QUESTION FOR JURY.

See, generally, the titles JURY, ante, p. 110; TRIAL.

Selection of Jury.—In a prosecution for libel, there is no error in overruling defendant's motion to have the jury commissioners appointed to select a jury by which he was to be tried. *Johnson v. State*, 31 Tex. Cr. App. 456, 462, 20 S. W. 985.

Province of Court and Jury.—Const., art. 1, § 8, and Pen. Code 1895, art. 748, requiring the jury to determine the law and the facts under the direction of the court in all indictments for libel, authorize the court to determine whether the matters alleged to be libelous are within the statutory definition. *Squires v. State*, 45 S. W. 147, 39 Tex. Cr. App. 96, 73 Am. St. Rep. 904.

Where defendant, in an indictment for slander in declaring that he had carnal intercourse with the prosecutrix, admitted the words spoken, and alleged their truth, and the prosecutrix denied them, and there was testimony which tended strongly to corroborate both sides, it was a question for the jury, and their determination will not

be disturbed on appeal. *Bowen v. State* (Cr. App.), 18 S. W. 464.

The jury is made by the criminal code the triers of the questions, both of the malice an intent to injure and of the publication. *Smith v. State*, 32 Tex. 594, 599.

Construction of Words.—In a trial for slander, it is the duty of the jury to construe plain words and clear allusions to matters of universal notoriety according to their obvious meaning, and as everyone who reads them must understand them. *Dickson v. State*, 34 Tex. Cr. App. 1, 5, 28 S. W. 815, 30 S. W. 807.

Satisfaction as to Meaning of Words.—To convict of slander, the jury must be satisfied that the meaning of the words as used is what it is charged to be. *Dickson v. State*, 34 Tex. Cr. App. 1, 4, 28 S. W. 815, 30 S. W. 807.

C. INSTRUCTIONS.

Propriety of Instructions.—Under Pen. Code, art. 748, constituting the jury in libel cases the judges of both the law and the facts under the direction of the court, it is not intended that they shall construe the law without direction from the court, and hence, in such cases, it is proper to instruct them. *McArthur v. State*, 57 S. W. 847, 41 Tex. Cr. App. 635.

Instructions to Acquit.—A charge of the court in a trial for slander that "if the jury believe the defendant not guilty, they will acquit him," in effect instructs the jury that they must find the defendant guilty unless they believe from the evidence that he was innocent, and is error. *Wagner v. State*, 17 Tex. Cr. App. 554, 559.

Definition of Slander.—In a prosecution for slander by imputing to a woman a want of chastity, a requested charge that, in order to convict, the jury must believe beyond a reasonable doubt not only that the alleged false words were uttered by defendant, but that such words were uttered maliciously or wantonly; that the expres-

sion "maliciously" meant that the words were so uttered as to imply an evil intent or legal malice, or without reasonable grounds for believing that they were true, or that the woman had a bad reputation for chastity, or was unchaste; and that the expression "wantonly" meant that the words were uttered regardless of consequences, in a reckless manner, or under such circumstances as evinced a wicked and mischievous intent, and without excuse—should have been given, as it is a part of the statutory definition of slander. *Rainwater v. State*, 81 S. W. 38, 46 Tex. Cr. App. 496.

In a prosecution for slander, a charge giving to the jury in the alternative the terms "falsely and maliciously," or "falsely and wantonly," and authorizing a conviction in case defendant used expressions in either sense, being the language of the statute, was correct; and the fact that the indictment charged that defendant used the language falsely and maliciously and wantonly did not change the rule. *Kelley v. State*, 51 Tex. Cr. App. 151, 101 S. W. 230.

Special Charge Covered by General Charge.—In a prosecution for slander an instruction requiring the jury to find beyond a reasonable doubt that the alleged slanderous utterance was made to B. before they could find defendant guilty sufficiently excluded the idea that the jury could convict defendant if he uttered the slander to others on a different occasion, and, therefore, a request for a special charge negating liability in case the utterance was made to persons other than B. was properly refused. *Collins v. State*, 39 Tex. Cr. App. 30, 44 S. W. 846.

In a prosecution for slander, in charging a brother and sister with incestuous intercourse, accused admitted the statement alleged, and also testified that he had seen the act of intercourse referred to. Held, that a re-

quested instruction that, if accused had good reason to believe his statement true, the jury should acquit, was sufficiently covered by an instruction that if the statement was true, or its truth in reasonable doubt, they should acquit. *West v. State*, 44 Tex. Cr. App. 417, 71 S. W. 967.

As to Purpose of Evidence.—In a prosecution for slander, in which statements made by defendant at nearly the same time as those charged are introduced to show intent, an instruction as to the purpose of such evidence should be given. *Stayton v. State*, 78 S. W. 1071, 46 Tex. Cr. App. 205, 108 Am. St. Rep. 988.

Instructions Not in Accord with Indictment.—On trial on an indictment

charging defendant with having slandered prosecutrix in the presence of B. and other persons, an instruction that the jury might convict him if he made such statements to other persons besides B. and others was erroneous. *Tippens v. State* (Cr. App.), 43 S. W. 1000.

Submitting Case on Wrong Theory.—Where a publication is libelous only as calculated to bring the person referred to into contempt, but not as representing him to be unworthy of holding public office, it is reversible error to submit the case to the jury on the latter theory. *Squires v. State*, 45 S. W. 147, 39 Tex. Cr. App. 96, 73 Am. St. Rep. 904.

LICENSES.

BY MINOR BRONAUGH.

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CROSS REFERENCES.

See the titles ATTORNEY AND CLIENT, vol. 1, p. 569; CONSTITUTIONAL LAW, vol. 2, p. 9; DRUGGISTS, vol. 2, p. 266; HAWKERS AND PEDDLERS, vol. 3, p. 473; INTOXICATING LIQUORS, vol. 4, p. 633.

As to legality of betting on pool games played on duly licensed tables, see the title GAMING, vol. 3, p. 353.

I. Nature and Object.

Taxes upon occupations are not taxes on property within the meaning of the constitution, "all property is taxed in proportion to its value." *Aulanier v. Governor*, 1 Tex. 653, 665.

The primary object of the act of March 13, 1875, is to secure payment of the tax, enforcement of the penalty being merely auxiliary. *Munch v. State*, 3 Tex. Cr. App. 552, 555.

It is not to be supposed that the legislature intended, by the act imposing license on bowling alleys, to punish criminally any of the sources from which revenues are derived. *Chiles v. State*, 1 Tex. Cr. App. 27, 32.

The fees imposed by a city to pay the cost of necessary inspection of the installation of electrical appliances inside and outside of buildings in the city are not taxes within Const., art. 8, § 1, providing that persons engaged in mechanical and agricultural pursuits shall not be required to pay an occupation tax. *Ex parte Cramer*, 62 Tex. Cr. App. 11, 136 S. W. 61.

II. Power to Impose Licence Tax.

A. IN GENERAL.

The constitution gives the state power to impose occupation taxes. *Ex parte Slaren*, 3 Tex. Cr. App. 662, 666; *Fahey v. State*, 27 Tex. Cr. App. 146, 160, 11 S. W. 108; *Blessing v. Galveston*, 42 Tex. 641, 660; *Ex parte Gregory*, 1 Tex. Cr. App. 753, 756.

The constitution empowers the legislature to impose a tax upon all persons following any occupation, trade, or profession other than agricultural or mechanical pursuits; and by virtue of this power it is competent for the legislature to make it a penal offense for any person subject to such tax to pursue his occupation without first paying the tax imposed. *Languille v. State*, 4 Tex. Cr. App. 312.

Acts 29th Leg. c. 6, incorporating the city of Paris, provides (section 6) that it may pass and establish such regula-

tions and ordinances not inconsistent with the state constitution as shall be advisable or needful for the government, interest, welfare, and general good of the city and its inhabitants, and that specifications of particular powers shall not limit powers therein granted. A special provision gave it general authority over streets, public grounds, sidewalks, and under this to prescribe and regulate on what streets public carriers, hacks or other vehicles may stand. Held, in view of this general authority as to streets, in connection with the saving clause in section 6 as to the specification of particular powers, the city had power to pass an ordinance licensing the running of vehicles for hire and prescribing fees for the privilege. *Ex parte Denny*, 59 Tex. Cr. App. 579, 129 S. W. 1115.

Powers of Cities Where Occupation Not Taxed by State.—Rev. St. 1895, art. 490, providing that municipalities shall have power to levy and collect taxes on trades, professions, or businesses carried on, for the public use, in vehicles, in so far as it authorizes the imposition of taxes on occupations not taxed by the state, violates Const., art. 8, § 1, providing that taxes on occupations levied by any city shall not exceed one-half the taxes levied thereon by the state, since a tax must be first imposed for the benefit of the state on such occupation before a city could tax it. *Ex parte Terrell*, 48 S. W. 504, 40 Tex. Cr. App. 28; *City of Laredo v. Lowry*, 4 App. Civ. Cases, § 320, 20 S. W. 89, overruling *Hirshfield v. Dallas*, 29 Tex. Cr. App. 242, 4 App. Civ. Cases, § 177, 15 S. W. 124.

Amount Entitled to Impose.—Under the constitution, power of counties, cities, and towns to levy occupation taxes is limited to levying a tax not exceeding one-half that levied by the state upon the same occupation. *Ex parte Slaren*, 3 Tex. Cr. App. 662, 666.

A city "license tax" on vehicles used for hire, which is not necessary to

meet the expense of regulating their use, is an occupation tax; and if it "exceeds one-half of the tax levied by the state," being the rate fixed by Const., art. 8, it is void. *Ex parte Gregory*, 1 Tex. Cr. App. 753.

City License to Do Business on Sunday—Contrary to State Statute.—Pen. Code., art. 186, makes it an offense for any trader to sell on Sunday. A city ordinance empowered the council to prescribe hours for closing places of business. Held, that the council could not license traders to sell before nine and after four on Sunday. *Flood v. State*, 19 Tex. Cr. App. 584.

Profit Not an Element Limiting Power to Require License.—The legislature had power to levy an occupation tax on a pool table run in connection with a saloon, regardless of any profit whatever to the owner of such table. *Wright v. State*, 41 Tex. Cr. App. 200, 53 S. W. 640.

Occupations Illegal under General Laws of State.—In the absence of constitutional restrictions, it is competent for the legislature, by charter or special act, to empower a municipality to license within its limits occupations which are illegal and punishable under the general laws of the state; and a municipal charter and by-laws may, expressly or by necessary implication, thus supersede the general law on such subjects, within the limits of the corporation. *Davis v. State*, 2 Tex. Cr. App. 425.

B. MODE OF LEVYING.

No particular form being prescribed by law for orders of commissioners' courts levying occupation taxes, an order that "there shall be levied and collected on occupations pursued in said county of B, which are not specially provided by the laws of this state, a tax of one-half of the state occupation tax as levied by the laws of the state," is sufficient. *Wade v. State*, 22 Tex. Cr. App. 629, 630, 3 S. W. 786.

An order of the commissioners'

court levying an occupation tax on the occupations taxable by statute is sufficient, without specifying each and every occupation on which the tax is levied. *Witherspoon v. State*, 39 Tex. Cr. App. 65, 44 S. W. 164.

III. Statutory Provisions—Constitutionality.

Under the constitution, all occupation taxes must be equal and uniform upon same class of subjects, within the limits of the authority levying a tax. *Fahey v. State*, 27 Tex. Cr. App. 146, 160, 11 S. W. 108.

An occupation tax must conform to § 1, art. 8, of constitution, requiring taxation to be equal and uniform, and this requirement is violated where the statute levying such tax exempts from its operation, blind, deaf and dumb, and wounded persons, and old soldiers. *Ex parte Jones*, 38 Tex. Cr. App. 482, 485, 43 S. W. 513.

A tax is equal and uniform where all the persons in the same trade, calling, or profession are taxed alike. *Ex parte Williams*, 31 Tex. Cr. App. 262, 20 S. W. 580, citing *Albrecht v. State*, 8 Tex. Cr. App. 216, 226; *Texas Banking, etc., Co. v. State*, 42 Tex. 636, 640.

In a prosecution for pursuing an occupation without a license, held, acts Twenty-Fifth Legislature, page 54, subdivision 38, imposing an occupation tax on cotton buyers, but exempting merchants who pay occupation tax, is valid under art. 8, §§ 1, 2, of the constitution, requiring taxes to be equal and uniform. *Poteet v. State*, 41 Tex. Cr. App. 268, 53 S. W. 869; *Rainey v. State*, 41 Tex. Cr. App. 254, 53 S. W. 882.

Acts 25th Leg. 1st Called Sess. c. 18, art. 1049, subd. 39, imposing a tax on persons selling sewing machines, held in violation of Const., art. 8, §§ 1, 2, for inequality and nonuniformity. *Ex parte Bockhorn*, 62 Tex. Cr. App. 651, 138 S. W. 706.

In Acts Sp. Sess. 25th Leg., c. 18,

subd. 35, providing that every person dealing in lightning rods shall pay an annual tax of \$36 to the state and \$18 to the county, and that every person canvassing for the sale of lightning rods shall pay an annual tax of \$100 to the state and \$50 to the county, the word "dealer" is used in the sense of one who buys and sells at his place of business, and one who pays the dealer's tax is not authorized to make sales by canvassing, so that the act is not in violation of Const., art. 8, §§ 1, 2, providing that taxation shall be equal and uniform upon the same class of subjects. *Camp v. State*, 61 Tex. Cr. App. 229, 135 S. W. 146.

Acts 29th Leg., p. 217, c. 111, § 1 imposes an annual occupation tax of \$5,000 on persons engaging in the business of purchasing assignments of unearned wages. Section 2 provides that the act shall not apply to persons procuring such assignments to pay for necessities of life for the assignor's family, the purchase of a homestead for him, or for any article necessary for the assignor's pursuit of his employment, etc., where the assignments are made directly to the person from whom the purchases are made, or where the assignments shall not be taken at a discount. Held, that the act is discriminatory, because it puts a tax upon a class and exempts other classes amenable to the tax, and hence is violative of Const., art. 8, § 1, requiring taxes to be equal and uniform, and § 2, that all occupation taxes shall be equal and uniform upon the same class of subjects within the limits of the authority levying the tax. *Owens v. State*, 53 Tex. Cr. App. 105, 112 S. W. 1075.

Charter Giving City Power to Both License and Tax.—When the power to license useful trades and employments is conferred, it does not, unless such appears to have been the legislative intent, give the authority to prohibit the trade or use the license as a mode of taxation with a view to revenue; but reasonable fees for the license and the

enforcement of the ordinance may be charged, but where the grant of power to the municipality by its charter is the twofold power to license and to tax, such provisions are constitutional unless there is some specific limitation on the authority of the legislature in this respect. *Ex parte Gregory*, 20 Tex. Cr. App. 210.

Conflict between Preamble and Body of Statute.—Under the rule that the preamble of a statute can not control the express provisions or affect the validity of the statute, recitals in the preamble of an ordinance imposing a license on hacks, that one of its purposes was to provide a fund for street improvement, did not invalidate it where it appeared from the title and body of the act that a paramount purpose of the act was the enforcement of regulations as to vehicles. *Ex parte Gregory*, 20 Tex. Cr. App. 210.

Invalid Provision for Disposition of Fund without Effect on Provision Imposing License.—Even if a provision of an ordinance imposing a license of \$8 per annum on hacks, which provided that the fund collected should be for the improvements of streets, was invalid, it would not render invalid the other provisions imposing the license. *Ex parte Gregory*, 20 Tex. Cr. App. 210.

Trade of Barbers Mechanical Pursuit—Statute Imposing License Invalid.—The trade of a barber is a "mechanical pursuit," within the meaning of Const., art. 8, § 1, exempting persons engaged in mechanical pursuits from an occupation tax; and hence Acts 30th Leg. 1907, p. 273, c. 141, imposing a license tax on barbers, is invalid. *Jackson v. State*, 55 Tex. Cr. App. 557, 117 S. W. 818.

Taxing Interstate Commerce.—Occupation tax upon sale of lightning rods, manufactured in another state, through salesman in Texas, is unconstitutional as a tax upon interstate commerce. *Talbutt v. State*, 39 Tex. Cr. App. 64, 65, 44 S. W. 1091.

Traveling salesmen, engaged by a nonresident firm to take orders for groceries and medicines, held engaged in interstate commerce, and hence not subject to the occupation tax imposed on traveling salesmen of patent or other medicines. *Turner v. State*, 41 Tex. Cr. App. 545, 55 S. W. 834.

Sales of foreign-made article by an employee of nonresident manufacturer held interstate commerce. *Kirkpatrick v. State*, 42 Tex. Cr. App. 459, 60 S. W. 762.

City Ordinances Imposing Licenses on Occupations Not Taxed by State.—See ante, "Power to Impose License Tax," II.

IV. Occupations Subject to License Tax.

A. IN GENERAL.

As used in statutes prohibiting pursuit of certain occupations without obtaining a license, occupation means a vocation, trade, or business in which one principally engages to make a living or to obtain wealth. *Love v. State*, 31 Tex. Cr. App. 469, 20 S. W. 978; *Williams v. State*, 23 Tex. Cr. App. 499, 500, 5 S. W. 136.

Where defendant, a farmer, had provided himself with the necessary equipment to operate a flying jenny, an occupation taxed by law, and to operate the same for profit, he was guilty of pursuing an occupation without paying the occupation tax provided therefor; the word "occupation," as used in the statute, meaning vocation, calling, trade, or the business which one engages in to procure a living or obtain wealth. *Robbins v. State*, 57 Tex. Cr. App. 462, 123 S. W. 695.

B. PARTICULAR OCCUPATIONS.

Billiard or Pool Tables.—A license to keep billiard tables was not intended by the legislature to license any kind of gaming under the name of billiards, but only the game of billiards proper, and not any modifications thereof. *Barker v. State*, 12 Tex. 273, 278.

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A pool table run in connection with a place where liquor is sold, though used for pleasure only, and without profit, is subject to the statutory occupation tax. *Wright v. State*, 41 Tex. Cr. App. 200, 53 S. W. 640.

Letting Wagons for Hire.—Occupation tax upon letting for hire a wagon not connected with a livery stable, levied under art. 5094, subdivision 31, acts called session of Twenty-Fifth Legislature, can not be collected of man who handles his own wagon for hire in moving goods. *Orr v. State*, 39 Tex. Cr. App. 124, 125, 44 S. W. 1102.

Paris city charter (Acts 29th Leg., c. 6), authorizing it to license, tax, and regulate hackmen, draymen, omnibus drivers, wagon drivers, and drivers of vehicles of every kind, and all others pursuing like occupations, applies to the owners and keepers as well as the drivers of the vehicles referred to. *Ex parte Denny*, 59 Tex. Cr. App. 579, 129 S. W. 1115.

Sums imposed in the regulation of the business of running vehicles for hire are license fees and not occupation taxes. *Ex parte Denny*, 59 Tex. Cr. App. 579, 129 S. W. 1115; *Ex parte Gregory*, 20 Tex. Cr. App. 210.

Selling Publications.—The tax levied by Act of May 4, 1882, on persons selling "Illustrated Police News," "Police Gazette," and similar illustrated publications is not a tax on property but on privilege, and is a police regulation as well as a tax for revenue. *Thompson v. State*, 17 Tex. Cr. App. 253, 258.

Act May 4th, 1882, providing that there shall be levied on and collected "from every person, firm or association of persons, selling, or offering for sale the Illustrated Police News, Police Gazette, and other illustrated publications of like character, the sum of \$500.00 in each county in which such sale may be made or offered to be made," is sufficiently definite and cer-

tain as to the class of publications to which it is directed, since the courts will take judicial notice of the character of the publications named. *Thompson v. State*, 17 Tex. Cr. App. 253.

Drummers and Canvassers.—Act, chapter 27, General Laws, called session of seventeenth legislature, imposing occupation tax on drummers is not unconstitutional as applied to drummers from other states. *Ex parte Asher*, 23 Tex. Cr. App. 662, 665, 5 S. W. 91.

Wholesale Dealers in Ice.—One manufacturing ice and selling his product is not a dealer, within Sayles' Annotated Civil Statutes, art. 5049, subdivision 52, imposing a tax on wholesale dealers in ice in cities of a certain population. *Egan v. State* (Cr. App.), 68 S. W. 273.

That an eleventh class merchant runs a dray line in connection with his business as merchant does not relieve him from paying a tax as such merchant. *Edwards v. State* (Cr. App.), 69 S. W. 144.

V. Violation of License Laws.

A. NATURE OF OFFENSE.

It is not the sale, but the business of selling without paying an occupation tax, which constitutes the offense. *Standford v. State*, 16 Tex. Cr. App. 331, 332.

A mere sale, without pursuing the occupation of selling, is not an offense against a statute requiring payment of an occupation tax. *Merritt v. State*, 19 Tex. Cr. App. 435.

Receipt for Amount as License.—Under the act of March 13, 1875, a person is liable for pursuing any occupation therein named without first paying the tax imposed, but no further license is required than a receipt of the proper officer for the amount of such tax. *Munch v. State*, 3 Tex. Cr. App. 552, 554.

Under Pen. Code, 1895, art. 112, penalizing the pursuit of a profession without a "license" therefor, in the absence of statutory provision as to what the license shall contain, a receipt for the occupation tax is to be regarded a license. *Fouts v. State*, 51 Tex. Cr. App. 3, 101 S. W. 223.

Failure to file comptroller's receipt for drummers' tax, not a nonpayment thereof, is a punishable offense under the act of February 28, 1879. *Lewis v. State*, 14 Tex. Cr. App. 230, 232.

Formal Assessment Not Necessary.—Under law imposing occupation taxes, no formal assessment was necessary; if the tax was not paid before the party liable to such tax entered upon the business taxed, it was the duty of the officer charged with collection of such tax to enforce its payment. *Texas Banking, etc., Co. v. State*, 42 Tex. 636, 637.

Statute Covers both State and County Licenses.—The act of 1875, fixing the penalty for failure to pay an occupation tax includes the county tax as well as the state. *Archer v. State*, 9 Tex. Cr. App. 78, 79.

Dismissal on Payment of License Fees and Costs.—Under the second section of the act of March 13, 1875, payment of a tax after engaging in an occupation would prevent the prosecution, or payment of the tax and costs after the prosecution had commenced would cause dismissal of the prosecution at any time before conviction. *Munch v. State*, 3 Tex. Cr. App. 552, 554.

But in *Rogers v. State*, 35 Tex. Cr. App. 543, 544, 34 S. W. 634, it was held that under art. 114 of Penal Code, an officer has no right to issue a license until costs of the prosecution as well as the tax have been paid, but, where a license is issued without collection of the costs of the prosecution and is offered in evidence by defendant, a conviction can not be had.

B. PROSECUTION AND PUNISHMENT.

1. Indictment or Information.

a. In General.

Under Revised Statutes, page 1016, levying a tax on billiard and pool tables, etc., an indictment against the keeper of a pool table for failure to pay the occupation tax is not invalid because it does not contain the term occupation at the outset. *Wright v. State*, 41 Tex. Cr. App. 200, 53 S. W. 640.

Information for maintaining "a pool table" without paying tax thereon is insufficient, such tables not being among those enumerated by name in the act punishing keeping certain tables without paying an occupation tax. *Longenotti v. State*, 22 Tex. Cr. App. 61, 63, 2 S. W. 620.

b. Allegation That Levy Was Made.

Indictment or information for pursuing taxable occupations without a license should allege the levy made by the county commissioners. *Crews v. State*, 10 Tex. Cr. App. 292, citing *Spears v. State*, 8 Tex. Cr. App. 467; *State v. McCormick*, 22 Tex. 297; *Osborn v. State*, 33 Tex. 545; *Tharp v. State*, 28 Tex. 696.

c. Amount Due.

In a prosecution under the act of 1875, for failure to pay an occupation tax, the amount due must be alleged in the indictment. *Archer v. State*, 9 Tex. Cr. App. 78, 80; *Spears v. State*, 8 Tex. Cr. App. 467; *Crews v. State*, 10 Tex. Cr. App. 292; *Sheffield v. State*, 14 Tex. Cr. App. 238; *Mansfield v. State*, 17 Tex. Cr. App. 468.

d. Taxable Occupation.

Indictment for pursuing an occupation without obtaining a license must allege that defendant pursued a taxable occupation, and the amount of taxes due. *Rather v. State*, 15 Tex. Cr. App. 556, 558.

"Police Gazette" and "Police News" being publications specially enumer-

ated by the statute as among those whose sale can not be pursued as an occupation without payment of an occupation tax, an indictment for pursuing the occupation of selling said papers without having paid a license need not describe same, further than by name. *Baldwin v. State*, 21 Tex. Cr. App. 591, 592, 3 S. W. 109.

By the act of May 4, 1882, providing for the levy of occupation taxes, it is provided that there shall be levied on and collected "from every person, firm or association of persons selling or offering for sale the Illustrated Police News, Police Gazette, and other illustrated publications of like character, the sum of \$500 in each county in which such sale may be or offered to be made." Indictment is sufficient to charge the offense, if it alleges, in proper form, the following of the occupation of selling, and offering to sell, the Illustrated Police News and Police Gazette. *Thompson v. State*, 17 Tex. Cr. App. 253.

Keeping Tenpin Alley.—Where a party was indicted under the act of February 3, 1845, for keeping a tenpin alley, without having paid the license tax imposed thereon by the act of February 5, 1842, it was held that it was not necessary, under the statute referred to, for the indictment to charge that the alley was kept for play, or that playing took place or was permitted therein. *Needham v. State*, 1 Tex. 139.

2. Evidence.

Weight and Sufficiency.—In a prosecution for pursuing an occupation without a license, the state should not merely show orders of the commissioners' court levying the tax, but also, from minutes of court, the amount of such levy. *Barnes v. State*, 44 Tex. Cr. App. 473, 72 S. W. 177.

An ordinance having imposed a license tax of \$500 a year, and two ticket brokers having testified in a prosecution for its violation that such a tax

was prohibitory, and this evidence being uncontradicted, a conviction can not be sustained. *Hirshfield v. City of Dallas*, 29 Tex. Cr. App. 242, 15 S. W. 124.

In a prosecution for fighting dogs without having first paid the occupation taxes due the state, evidence held insufficient to sustain a conviction. *Kennedy v. State*, 58 Tex. Cr. App. 608, 127 S. W. 204.

An ordinance having imposed a license tax of \$500 a year, and two ticket brokers having testified in a prosecution for its violation that such a tax was prohibitory, and this evidence being uncontradicted, a conviction can not be sustained. *Hirshfield v. City of Dallas*, 29 Tex. Cr. App. 242, 15 S. W. 124.

Ownership—Operation of Photograph Gallery.—Facts held insufficient to show ownership or operation of a photograph gallery, so as to render defendant liable to occupation tax imposed by laws, special session, 1897, page 50, subdivision 6. *Mullinnix v. State*, 42 Tex. Cr. App. 526, 60 S. W. 768.

Presumption as to Reasonableness.

—A license tax imposed by an ordinance will be presumed to be reasonable, unless the contrary appears on the face of the ordinance, or is established by evidence. *Ex parte Gregory*, 20 Tex. Cr. App. 210.

3. Questions for Jury.

What constitutes pursuing an occupation is a question of fact, not of law. *Standford v. State*, 16 Tex. Cr. App. 331, 332.

4. Sentence and Punishment.

Pursuing a taxable occupation without license being punishable by fine in any sum not less than the amount of taxes due nor more than double such amount, a charge that, if guilty, the punishment should be assessed at a fine equal to the amount of the tax is error. *Longenotti v. State*, 22 Tex. Cr. App. 61, 63, 2 S. W. 620; *Ex parte Williams*, 31 Tex. Cr. App. 262, 20 S. W. 580.

For pursuing an occupation taxed by law without first obtaining a license therefor, the minimum punishment is a fine of not less than the taxes imposed upon such occupation. *Davidson v. State*, 27 Tex. Cr. App. 262, 263, 11 S. W. 371.

Limiting Testimony.

See the title INSTRUCTIONS, vol. 4, p. 385.

LIMITATION OF PROSECUTIONS.

BY LEONARD F. PIERSON.

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CROSS REFERENCES.

See the titles APPEAL, ERROR AND CERTIORARI, vol. 1, p. 87, CRIMINAL LAW, vol. 2, p. 168; HOMICIDE, vol. 4, p. 1; INDICTMENT AND INFORMATION, vol. 4, p. 239; INSTRUCTIONS, vol. 4, p. 385; TIME; TRIAL.

As to averments of time, see the title INDICTMENT AND INFORMATION, vol. 4, p. 239.

I. Statutory Provisions.

The limitation of the time within which actions and prosecutions are to be brought is a creation of the statute, and does not exist at common law. *White v. State*, 4 Tex. Cr. App. 488, 490.

Construction.—Statutes limiting the time within which offenses shall be prosecuted are to be construed liberally in favor of the accused. *White v. State*, 4 Tex. Cr. App. 488.

Retrospective Operation.—Statutes of limitations for the prosecution of crimes and misdemeanors do not have a retrospective operation; and it was, therefore, correctly held, that the statute of limitations passed in 1854, could not operate as a bar to a prosecution, commenced within two years from the time that statute went into operation, there being no previous limitation to the prosecution of the offense in question. *Martin v. State*, 24 Tex. 61, 62.

The limitations prescribed in act of

1854, began to run from the time it went into effect; and therefore prosecutions for offenses, previously committed, are barred in two, five and ten years, respectively, from that period. *Martin v. State*, 24 Tex. 61, 62.

Where the bar of the statute of limitations of one year was completed before the code went into operation, by which the period of limitation of prosecutions in such misdemeanors was extended to two years, and the state neglected to prosecute within the time prescribed for its own action, the right to prosecute the suit was lost. To give an act of the legislature, passed after such loss, the effect of reviving the right of action in the state, would give it an operation ex post facto, which the legislature did not intend. *State v. Sneed*, 25 Tex. Supp. 66, 67.

II. Limitations Applicable.

A. IN GENERAL.

When Limitation Applies.—Limitation of criminal prosecutions applies

only where the indictment has not been returned within the statutory period. *Carr v. State*, 36 Tex. Cr. App. 390, 391, 37 S. W. 426. See, also, *Donaldson v. State*, 15 Tex. Cr. App. 25, 30.

To Misdemeanors.—"Article 219 of the Code of Criminal Procedure provides: 'For all misdemeanors an indictment or information may be presented within two years from the commission of the offense, and not afterwards.' It is plain, then, from the reading of this statute, that, if a prosecution does not occur within two years from the time of its commission, there can be no prosecution. This is the period of limitation fixed by the legislature. They had authority to fix the period of limitation. This court has no authority to change it. And there is no authority in law to prosecute any citizen of Texas for the violation of the law after the period of limitation has intervened. *White v. State*, 4 Tex. Cr. App. 488; *Hickman v. State*, 44 Tex. Cr. App. 533, 72 S. W. 587; *Monford v. State*, 35 Tex. Cr. App. 237, 33 S. W. 351; *Temple v. State*, 15 Tex. Cr. App. 304, 315." *Ex parte Hoard* (Cr. App.), 140 S. W. 449, 450.

One charged with a misdemeanor may, as a general rule, be convicted for any violation occurring within two years prior to the indictment. *Matthews v. State*, 57 Tex. Cr. App. 328, 122 S. W. 544.

Misdemeanors Where Justices Have Concurrent Jurisdiction.—Under Pasch. Dig., art. 2653, providing that in all misdemeanors, where justices have concurrent jurisdiction with the district court, the indictment must be presented within one year, and Const., art. 5, § 17, providing that all offenses less than felony may be prosecuted before a justice, a misdemeanor may be prosecuted before a justice; and hence, if prosecuted in the district court, the prosecution must commence within one year. *Owens v. State*, 38 Tex. 555.

B. TO PARTICULAR OFFENSES.

1. In General.

Prosecutions for Murder.—The Code places no limitation on prosecutions for murder, and an indictment may be presented at any time. *White v. State*, 4 Tex. Cr. App. 488; *Fuecher v. State*, 33 Tex. Cr. App. 22, 24 S. W. 292.

A prosecution for felonious theft is barred by the lapse of five years between the commission of the offense and the presentment of an indictment therefor. *Wimberly v. State*, 22 Tex. Cr. App. 506, 3 S. W. 717.

In a case of theft of cattle, which is a felony, the prosecution may prove that the offense was committed at any time within five years next proceeding the indictment. *Shoefercater v. State*, 3 Tex. Cr. App. 207, 211.

A prosecution for robbery held barred by limitations, where the transcript showed the offense was committed more than five years before the indictment was presented. *Johnson v. State* (Cr. App.), 65 S. W. 522.

A prosecution for receiving stolen property is barred in three years. *McKay v. State*, 49 Tex. Cr. App. 118, 90 S. W. 653.

Under the statute, an indictment for forgery in which the copy of the instrument forged bears a date of more than ten years back is bad. *Hickman v. State*, 44 Tex. Cr. App. 533, 72 S. W. 587.

Prosecution for Embezzlement.—Prosecutrix delivered to defendant certain money to be invested on October 15, 1902. On December 5th she let him have \$60 more for the same purpose. He deposited the money in the bank, and thereafter at various times withdrew different sums from the bank and appropriated the same, and on December 17, 1902, attempted to conceal such fact from prosecutrix by forging a note which he represented had been received for a loan of the money. When it was later discovered that the note was a

forgery, defendant fled the country, and was later returned and prosecuted; the indictment being returned October 28, 1905, and the embezzlement fixed as of December 13, 1902, when he claimed he had loaned the money to W. on a note and mortgage. Held that, since such concealment was the first manifestation of defendant's attempt to embezzle the funds, the offense was not complete until that time, and it was therefore not barred by limitations. *Hamer v. State*, 60 Tex. Cr. App. 341, 131 S. W. 813.

Excluding Evidence of Barred Items in Embezzlement Prosecution.—On a trial for the embezzlement of the funds of the state by an employee thereof, items of defalcation barred by limitations should not be received in evidence. *Busby v. State*, 51 Tex. Cr. App. 289, 103 S. W. 638.

Prosecution for Aggravated Assault.—Cr. Code, art. 186, providing that prosecutions for misdemeanors, cognizable by a justice of the peace, must be commenced within one year, and that prosecutions for other misdemeanors must be commenced within two years, does not bar a prosecution for an aggravated assault until two years after the commission of the offense; it being, under Cr. Code, art. 491, punishable by a fine which may exceed \$100, and a justice having no jurisdiction of misdemeanors where the penalty exceeds that sum. *State v. Newhous*, 41 Tex. 185.

A prosecution for a simple assault is barred unless an indictment therefor is presented within one year. *Bingham v. State*, 2 Tex. Cr. App. 21, 25.

A prosecution for rape is barred unless the indictment therefor is presented within one year. *Anschilds v. State*, 6 Tex. Cr. App. 524.

A prosecution for rape is barred by limitations, where the first intercourse charged occurred more than a year prior to the beginning of the prosecution. *Ex parte Black*, 55 Tex. Cr. App. 121, 113 S. W. 534.

Where, in a rape case, several acts of intercourse were shown, all of which were barred by limitations except one, alleged in the indictment and relied upon in the trial, a charge that if accused had more than one act of intercourse with prosecutrix, and the first act occurred more than one year before filing the indictment, he should be acquitted, was properly refused. *Eckermann v. State*, 57 Tex. Cr. App. 287, 123 S. W. 424.

Assault with Intent to Rape.—A prosecution for rape must be begun within a year; a prosecution for "all other felonies" within three years. Held, that a prosecution for an assault with intent to commit rape may be begun at any time within three years. *Moore v. State*, 20 Tex. Cr. App. 275.

Conviction for gaming in a public place can be sustained by proof of the offense at any time within two years prior to the indictment. *Harvell v. State* (Cr. App.), 53 S. W. 623.

An indictment for unlawfully taking up and using an estray is not barred by limitation after the lapse of one year from the taking up of the animal, if accused continued to use the animal, in violation of law, until within one year before the indictment was found. *Davis v. State*, 2 Tex. Cr. App. 162.

Bringing Free Negro into State.—A. was indicted on the 1st day of January, 1857, for a misdemeanor in bringing a free person of color within the state on the 1st day of January, 1855. Held, that the indictment was barred by the limitation of two years. *State v. Asbury*, 26 Tex. 82.

In a prosecution for disposing of mortgaged property, the evidence considered, and held sufficient to show the prosecution barred by the three-year statute of limitations. *Stanford v. State*, 49 Tex. Cr. App. 100, 90 S. W. 167.

Negligent homicide being a misdemeanor, a prosecution for the offense would be barred by the lapse of two

years after the commission of the offense. (Code Crim. Proc., art. 200.) *Whitaker v. State*, 12 Tex. Cr. App. 436, 444.

A violation of the local option law, charged in the indictment to have been committed on May 2, 1904, but proven to have been committed May 2, 1902, was barred by limitations. *Lane v. State* (Cr. App.), 82 S. W. 1034.

2. Where Degree Charged Was Higher than Proved.

Conviction for Manslaughter on Indictment for Murder.—Though the Code of this state puts no limitation on prosecutions for murder, yet it does prescribe limitations on prosecutions for all other felonies; wherefore a conviction for manslaughter, though had on an indictment for murder, can not be sustained when the indictment was not presented within the period of limitation (three years after the commission of the offense) prescribed, in general, for felonies not expected or specifically provided for. *White v. State*, 4 Tex. Cr. App. 488.

Conviction of Assault with Intent to Murder on Indictment for Murder.—Code Cr. Proc. art. 198, provides that an indictment for theft, punishable as a felony, arson, burglary, robbery, and counterfeiting may be presented within five years. Article 199 provides that an indictment for all other felonies may be presented within three years from the commission of the offense, and not afterwards, except murder, for which an indictment may be presented at any time. Held, on an indictment for murder presented six years after the alleged killing, that defendant could not be convicted of an assault with intent to murder. *Fuecher v. State*, 33 Tex. Cr. App. 22, 24 S. W. 292.

III. Computation of Time.

Whether, in the computation of time, the day on which an act is done or an event happens is to be included or excluded, depends upon the circumstances

and reason of the thing, so that the intention of the parties may be effected. Such a construction should be given as will tend most to the ease of the party entitled to favor. The rule laid down in the case of *O'Connor v. Towns*, 1 Tex. 107, quoted and approved. *State v. Asbury*, 26 Tex. 82, 83.

Computing Absence.—There was evidence in the case to show that immediately after the homicide the defendant left the county, and was for a while in Austin, Travis county, and after that was absent in the state of Missouri until after filing of the indictment in September, 1879—the homicide having been committed some six years before the indictment was presented. It is provided by art. 202, Code Crim. Procedure, "That the time during which a person accused of an offense is absent from the state shall not be computed in the period of limitation." *Whitaker v. State*, 12 Tex. Cr. App. 436, 444.

IV. Continuance or Delay in Prosecution.

Where a defendant is indicted within the time fixed by the statute of limitations, the right to prosecute the indictment does not become barred because the case is thereafter continued during the term of defendant's imprisonment in the penitentiary under another conviction. *Carr v. State*, 37 S. W. 426, 36 Tex. Cr. App. 390. See the title CONTINUANCES, vol. 2, p. 65.

V. New Proceedings after Failure of Original Prosecution.

Where defendant has been convicted on an indictment that is fatally defective, if a new indictment for the same offense, found after the reversal of the judgment of conviction, would be barred, the supreme court will dismiss the cause. *Redfield v. State*, 24 Tex. 133.

Substitution of New Indictment for One Lost.—Code Cr. Proc. 1895, § 470, providing that where an indictment is

lost the district attorney may suggest that fact when another indictment may be substituted upon his written statement that it is substantially the same as that lost, or that another indictment may be presented as in the first instance, when the period for the commencement of the prosecution shall be dated from the time of the making of such entry, applies as a statute of limitation only where a new indictment is found, and not where another indictment is substituted for the one lost, so that, if the prosecution was not barred when the original indictment was returned, a prosecution under an indictment substituted for the one lost will not be barred though substituted at a time when prosecution would be barred on a new indictment. *Brown v. State*, 57 Tex. Cr. App. 570, 124 S. W. 101.

VI. Necessity to Plead and Burden of Proof.

It is not necessary for accused to plead the defense of limitation, the burden being on the state to prove an offense committed within the statutory

limitation. *White v. State*, 4 Tex. Cr. App. 488; *Ex parte Hoard* (Cr. App.), 140 S. W. 449, 451.

Neither the state nor the defense is bound by the allegation in the indictment of the date of the offense; and, to warrant a conviction for an offense liable to be barred by limitation, the proof must show that the offense was committed at a time which precludes the bar. *Temple v. State*, 15 Tex. Cr. App. 304. See, also, *White v. State*, 4 Tex. Cr. App. 488.

In a prosecution for playing at cards, it is essential for the state to prove that the playing was anterior to the finding of the indictment, and that the offense is not barred by limitation. *Cotton v. State*, 29 Tex. 186.

VII. Questions of Law and Fact.

Limitation as to the period of time when a prosecution for crime is barred is not a question for the jury, in the absence of evidence which presents that issue. *Cohen v. State*, 20 Tex. Cr. App. 224. See the title TRIAL.

Liquor.

See the title INTOXICATING LIQUORS, vol. 4, p. 633.

Livery Stable.

See the title GAMING, vol. 3, p. 353.

Live Stock.

See the title ANIMALS, vol. 1, p. 55.

Living Together.

As element of adultery, see the title ADULTERY, vol. 1, p. 36.

Local Law.

See the titles ANIMALS, vol. 1, p. 76; STATUTES.

Local Option.

See the title INTOXICATING LIQUORS, vol. 4, p. 633. As to local option stock law, see the title ANIMALS, vol. 1, p. 76.

Local Prejudice.

As ground for continuance or change of venue, see the titles CONTINUANCES, vol. 2, p. 65; JURISDICTION AND VENUE, ante, p. 60. As ground for new trial, see the title NEW TRIAL AND ARREST OF JUDGMENT.

Loco Parentis.

As to corporal punishment by one in loco parentis not being an assault, see the title ASSAULT AND BATTERY, vol. 1, p. 506.

LOGS AND LOGGING.

Offense of Cutting and Carrying Away Timber.—Where a defendant is indicted for cutting down and carrying away timber, under the statute (Hart. Dig., art. 493), he may be convicted if either the cutting down or carrying away is proved. *Welsh v. State*, 11 Tex. 368.

Necessity to Show Consent.—Where a defendant is indicted for cutting timber, under the statute (Hart. Dig., art. 493), it is for him to show that he had the consent of the owner. *Welsh v. State*, 11 Tex. 368.

Indictment—Descriptive Allegations of Timber Land.—Under Hart's Dig., art. 493, providing that if any person shall willfully and knowingly cut down, carry away, or destroy any tree or timber on any land not his own, without first having the consent of the owner, an indictment charging defendant with having cut and carried away certain timber "on land not his own, but which was the property of R.," sufficiently describes the land from which the timber was cut. *State v. Warren*, 13 Tex. 45.

Lord's Day.

See the title SUNDAYS AND HOLIDAYS.

Lost Indictment.

See the title INDICTMENT AND INFORMATION, vol. 4, p. 239. See, also, the title EXCEPTIONS, BILL OF, AND STATEMENT OF FACTS ON APPEAL, vol. 3, p. 1.

LOST INSTRUMENTS.

Where an indictment has been accidentally destroyed after trial and conviction, it may be supplied either by a second indictment or by substitution in the mode provided by law. *Harwood v. State*, 16 Tex. Cr. App. 416.

Where the loss of an indictment is suggested under Paschal's Dig., art. 2873, providing that when an indictment has been lost or mislaid, the district attorney may suggest the fact to the court and the same shall be entered upon the minutes of the court, and in such case another indictment may be substituted upon the written

statement of the district attorney that it is substantially the same as that which has been lost or mislaid, the suggestion of loss should be in writing, set out the facts, and be entered on the minutes of the court and on presentation of the indictment prepared as the substitute, accompanied by a written statement of the district or county attorney that it is substantially the same as that lost, an order of the court should be entered showing that the substitution was allowed and made. *Clampitt v. State*, 3 Tex. Cr. App. 638.

Lost Papers.

See the titles INDICTMENT AND INFORMATION, vol. 4, p. 239; RECORDS. As to lost process, see the title CRIMINAL LAW, vol. 2, p. 194.

Lost Property.

As to larceny of, see the title LARCENY, ante, p. 195.

LOTTERIES.

BY LEONARD F. PIERSON.

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CROSS REFERENCES.

See the title GAMING, vol. 3, p. 353.

As to dealings in futures, see the title GAMING, vol. 3, p. 353.

I. Definitions and Distinctions.

A lottery is a game in which there is a keeper or exhibitor who has the real fund, and against this the bettor stakes his money, which may be evidenced by tickets. On the side of

those who hold the tickets it is a perfect game of chance, while on the side of the keeper there are both chance and skill. *Risein v. State*, 44 Tex. Cr. App. 413, 71 S. W. 974.

Distribution of Prizes.—A lottery is

a disposition of prizes by lot or chance. *Risein v. State*, 44 Tex. Cr. App. 413, 71 S. W. 974.

Any scheme for the distribution of prizes by chance is a lottery; and it matters not by what name such a scheme may be known, it comes within the prohibition of the penal law against lotteries. *State v. Randle*, 41 Tex. 292.

Every scheme for the distribution of prizes by chance is a lottery. The fact that every ticket holder receives something does not render a distribution of prizes of unequal value to the ticket holders any less a lottery than if the ticket holders drew blanks when not drawing prizes. *Randle v. State*, 42 Tex. 580.

Every drawing, where money or property is offered as prizes to be distributed by chance according to a specified scheme or plan, and a ticket or tickets sold which entitles the holder to money or property, and which is dependent upon chance, is a "lottery." *Grant v. State*, 54 Tex. Cr. App. 403, 112 S. W. 1068.

In a raffle, as distinguished from a lottery, all the tickets are disposed of and some one is bound to win the prize. *Risein v. State*, 44 Tex. Cr. App. 413, 71 S. W. 974.

Where the owner of a horse and buggy of less than \$500 value sells the entire number of 200 tickets, numbered from 1 to 200, consecutively, for so many cents each as the number borne thereby, and the purchasers then shake dice among themselves to determine which of them shall have the whole of the property, the proceeding constitutes a raffle, and is not the establishing of a lottery to dispose of the horse and buggy, for which the owner would be indictable. *Risein v. State*, 71 S. W. 974, 44 Tex. Cr. App. 413.

A raffle is a game of perfect chance in which every participant is equal with every other in the proportion of

his risk and prospective gain and the prize is a common fund, or that which is purchased by a common fund. The successful party takes the whole prize and all the rest lose. The element of one against the many; the keeper against the bettor either directly or indirectly, is not to be found in it. It has no keeper, dealer or exhibitor. *Risein v. State*, 44 Tex. Cr. App. 413, 71 S. W. 974.

II. Constitutional and Statutory Provisions.

The policy of the state is opposed to lotteries, they being prohibited by Const. 1876, art. 3, § 47. *Holoman v. State*, 2 Tex. Cr. App. 610.

Constitutionality of Provisions for Gift Enterprizes.—Const., art. 12, § 36, which provides that "no lottery shall be authorized by the state, and the buying and selling of lottery tickets within the state is prohibited," renders nugatory section 3 of the act of June 3, 1873 (Pasch. Dig., art. 7705), defining what shall be regarded as a gift enterprise, and imposing a license tax on the proprietors of such business. *Randle v. State*, 42 Tex. 580.

Power of Legislature to License.—The legislature has no power to license lotteries, since Const., art. 3, § 47, provides that it shall pass laws prohibiting the establishment of lotteries as well as sale of tickets in lotteries or other evasions involving the lottery principles established or existing in other states. *Barry v. State*, 45 S. W. 571, 39 Tex. Cr. App. 240.

License Legalizing Operation of Knife Racks.—The state having imposed a license on the operation of a knife rack by Laws 1897, p. 51, c. 18, subd. 16, the maintenance of such racks was thereby legalized. *McRea v. State*, 81 S. W. 741, 46 Tex. Cr. App. 489.

Sufficiency of Offense Defined under Provisions for Fine.—Pen. Code, art. 404, which provides: "If any person shall establish a lottery, or dispose of

any estate, real or personal, by lottery, he shall be fined," etc., sufficiently defines an offense under the requirements of article 3 of the Code. *State v. Randle*, 41 Tex. 292.

III. Lottery Schemes and Devices.

Automatic Slot Machines.—Defendant placed a slot machine in his saloon. The machine was so constructed that by placing a five-cent piece in the slot and pressing a lever the machine would work automatically, and if the nickel, in falling into the machine, touched certain springs, a valve would be opened, and the machine would pay a certain amount of money in excess of the deposit. The machine was so constructed that the nickel deposited would remain in the machine, and the proportion of times when one playing the machine would win was less than the times when he would lose. Held sufficient to support a verdict finding defendant guilty of establishing a lottery. *Prendergast v. State*, 57 S. W. 850, 41 Tex. Cr. App. 358.

A nickel in the slot machine was so constructed that if the nickel, in falling into the machine, touched certain springs, a valve would be opened, and the machine would pay a certain amount of money in excess of the deposit. The nickel deposited would remain in the machine, and the proportion of times when one playing the machine would win was less than the times when he would lose. Held, it was not error to charge the jury that such machine constituted a lottery. *Prendergast v. State*, 57 S. W. 850, 41 Tex. Cr. App. 358.

Spindle Indicator.—Defendant kept a stand, the circumference of which was divided into spaces by nails driven on the edge, and between the nails different articles of value were placed, on which the prices were marked. A spindle turned on a pivot, and the speculator obtained whatever was in

the space at which the point of the spindle stopped. Held, that it was a lottery within Pen. Code 1895, art. 373. *Barry v. State*, 45 S. W. 571, 39 Tex. Cr. App. 240.

Candy Box Containing Prize.—Appellant sold candy in boxes, at fifty cents each, representing each box to contain, besides the candy, a prize of money or jewelry, but each purchaser selected his box in ignorance of its contents. Held, that this was a device in the nature of a lottery, and punishable as such. *Holoman v. State*, 2 Tex. Cr. App. 610, 28 Am. Rep. 439.

A knife rack operated by defendant, consisting of an inclined table, with knives stuck therein, and so arranged that rings could be thrown on them, which rings defendant sold to customers who endeavored to ring the knives on the table, they being entitled to any knives rung, or on which the rings caught, did not constitute a lottery. *McRea v. State*, 81 S. W. 741, 46 Tex. Cr. App. 489.

IV. Persons Liable.

Where, in a prosecution for sale of a lottery ticket, it appears that defendant kept a place where the sale of tickets was advertised, and that at the time of the sale he and his brother were waiting on the purchaser, it is immaterial whether defendant personally sold the ticket, since Pen. Code, art. 75, provides that when an offense is actually committed by one or more persons, and others are present, knowing of the unlawful intent, and assist those actually engaged in the unlawful act, such persons are principal offenders. *Kaufman v. State* (Cr. App.), 38 S. W. 771.

That one keeping and maintaining a nickel-in-the-slot machine was indictable for maintaining a gaming device is no reason why he should not also be indicted for establishing a lottery. *Prendergast v. State*, 41 Tex. Cr. App. 358, 57 S. W. 850.

V. Prosecution.

A. INDICTMENT.

Alleging Distribution.—An indictment which charges the accused "did unlawfully establish a lottery for the purpose of exposing a horse and buggy to be by lot and chance of certain drawings to be disposed of and distributed to and among the persons who should become purchasers of tickets therein," is defective as alleging the distribution of a single prize, not to the winner, but to all the purchasers of tickets. *Risein v. State*, 71 S. W. 974, 44 Tex. Cr. App. 413.

Evidence Sustaining Charge of Ticket Sale.—An indictment charging a sale of a ticket in the lottery known as the "Louisiana Lottery of the State of Louisiana" is sustained by a witness who describes it as a ticket in the Louisiana Lottery, though the ticket is not introduced in evidence, and defendant describes it as a ticket in the Louisiana "State" Lottery. *Anderson v. State* (Cr. App.), 39 S. W. 109.

Failure to Allege to Whom Ticket Was Sold.—One convicted of establishing a lottery under an indictment which charged him with establishing a lottery, and with disposing of certain property thereby, on appeal can not allege, as a ground of reversal, the fact that the indictment did not state to whom the ticket was sold, where the evidence sustains the allegation charging the establishment of the lottery, since such proof is not necessary to sustain a conviction. *Prendergast v. State*, 57 S. W. 850, 41 Tex. Cr. App. 358.

B. EVIDENCE.

Acts of Accused.—Evidence that accused was seen at one time with money in his hands in the house where people were betting at a lottery, and that he at one time turned the policy wheel, which could have been done by any one designated by the holders of tickets, was inadmissible, as showing that accused established the lottery. *Howard v. State*, 991 S. W. 785, 49 Tex. Cr. App. 327.

Competency to Show Disposition of Tickets.—Where the indictment charged accused with establishing a lottery, as distinguished from disposing of property by lottery, in violation of Pen. Code, art. 373, declaring that, "if any person shall establish a lottery or dispose of any estate * * * by lottery," he shall be punished, it was not competent to show that he exposed lottery tickets, or that a witness purchased from a third person, in the absence of accused a ticket at the place where accused was seen exposing tickets. *Howard v. State*, 91 S. W. 785, 49 Tex. Cr. App. 327.

Sufficiency.—Instance of evidence held sufficient to sustain a conviction for running a lottery. *Randle v. State*, 42 Tex. 580, 591.

Evidence held to sustain a conviction of conducting a lottery, in violation of Pen. Code, art. 373. *Grant v. State*, 54 Tex. Cr. App. 403, 112 S. W. 1068.

A conviction of selling a lottery ticket is sustained by evidence that money was paid to defendant for the ticket; that he sent for it, and received a commission for its sale. *Anderson v. State* (Cr. App.), 39 S. W. 109.

Lucri Causa.

As to taking *lucri causa*, as element of theft, see the title LARCENY, ante, p. 195.

Lunatics.

See the title INSANE PERSONS, vol. 4, p. 382.

Lying in Wait.

See the title HOMICIDE, vol. 3, p. 477.

Magistrate.

See the title JUSTICES OF THE PEACE, ante, p. 189. See, also, the titles ARREST, vol. 1, p. 474, et seq.; CRIMINAL LAW, vol. 2, p. 186, et seq.

Magnifying Glass.

See the title JURY, ante, p. 110.

Maiming.

See the title MAYHEM. As to maiming animals, see the title ANIMALS, vol. 1, pp. 67, 70, et seq.

Malfeasance.

See the titles JURY, ante, p. 110; JUSTICES OF THE PEACE, ante, p. 189.

Malice.

See the title CRIMINAL LAW, vol. 2, p. 173, et seq. As to malice as an ingredient of criminal offenses, see the titles treating of the different offenses. See, particularly, the title HOMICIDE, vol. 3, p. 477.

Malicious Arrest.

See the title FALSE IMPRISONMENT, vol. 3, p. 231.

MALICIOUS MISCHIEF.

. BY LEONARD F. PIERSON.

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See the titles ANIMALS, vol. 1, p. 55; FENCES, vol. 3, p. 275; FIRES, vol. 3, p. 297, or other specific heads.

I. Nature and Elements of Offenses.**A. IN GENERAL.**

Malicious mischief is not an offense known to the law of Texas. *Koritz v. State*, 27 Tex. Cr. App. 53, 54, 10 S. W. 757; *McLaren v. State*, 3 Tex. Cr. App. 680; *Waterman v. State*, 8 Tex. Cr. App. 671.

There being no offense specifically designated in the Code as "malicious mischief," a recital in a recognizance that the defendant is accused of "malicious mischief" is not a compliance with the statutory requirement that "the offense of which the defendant is accused be distinctly named in the bond." The omission, therefore, of such a designation of the offense is not a fatal defect in a recognizance otherwise sufficient. *Killingsworth v. State*, 7 Tex. Cr. App. 28.

Malice is the gravamen of the offense of malicious mischief without which the act is a mere trespass. *Woodward v. State*, 33 Tex. Cr. App. 554, 28 S. W. 204.

The intent with which alleged malicious mischief was done is material and, if it be shown that accused acted in good faith or under a claim of right, the charge can not be sustained. *Woodward v. State*, 33 Tex. Cr. App. 554, 28 S. W. 204.

Necessity for Intent and Resulting Damages.—In a prosecution for malicious mischief the state must show when the offense was committed, the intent with which it was done and the

amount of damages inflicted. *Dover v. State*, 32 Tex. 84, 85.

B. STATUTORY PROVISIONS.

Provisions for Injuring Agricultural Product or Property Construed.—Article 683 of the Penal Code is as follows: "If any person shall willfully and mischievously injure or destroy any growing fruit, corn, grain, or other agricultural product or property real or personal, of any description whatever, in such manner as that the injury does not come within the description of any of the offenses against the property otherwise provided for by this code, he shall be punished by fine not exceeding one thousand dollars." Held, that the language of the article is plain, clear and unambiguous, and admits of no other interpretation than that the Legislature intended only to provide a punishment for injuries to agricultural product or property, and that its intention comprehended no property of any other character. *Murray v. State*, 21 Tex. Cr. App. 620, 2 S. W. 757.

C. INJURY TO BUILDINGS AND REAL ESTATE.

As to burning of woodlands and prairies. see the title FIRES, vol. 3, p. 297.

A schoolhouse is a "public building," within Pen. Code, art. 500, defining the term "public building," with reference to the article prohibiting the injuring or defacing of a public building, as any building held for public use by any department of the government, state, county, or municipal. *Thurston v.*

State, 58 Tex. Cr. App. 308, 125 S. W. 31.

"Injury Defined."—A charge, in a prosecution for injuring and defacing a public building, that the word "injury," as thus used, is an injury which will render the building less agreeable, useful, or comfortable for the purpose for which it was intended, is not reversible error. *Mitchell v. State* (Cr. App.), 62 S. W. 572.

"Deface" Defined.—A charge, in a prosecution for injuring and defacing a public building, that the word "deface" in such connection means the staining the building with any article that will discolor the same, and that such stains need not be of a permanent or lasting character, is not erroneous. *Mitchell v. State* (Cr. App.), 62 S. W. 572.

One breaking the window-panes of and shooting into a schoolhouse is guilty of injuring it, within the statute punishing the injuring or defacing of a public building, though it be conceded that the injury did not amount to a defacing. *Thurston v. State*, 58 Tex. Cr. App. 308, 125 S. W. 31.

Breaking Lock on Church Door.—On a trial for malicious mischief in breaking the lock on a church door, it appeared that there was a difference among the membership of the church on certain matters, and that the prosecuting witness had locked the door in opposition to the wishes of the majority. Defendant, one of that majority, was an officer of the church, and acted under a reasonable claim of right to do so in breaking the lock. Held, that the charge could not be sustained. *Woodward v. State*, 33 Tex. Cr. App. 554, 28 S. W. 204.

Injury to Private Residence.—Evidence that defendant and her children, after a heated colloquy with prosecutor, threw stones at him, one of which accidentally struck his house and broke a window glass, did not authorize a conviction under an information charg-

ing defendant with willfully and maliciously throwing a brickbat at prosecutor's residence. *Niblo v. State* (Cr. App.), 79 S. W. 31.

Private Storehouse.—An information charging malicious injury to a private storehouse, and formulated under Pen. Code Tex. art. 683, relating only to the injury to "growing fruit, corn, grain, or other agricultural product or property, real or personal," charges no offense and will not support a conviction. *Beeson v. State*, 23 Tex. Cr. App. 406, 5 S. W. 118. See ante, "Statutory Provisions," I, B.

Removal of Private Building.—A purchaser of land is the holder of the legal title thereto after a judgment of foreclosure of the vendor's lien thereon, but before sale under the foreclosure, so that his act in removing a building therefrom is not a violation of the statute forbidding willful injury to real estate. *Price v. State*, 92 S. W. 811, 49 Tex. Cr. App. 343.

On a trial for malicious mischief to real estate by the removal of a house therefrom, the fact that the house was built by defendant, or that his wife claimed an interest in the land, on which it stood, neither justified nor excused him in removing the house against the will of the person holding both the title and possession, for if defendant claimed rights in the property, his recourse was to the courts. *Ritter v. State*, 33 Tex. 608.

Digging Ditch.—Pen. Code 1895, art. 791, making it an offense for any person to willfully or maliciously injure or destroy any real property does not apply where a landowner digs a small ditch for a reasonable purpose on the land of another believing it to be on his own land. *Adams v. State*, 81 S. W. 963, 47 Tex. Cr. App. 35.

Stacking up Rubbish.—In a prosecution for malicious mischief under Pen. Code, art. 791, providing a punishment against persons who "willfully or mischievously injure or destroy any

real or personal property," the evidence showed that defendant had brought rubbish from outside a blacksmith shop, and stacked it up inside the shop to a height of six or seven feet, and that it took the owner half an hour to remove the rubbish. Held insufficient to sustain a conviction, since no injury to the property was shown. *Patterson v. State*, 55 S. W. 338, 41 Tex. Cr. App. 412.

Johnson Grass as Being Objectionable to Lessor.—Defendant, having leased his ranch to prosecutor, went there, and found hay, made of Johnson grass, stacked in his garden lot. He said he could not have it there, as, if the seed got started, it would ruin the ground, and thereupon hauled out two loads and burned the rest. There was evidence that there was no seed in the hay. Held that, the grass being in fact noxious, defendant was not shown to have acted willfully or mischievously. *Brady v. State* (Cr. App.), 26 S. W. 621.

D. BURNING AND INJURY TO PERSONALTY.

See the title FIRES, vol. 3, p. 297.

Injury to personalty is not indictable unless causing breach of the peace. *Illies v. Knight*, 3 Tex. 312, 316.

Burning of Personal Property.—Pen. Code 1895, art. 777, provides for punishment of any person willfully burning personal property belonging to another. Article 791 provides that a person willfully destroying property of another, so that the injury does not come within the description of any of the offenses against property otherwise provided for by the Code, shall be punished by fine of not more than \$1000, provided that, where the property is of the value of \$50 or less, the punishment shall not exceed \$200. Held, that a complaint averring the burning of song books "of the value of \$2.50" was under the latter section, since the value of the property would be imma-

terial under the former. *Stanton v. State*, 74 S. W. 771, 45 Tex. Cr. App. 168.

The prosecution, being under the latter section, was unwarranted, as the offense of willful burning is denounced by the former, and the latter only applies in the absence of application of any other provision of the Code. *Stanton v. State*, 74 S. W. 771, 45 Tex. Cr. App. 168.

To Trunks and Goods.—Defendant knocked and kicked down certain trunks and goods which had been piled by a storekeeper upon the sidewalk of a town so as to obstruct the same. Held, that the evidence was insufficient to support a conviction. *Rose v. State*, 19 Tex. Cr. App. 470.

Buggy Harness.—The destruction of a buggy harness is not an offense within Pen. Code, art. 683, providing a penalty for the willful and mischievous injury or destruction of "any growing fruit, corn, grain, or other agricultural product or property," nor within any other statute of that state. *Terry v. State*, 25 Tex. Cr. App. 714, 8 S. W. 934.

Injuring Locomotive.—The offense defined by Pen. Code, art. 683, relates only to the destruction of, or injuries done to, "growing fruit, corn, grain or other agricultural products or property, real or personal." And the provisions of the said article can not be extended, by intentment or otherwise, to comprehend the willfully and mischievously injuring a locomotive engine. *Murray v. State*, 21 Tex. Cr. App. 620, 2 S. W. 757, 57 Am. Rep. 623. See ante, "Statutory Provisions," I, B.

E. KILLING, MAIMING AND ESTRAYING ANIMALS.

See the title ANIMALS, vol. 1, p. 55.

F. DESTRUCTION AND REMOVAL OF FENCES.

See the title FENCES, vol. 3, p. 275.

G. OBSTRUCTION OF PUBLIC ROADS.

See the title STREETS AND HIGHWAYS.

H. OBSTRUCTION OF RAILROAD TRACK.

See the title RAILROADS.

I. DESTRUCTION OF TELEPHONE POSTS.

See the title TELEGRAPHS AND TELEPHONES.

II. Indictment or Information.

Averments charging malicious mischief must be positive and certain and not by way of argument or inference. *Woodward v. State*, 33 Tex. Cr. App. 554, 28 S. W. 204.

An indictment under Pen. Code 1895, art. 791, need not allege that the offense does not come within the description of any other offenses provided for by this Code. *Todd v. State*, 45 S. W. 596, 39 Tex. Cr. App. 232; *Adams v. State*, 81 S. W. 963, 47 Tex. Cr. App. 35.

Essential Allegations of Ownership or Possession.—While in some cases of malicious mischief ownership of property is immaterial, as in case of wanton cruelty to animals, yet in others the indictment should allege ownership or possession of the injured property in some person other than defendant. *Woodward v. State*, 33 Tex. Cr. App. 554, 555, 28 S. W. 204.

Of Rightful Possession.—An information charging one with willfully breaking a lock on the door of a church building should allege that the rightful possession of the property was in some other person than the defendant. *Woodward v. State*, 33 Tex. Cr. App. 554, 28 S. W. 204.

Necessity to Allege "Property of Another."—*State v. Smith*, 21 Tex. 748, overruled in so far as it requires allegation, "property of another," in an indictment under art. 2345, Paschal's Di-

gest. *State v. Brocker*, 32 Tex. 611, 614.

Necessity to Allege Nature and Character of Injury.—Under Pen. Code 1895, art. 791, an indictment for willfully injuring a certain room of a house should allege the nature and character of the injury. *Todd v. State*, 45 S. W. 596, 39 Tex. Cr. App. 232.

Necessity to Allege Character of Building.—Under White's Ann. Pen. Code, art. 504, declaring it an offense to injure public property pertaining to any public building as defined in art. 500, which states that the term "public building" embraces certain enumerated buildings, and all other buildings "held for public use" by any department or branch of government, an indictment charging injury to property pertaining to a public building, to wit, "the Colorado High School Building," should allege that such building was held for public use; it not being one of those enumerated in the statute. *Hughes v. State*, 59 Tex. Cr. App. 360, 128 S. W. 904.

To charge the offense of defacing a public building, unless the building defaced be one that is specifically named in Pen. Code, art. 418, the information should allege that the building was a "public building held for public use." An information, therefore, which fails to so describe a school house alleged to be so defaced is insufficient. *Brown v. State*, 16 Tex. Cr. App. 245; *Pratt v. State*, 19 Tex. Cr. App. 276; *Burkhalter v. State* (Cr. App.), 104 S. W. 901.

Sufficiency.—Information for defacing a schoolhouse which alleges that same was a "public building, held for public use by C. county," sufficiently charges the offense of defacing a public building. *Clark v. State*, 23 Tex. Cr. App. 260, 261, 5 S. W. 115.

An indictment charging that defendant did, in a certain county and state, unlawfully and willfully injure and deface a public building, to wit, Rose

School House, a public building of E. county, and held for public use, is sufficient to support a prosecution for injuring and defacing a public building. *Mitchell v. State* (Cr. App.), 62 S. W. 572.

Essential Allegations of Value.—An indictment for malicious mischief in injuring property, to be sufficient, must allege the value of the property injured since such value is the criterion by which punishment is assessed. *Beaufire v. State*, 37 Tex. Cr. App. 50, 51, 38 S. W. 608.

Sufficiency.—Under Pen. Code 1895, art. 791, declaring that, if any person mischievously injure property of another, he shall be punished by a fine not exceeding \$1,000, provided that, if the value of the property injured is \$50 or less, the fine shall not exceed \$200, an indictment for unlawfully injuring a buggy by removing from the spindle a tap of the value of twenty-five cents is insufficient in not alleging the value of the buggy. *Beaufire v. State*, 38 S. W. 608, 37 Tex. Cr. App. 50.

An indictment for willful injury to real estate, forbidden by Pen. Code 1895, art. 791, which alleges that the accused removed a house of the value of \$100, was not defective for failure to allege the value of the real estate. *Price v. State*, 92 S. W. 811, 49 Tex. Cr. App. 343.

III. Evidence.

A. ADMISSIBILITY.

Right to Prove Reputation.—Defendant in trial for malicious mischief has the right to prove his own reputation for honesty and truth. *Browder v. State*, 30 Tex. Cr. App. 614, 615, 18 S. W. 197.

Evidence tending to rebut malice or to show animus of defendant, charged with malicious mischief, is admissible. *Woodward v. State*, 33 Tex. Cr. App. 554, 557, 28 S. W. 204.

To Show Ownership.—Pen. Code 1895, art. 791, making it an offense to

willfully or maliciously injure or destroy any real property, was intended to protect an owner against injury to his property, and not to a mere possessory right; and where issue is made as to the actual ownership defendant should be permitted to make proof of ownership by deed or other evidence of title. *Adams v. State*, 81 S. W. 963, 47 Tex. Cr. App. 35.

To Show Good Faith as Being Disregard of Tenant's Rights.—In a prosecution for willfully destroying growing corn, evidence that ownership of the land was in dispute; that defendant had rented it to prosecutor to reimburse him for taking up a claim thereto; that, after prosecutor claimed possession of the land as owner, defendant proposed, in settlement, that, if prosecutor would pay rent for a certain portion, he might work the corn, and on his refusal defendant plowed up the land, as he believed he had a right to do—was inadmissible to show defendant's good faith, since such facts tended to show a disregard of the tenant's rights. *Camp v. State* (Cr. App.), 57 S. W. 96.

In a prosecution for willfully destroying growing corn, evidence that prosecutor had rented the land on which the corn was growing from defendant, and had thereafter repudiated the tenancy and claimed title to the corn, was irrelevant. *Camp v. State* (Cr. App.), 57 S. W. 96.

Of Broken Contents in Building.—Error in admission of evidence, in a prosecution for defacing a public building, that certain contents of the building were found broken, but which were not shown to have been broken by defendant, is harmless, on instructions to disregard such evidence. *Mitchell v. State* (Cr. App.), 62 S. W. 572.

A remark by a person standing within four feet of another person, when the latter led a horse out of the schoolhouse, that the horse of the latter had been through the academy, is

admissible in a prosecution of the latter for injuring and defacing a public building, when defendant is shown to have laughed at such remark. *Mitchell v. State* (Cr. App.), 62 S. W. 572.

B. WEIGHT AND SUFFICIENCY.

Of Intent Alleged.—Evidence held insufficient to support a conviction for malicious mischief, because insufficient to establish the intent alleged. *Owens v. State*, 25 Tex. Cr. App. 552, 8 S. W. 658.

Of Injury to Property.—In a prosecution for malicious mischief under Penal Code, art. 791, evidence held insufficient to sustain a conviction for malicious mischief, no injury to property being shown. *Patterson v. State*, 41 Tex. Cr. App. 412, 55 S. W. 338.

Ownership of Land on Which House Stood.—On the trial of an indictment for malicious mischief in tearing down and removing a certain house, it is sufficient for the prosecution to prove that the land on which the house stood did not belong to the defendant, but to the person alleged in the indictment to be the owner, and that the defendant entered upon the land and committed the offense charged. *Ritter v. State*, 33 Tex. 608.

To Show Injury to Schoolhouse.—Evidence held insufficient to justify a conviction for entering and defacing a schoolhouse, alleged to be a public building. *Weatherford v. State*, 91 S. W. 591, 49 Tex. Cr. App. 293.

To Show That Building Was Held for Public Use.—Under Pen. Code, art. 499, prescribing a penalty for willfully injuring or defacing a public building, evidence, on a trial for defacing such

a building, that the building defaced was a schoolhouse built about eight years before, and that during that period the public school had been taught there, and that it had also been used for church purposes, is insufficient, since it does not prove that the building was owned or controlled and held by the public authorities for a public use. *Cleavenger v. State*, 65 S. W. 89, 43 Tex. Cr. App. 273.

IV. Variance.

Under an indictment charging offense defined in article 680, Penal Code, defendant can not be convicted when evidence proves offense defined by article 685 of that code, both articles covering generally the offense of maiming, wounding, or killing another's animals. *McRay v. State*, 18 Tex. Cr. App. 331, 335.

V. Punishment.

Punishment prescribed by the act of 1884, for malicious mischief being greater than that prescribed by art. 684 of Penal Code for that offense as therein described the act of 1884 is inapplicable, where the offense was committed before that act became effective, though information was filed after it had become effective. *Roberts v. State*, 17 Tex. Cr. App. 148, 151.

The provision of Pen. Code 1895, art. 791, fixing a greater punishment for injury to real property where the value of the property is more than \$50, does not apply where the injury complained of is the digging of a little ditch on one corner of a large tract. *Adams v. State*, 81 S. W. 963, 47 Tex. Cr. App. 35.

MALICIOUS PROSECUTION.

Malice Defined.—Legal malice is any unlawful act done willfully and purposely, to the injury of another; this wrong motive coupled with a wrongful act willfully done to the injury of another constitutes legal malice. *Dempsey v. State*, 27 Tex. Cr. App. 269, 11 S. W. 372.

Probable Cause Defined.—In the law relating to malicious prosecution, by probable cause is meant the existence of such facts as would excite belief in a reasonable mind, acting on the facts, within the knowledge of the prosecutor, that the person charged was guilty of the offense for which he was prosecuted. *Dempsey v. State*, 27 Tex. Cr. App. 269, 11 S. W. 372.

Construction and Object of State.—It is certainly not the meaning and intent of the statute to punish one for prosecuting supposed crime, who does so with probable cause, although he may do so for the purpose of vexing, harassing and injuring the person prosecuted. To otherwise construe the statute would, it seems to us, make it operate against public policy. It would deter citizens from commendable efforts to bring criminals to justice. A man would fear to institute a prosecution, however meritorious it might be, knowing that he might himself be prosecuted and punished merely upon proof that he instituted it for the purpose and with the intent to vex, harass and injure the prosecuted party, without regard to the evidence of such party's guilt of the charge. *Dempsey v. State*, 27 Tex. Cr. App. 269, 272, 11 S. W. 372.

"As we understand the statute, it is intended to punish a person who, without probable cause, actuated by malice, not in good faith, institutes a criminal prosecution against another for the purpose and with the intent to vex, harass and injure such other person. It is intended to prevent groundless prosecutions, and not such as there

is legal evidence to justify a reasonable belief that the person prosecuted is guilty of the crime charged." *Dempsey v. State*, 27 Tex. Cr. App. 269, 272, 11 S. W. 372.

Information—Necessity to Allege Termination of Prosecution.—In a criminal action for malicious prosecution under art. 273, Penal Code, it is not essential that the information shall allege that the prosecution against the injured party had ended before the information was presented. The court said: "In a civil suit for damages for malicious prosecution, it is essential to allege and prove that the alleged malicious prosecution had terminated before the institution of the suit, because in such case it can not be known whether or not there was any injury until there has been an acquittal of the charge, nor what the extent of the injury might be. And a civil suit is not maintainable at all if there has been a conviction upon the criminal charge. (*Glasgow v. Owen*, 69 Tex. 167, 6 S. W. 527; *McManus v. Wallis*, 52 Tex. 534, 535; *Usher v. Skidmore*, 28 Tex. 617; 2 Greenl. Ev., § 452; *Cooley on Torts*, § 186.) But it does not appeal to us that the above stated rule is applicable in the case of a criminal prosecution under art. 273 of our Penal Code. In such case, we think it is immaterial whether or not the alleged malicious prosecution had terminated at the time of the filing of the indictment or information. The reason for the rule in a civil suit does not exist in the criminal case, and it does not seem to be contemplated by said article that it shall exist in such case." *Dempsey v. State*, 27 Tex. Cr. App. 269, 271, 11 S. W. 372.

Effect of Malice and Probable Cause.—A conviction for malicious prosecution can not be sustained where the evidence shows that defendant had probable cause for instituting the prosecution, though he was actuated by

malice in doing so. *Dempsey v. State*, 27 Tex. Cr. App. 269, 11 S. W. 372.

Prosecution upon probable cause will not sustain conviction for malicious prosecution, although the prosecutor was actuated by malice and a desire to harass. *Halliburton v. State*, 32 Tex. Cr. App. 51, 57, 22 S. W. 48.

Where the proof was convincing that Z. had unlawfully carried a pistol, a conviction of defendant of a malicious prosecution of Z. for such offense can not be sustained, though defendant may have been actuated by a spirit of revenge, and with a desire to harass and injure Z. *Johnson v. State*, 32 Tex. Cr. App. 58, 22 S. W. 43.

Burden of Proof.—In prosecution for malicious prosecution, state must prove that defendant maliciously instituted prosecution named in prosecution for purpose of vexing, harassing and injuring prosecutor, and without probable cause. *Dempsey v. State*, 27 Tex. Cr. App. 269, 272, 11 S. W. 372.

Testimony of the justice before whom the prosecution was had, that he discharged the prosecuted party because, in his opinion, the evidence did not support the charge, is inadmissible. *Dempsey v. State*, 27 Tex. Cr. App. 269, 11 S. W. 372, 11 Am. St. Rep. 193.

Admission of Verdict of Acquittal.—A verdict of acquittal, in the prosecu-

tion instituted by the accused, is not competent evidence against him. *Reed v. State*, 29 Tex. Cr. App. 449, 16 S. W. 99.

Instructions to Jury.—Pen. Code, art. 273, provides that "if any person, * * * for the purpose of extorting money from another, or the payment or security of a debt, * * * or with intent to vex, harass, or injure, * * * shall institute * * * any criminal prosecution, * * * he shall be deemed guilty of malicious prosecution." Held that, where the information does not charge an intent to extort money, nor the payment or security of a debt, it is error to give in charge to the jury any part of article 273, which is not embraced in the indictment. *Reed v. State*, 29 Tex. Cr. App. 449, 16 S. W. 99.

On an information under Pen. Code, art. 273, providing for punishment for a malicious prosecution, the court should define "malice," and instruct in regard to the want of probable cause. *Reed v. State*, 29 Tex. Cr. App. 449, 16 S. W. 99.

Where one paragraph of the charge requires the jury to believe the accused not guilty before they could acquit, and the jury may have been misled, the judgment will be reversed. *Reed v. State*, 29 Tex. Cr. App. 449, 16 S. W. 99.

Malt Liquor or Tonic.

See the title INTOXICATING LIQUORS, vol. 4, p. 633.

MANDAMUS.

CROSS REFERENCES.

See the titles APPEAL, ERROR AND CERTIORARI, vol. 1, p. 87; HABEAS CORPUS, vol. 3, p. 430.

Authority to Issue.—The court of criminal appeals can issue a writ of mandamus only for the purpose of enforcing its own jurisdiction. *Ex parte Quesada*, 34 Tex. Cr. App. 116, 117, 29 S. W. 473.

Under Const., art. 5, § 6, giving the court of criminal appeals appellate jurisdiction in all criminal cases, except as otherwise provided, and giving it power to issue writs of habeas corpus and such writs as may be necessary to enforce its own jurisdiction, that court has no power to issue writs of mandamus to compel district judges to do or not to do any particular act with reference to cases appealed to the court of criminal appeals. *Ex parte Firmin*, 60 Tex. Cr. App. 222, 131 S. W. 1116.

Nature of Act Subject of Writ.—Since mandamus lies only to compel the performance of a ministerial act, it does not lie to compel a county attorney to institute a criminal prosecution, which involves discretion. *Murphy v. Sumners*, 54 Tex. Cr. App. 369, 112 S. W. 1070.

Jurisdiction of Appeal of Order Denying Writ to Compel Prosecution.—The court of criminal appeals has no jurisdiction of an appeal from an order denying an application for a writ of mandamus to compel a county attorney to institute a prosecution. *Murphy v. Sumners*, 54 Tex. Cr. App. 369, 112 S. W. 1070.

To Compel Trial on Question of Insanity after Conviction.—The court of appeals has no jurisdiction to issue a writ of mandamus to compel the district judge to try the question of insanity after conviction and judgment for robbery. *Ex parte Quesada*, 34 Tex. Cr. App. 116, 117, 29 S. W. 473.

To Compel Clerk to Enter Sentence.—Mandamus will not issue from the court of criminal appeals to compel the clerk of the court below to enter the sentence in a criminal case on the record. *Jones v. State*, 66 S. W. 559, 43 Tex. Cr. App. 419.

Where the Cause Was Not Appealable.—The court of appeals, having no jurisdiction over a judgment of a county court rendered on appeal from a fine of less than \$100 imposed by a justice of the peace, has no jurisdiction to issue writ of mandamus to supervise either the judicial or ministerial action of the county court. *Wyatt v. Barmore*, 5 Tex. Cr. App. 332.

Effect of Failure to Appeal at Term of Court.—Where a sworn petition was made to the court of appeals for a mandamus to compel the county court to allow an appeal and the term of court having passed without notice of appeal and preparation of the case for appeal, it was held that the court of appeals was without any remedial jurisdiction in the premises. *Clark v. State*, 3 Tex. Cr. App. 338.

Mandate.

See the title APPEAL, ERROR AND CERTIORARI, vol. 1, p. 392.

Mandatory Statutes.

See the title STATUTES. As to mandatory statutes on particular subjects, see the titles treating of those subjects.

Mania a Potee.

See the title CRIMINAL LAW, vol. 2, p. 183, et seq.

Manslaughter.

See the title HOMICIDE, vol. 3, p. 477.

Maps.

See the title EVIDENCE, vol. 2, p. 532.

Market Place.

See the title MUNICIPAL CORPORATIONS.

Market Value.

See the titles EMBEZZLEMENT, vol. 2, p. 295; LARCENY, ante, p. 195.

Marks and Brands.

See the title BRANDS AND MARKS, vol. 1, p. 669.

MARRIAGE.

BY LEONARD F. PIERSON.

- I. Nature of Obligation, 442.**
- II. Power to Regulate and Control, 442.**
- III. Age of Persons Who May Marry, 442.**
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 - A. Of Common Law Marriage, 442.
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CROSS REFERENCES.

As to where marriage is an element, see the titles ADULTERY, vol. 1, p. 35; BIGAMY, vol. 1, p. 639; INCEST, vol. 4, p. 227; MISCEGENATION, or other specific heads.

I. Nature of Obligation.

Marriage is a civil contract and a thing of common right, encouraged by public policy. *Holder v. State*, 35 Tex. Cr. App. 19, 24, 29 S. W. 793.

Marriage is not a contract protected by the constitution of the United States, but a civil status left solely to the discretion of the states. *Frasher v. State*, 3 Tex. Cr. App. 263, 281.

II. Power to Regulate and Control.

The power of regulating marriage is reserved to the states. *Frasher v. State*, 3 Tex. Cr. App. 263, 30 Am. Rep. 131.

Each state has an exclusive right to declare how and whom its citizens may marry, and the legal consequences of the marriage contract. *Francois v. State*, 9 Tex. Cr. App. 144.

III. Age of Persons Who May Marry.

Under a statute providing that males under sixteen years and females under fourteen years of age shall not marry, there can be no common-law marriage with a girl of ten. *Hardy v. State*, 38 S. W. 615, 37 Tex. Cr. App. 55.

IV. Marriage of Slaves.

Under the constitution of 1869, all persons formerly held in bondage who were living together as husband and wife at the date of its adoption, were legally married. *Steward v. State*, 7 Tex. Cr. App. 326, 327; *Webb v. State*, 24 Tex. Cr. App. 164, 166, 5 S. W. 651.

The constitution of 1869 legalizes marriage of negroes living together as husband and wife, both of whom, by

law of bondage, were precluded from rites of marriage. *Frasher v. State*, 3 Tex. Cr. App. 263, 278.

Effect of Abrogating Const. 1869.—

The abrogation of Const. 1869, which recognized the relation of persons who had been formerly held in bondage and were living together as husband and wife by the constitution of 1876, did not have the effect of annulling marriages which had been so legalized. *Steward v. State*, 7 Tex. Cr. App. 326.

Presumption from Cohabitation.—If

a negress lived with a slave, as his wife, before her emancipation, until 1876, she was deemed to have been married to him. *McKnight v. State*, 6 Tex. Cr. App. 158, 163.

V. Validity of Marriage.

A. OF COMMON LAW MARRIAGE.

When statutes do not declare void marriages not celebrated in the prescribed way, or by certain magistrates or ministers, any marriage regularly made, according to common law would be a valid marriage. *Simon v. State*, 31 Tex. Cr. App. 186, 202, 20 S. W. 399, 716; *Holder v. State*, 35 Tex. Cr. App. 19, 24, 29 S. W. 793; *Burks v. State*, 50 Tex. Cr. App. 47, 94 S. W. 1040.

What Constitutes.—Living together as man and wife under a mutual agreement to live in the relation constitutes a common-law marriage under the laws of Texas, which do not make a license a prerequisite to a valid marriage. *Knight v. State*, 55 Tex. Cr. App. 243, 116 S. W. 56.

Where one by means of a sham marriage obtained the consent of a woman to occasional cohabitation, after which she returned to her home, and he never

had any purpose or intent of consummating a marriage, nor did he ever hold her out to the world as his wife, no common-law marriage was created, and therefore the cohabitation was criminal. *Lee v. State*, 72 S. W. 1005, 44 Tex. Cr. App. 354, 61 L. R. A. 904.

A marriage celebrated by a justice of the peace outside of his county is valid, in the absence of any statute expressly declaring void marriages not celebrated according to the statutory forms. *Simon v. State*, 31 Tex. Cr. App. 186, 20 S. W. 390, 37 Am. St. Rep. 802.

B. OF STATUTORY MARRIAGE.

A "valid marriage" is a marriage solemnized with the legal prerequisites of and in accordance with the *lex loci contractus*. In Texas a license is a legal prerequisite, and the rites of matrimony must be performed by some one of the functionaries authorized by the statute to perform them; and, in a prosecution for bigamy or unlawful marriage, if the issue turn upon the validity of a marriage contracted in Texas since these prerequisites have been in force, that issue is dependent upon proof of them by legal evidence; which may consist of the original license and the return thereon, or of eyewitnesses to the marriage ceremony, or, as already indicated, of general reputation in connection with cohabitation, admissions of defendant, etc. *Dumas v. State*, 14 Tex. Cr. App. 464.

C. OF SECOND MARRIAGE.

Where a man and woman, after being married once, have a second marriage performed, the first marriage not being dissolved, the second marriage, though of no effect if the first was legal will be effective if the first was void. *Knapp v. State*, 54 Tex. Cr. App. 633, 114 S. W. 836.

D. AUTHORITY TO PERFORM.

Effect of Celebration by Unobtained Minister.—The fact that the minister

celebrating a marriage was not ordained as provided by statute does not render the marriage void, provided there was a valid common-law marriage. *Holder v. State*, 35 Tex. Cr. App. 19, 29 S. W. 793.

Indictment Charging False Assumption of Authority.—An indictment charged that defendant did falsely assume to be a minister of the gospel, and as such did solemnize the rite of matrimony between certain designated parties, but it nowhere alleged that he was not a minister of the gospel, nor that he was not legally authorized to solemnize marriages. Held, that it was defective, in failing to contain one or both of these negative averments. *Young v. State*, 35 Tex. 114.

E. MARRIAGE IN COUNTY OTHER THAN THAT FROM WHICH LICENSE ISSUED.

A marriage is valid, though the ceremony was performed in a county other than that from which the license issued. *Cummings v. State*, 36 Tex. Cr. App. 256, 36 S. W. 442.

F. DURESS AFFECTING VALIDITY.

Where one who is under arrest for seduction marries the female alleged to have been seduced, he can not afterwards, in a prosecution for bigamy, claim that such marriage was under duress, as marriage under such circumstances is provided for by Pen. Code, art. 816, declaring that if a person accused of seduction, at any time before conviction, marries the female seduced, the prosecution shall be dismissed. *Medrano v. State*, 32 Tex. Cr. App. 214, 22 S. W. 684, 40 Am. St. Rep. 775. See the title SEDUCTION.

VI. Laws of Foreign Countries.

The Michigan law regarding marriage and solemnization thereof construed. *Patterson v. State*, 17 Tex. Cr. App. 102, 109. See post, "Evidence," VIII, B.

Under Michigan law, a justice of peace is authorized to solemnize a marriage in that state. *Patterson v. State*, 17 Tex. Cr. App. 102, 109.

Under the Michigan law, a county clerk was the proper custodian of the original marriage certificate. *Patterson v. State*, 17 Tex. Cr. App. 102, 110.

Effect of Omissions Regulating Marriage.—It was objected to the certificate of the secretary of state that it "only purported to contain a portion of the laws of Michigan regulating marriage in that state, and that the said purported copy shows on its face that thirteen different sections of said law are omitted." Held, that the omissions do not invalidate the certificate as to the section given therein, and, in the absence of proof to the contrary, the appellate court is authorized to hold that the sections copied into the certificate are all the sections relating to the rites of marriage and its solemnization in Michigan. *Patterson v. State*, 17 Tex. Cr. App. 102.

VII. Licenses.

A deputy county clerk is authorized to issue marriage licenses. *Mahon v. State*, 79 S. W. 28, 46 Tex. Cr. App. 234.

Authority of Minor Deputy Clerk.—There being no law prescribing the qualifications of deputy county clerk, a minor is eligible to hold the office, and under Sayles' Civ. St., art. 1146, providing that deputies may perform all such official acts as may be lawfully done by the clerk in person, is authorized to administer an oath to an applicant for a marriage license. *Harkreader v. State*, 35 Tex. Cr. App. 243, 33 S. W. 117, 60 Am. St. Rep. 40.

Effect of Mistake of Clerk.—A mistake of a clerk who was filling offices of the district and county clerk in signing a marriage license as the district instead of as the county clerk will not invalidate an otherwise valid marriage.

Foster v. State, 31 Tex. Cr. App. 409, 20 S. W. 823.

As a Legal Prerequisite.—A valid marriage is a marriage solemnized with the legal prerequisites of and in accordance with the *lex loci contractus*. In Texas a license is a legal prerequisite to a valid marriage. *Dumas v. State*, 14 Tex. Cr. App. 464.

A contrary holding is taken in the cases of a common-law marriage, the court stating that: "It has been held from the beginning in Texas that a common-law marriage is valid, and that it is not a prerequisite to the validity of a marriage that a license issue. The issuance of the marriage license, and the execution of it by marrying the parties, and the return, is but evidence of a marriage. The issuance of the license authorizes the marriage, but the license itself does not constitute a marriage." *Burks v. State*, 50 Tex. Cr. App. 47, 94 S. W. 1040.

VIII. Prosecution for Unlawful Marriage.

A. INDICTMENT OR INFORMATION.

See the titles BIGAMY, vol. 1, p. 659; INCEST, vol. 4, p. 227.

B. EVIDENCE.

To Prove Validity of Marriage.—If the issue turn upon the validity of a marriage contract, the original license and the return thereon, the testimony of eye witnesses to the marriage ceremony, the general reputation in connection with cohabitation, the admission of defendant, etc., are admissible to establish validity of marriage. *Dumas v. State*, 14 Tex. Cr. App. 464.

In order to establish the validity of a marriage it is not necessary to prove that a man whose name the woman bore at the time of the marriage, and who was claimed by her son as his father, was dead or divorced from her, since the name and the child do not constitute proof of a previous mar-

riage. *Simon v. State*, 31 Tex. Cr. App. 186, 20 S. W. 399, 37 Am. St. Rep. 802.

To Prove Particular Day of Marriage.—Where the fact of a marriage having taken place on a particular day is material, the best evidence of the fact is the testimony of those who witnessed the ceremony; and a certified copy of a marriage license, or of a certificate of its solemnization, both of which, under Rev. St., § 2842, are required to be recorded in a well-bound book, is not admissible. *Chew v. State*, 23 Tex. Cr. App. 230, 5 S. W. 373.

To Prove Illegal and Fraudulent Marriage.—On a trial for forgery, where the prosecution claimed that defendant's marriage to a certain woman, whose name was alleged to be forged, was illegal and fraudulent, it was proper to permit evidence that defendant, subsequent to his alleged marriage to such woman, introduced another woman as his wife. *Whittle v. State*, 66 S. W. 771, 43 Tex. Cr. App. 468.

Proof of Marriage by Reputation.—Although a statute says that the fact of marriage can not be proved by mere reputation, reputation may be proof in connection with other facts, and therefore evidence of reputation is admissible. *Patterson v. State*, 17 Tex. Cr. App. 102; *Dumas v. State*, 14 Tex. Cr. App. 464.

Under the Penal Code, in a trial for offenses under the general head of unlawful marriages, a marriage can not be sufficiently proved by mere reputation but in other cases, such proof of marriage is sufficient. *Jackson v. State*, 8 Tex. Cr. App. 60, 61.

Proof by Circumstantial Presumptive Evidence.—Marriage of the parent and the step-parent, where the incestuous intercourse is charged to have transpired between the step-parent and step-child, may be proved by circumstantial presumptive evidence as well as by a witness who was present at the celebration of the marriage. *Nance*

v. State, 17 Tex. Cr. App. 385. See the title INCEST, vol. 4, p. 227.

Proof of Foreign Laws and Their Admission.—A general rule upon the question of proving foreign laws has been correctly stated as follows: "Laws of a state under these provisions, when offered as evidence, are not subservient to or within the purview of the rules which apply to proofs of private documents. They are exceptional, and, if parol evidence with regard to them is admissible at all, it must be on some ground peculiar to the subject of foreign laws." The written law of another state can not be proved by parol in Texas. Under the rules stated, certain written instruments, certified under seal by the secretary of state of Texas to be true copies of certain statutes of the state of M. deposited in his office, were properly admitted on behalf of the state, in a prosecution for bigamy, for the purpose of proving the first marriage of the defendant. *Patterson v. State*, 17 Tex. Cr. App. 102.

Admissibility of Foreign Certified Copy of Marriage Certificate.—Where a certificate of marriage is required to be registered, and is properly registered in the county under the state law, it can be authenticated as an exemplification of a record to another state under the act of congress, and, being a record which can properly be so exemplified when thus authenticated, it is admissible as other documentary evidence would be. By the law of Michigan, as it was proved on this trial, it was required that marriage certificates should be recorded by the county clerk, and that his certified copy of such record "shall be received in all courts and places as presumptive evidence of the fact of such marriage." Under this rule, the copy certified according to law was not only admissible in evidence, but was sufficient to prove the marriage and the time of its celebration,

if the parties be identified as the parties named in the certificate. It was, under the facts of this case, at least confirmatory of reputation and cohabitation. *Patterson v. State*, 17 Tex. Cr. App. 102.

C. INSTRUCTIONS.

The question of marriage arising in a criminal case, defendant requested an instruction "that the marriage may

be proved by the common reputation in the community where the parties reside and are recognized by the community as man and wife." Held that, though it was proper to refuse the charge in the form asked, yet, since the attention of the court was called to the subject, it should have so modified the instruction as to present the question to the jury correctly. *Jackson v. State*, 8 Tex. Cr. App. 60.

Marriage License.

See the title MARRIAGE, ante, p. 441.

Married Women.

See the title HUSBAND AND WIFE, vol. 4, p. 222. As to allegation of ownership of land in indictment against married woman for injuring stock, see the title ANIMALS, vol. 1, p. 86.

MASTER AND SERVANT.

CROSS REFERENCES.

As to constitutionality of statutory provisions for payment of laborers in goods and merchandise, see the title CONSTITUTIONAL LAW, vol. 2, p. 9.

Construction of Statute—Right of Master to Chastise.—Pasch. Dig., art. 2145, provides that "violence used to the person does not amount to an assault and battery in the following cases: in the exercise of the right of moderate restraint or correction given by law to the parent over the child, the guardian over the ward, the master over his servant or apprentice, the teacher over the scholar." Held, that this applies to a real, and not a mere conventional, relation of parent and child; and that a master has no right to whip a youthful domestic servant, even for misconduct. *Davis v. State*, 6 Tex. Cr. App. 133.

"A master has no right to correct a menial or domestic servant otherwise than by words and remonstrances; and if he beat him, though moderately,

by way of correction, it is good ground for the servant's departure, and he might support an action against the master." *Davis v. State*, 6 Tex. Cr. App. 133, 142.

Chitty says: "A master can not, by way of correction, even moderately beat his servant or laborer in husbandry or otherwise, as he might his child or apprentice; and if he do, the servant may lawfully depart, or obtain his discharge by application to a justice, and support an action for battery. There is, however, an exception as to two description of servants, viz, sailors and soldiers, allowed from the necessity of larger powers to preserve discipline and prevent mutiny." *Davis v. State*, 6 Tex. Cr. App. 133, 141.

Kent says: "It is said that the master may give moderate corporal cor-

rection to his servant, while employed in his service, for negligence or misbehavior; but this power does not grow out of the contract of hiring; and Dr. Taylor justly questions its lawfulness, for it is not agreeable to the genius and spirit of the contract. And, without alluding to seamen in the merchant-service, it may be safely confined to apprentices and menial servants while under age, for then the master is to be considered as standing in loco parentis." 2 Kent's Comm. 294, 295. *Davis v. State*, 6 Tex. Cr. App. 133, 141.

To constitute the offense of enticing away a negro from his master, there must be the felonious intent wholly to

deprive the owner of his property; and this intent must be averred in the indictment. *Cain v. State*, 18 Tex. 387.

Labor is property, and the laborer has the same right to sell his labor and make contracts with reference thereto as he would any other property he had. *Jordan v. State*, 51 Tex. Cr. App. 531, 103 S. W. 633, 634.

The legislature has no authority to prevent the citizenship of this country from making their own contracts, nor to interfere with the freedom of contract between workman and employer. *Jordan v. State*, 51 Tex. Cr. App. 531, 103 S. W. 633, 634. See the title CONSTITUTIONAL LAW, vol. 2, p. 9.

Materiality.

See the title PERJURY.

MAYHEM.

BY LEONARD F. PIERSON.

I. Elements of Offense, 447.

II. Indictment, 448.

III. Evidence, 448.

IV. Trial, 448.

CROSS REFERENCES.

As to maiming of animals, see the titles ANIMALS, vol. 1, pp. 67, 70 et seq.; ASSAULT AND BATTERY, vol. 1, p. 493.

I. Elements of Offense.

Maiming, is defined as follows: "To maim is to willfully and maliciously cut off or otherwise deprive a person of the hand, finger, toe, foot, leg, nose, or ear; to put out any eye, or in any way deprive the person of any other member of his body." Penal Code, Art. 507. *Davis v. State*, 22 Tex. Cr. App. 45, 50, 2 S. W. 630.

Maiming under the Texas statute, is defined to be the willful and malicious intent of depriving a person of

any member of his body. *Cole v. State*, 62 Tex. Cr. App. 270, 138 S. W. 109, 110.

Under the express provisions of Code Cr. Proc. 1895, art. 752, maiming includes disfiguring, wounding, aggravated assault and battery, and simple assault and battery. *Pool v. State*, 50 Tex. Cr. App. 482, 129 S. W. 1135.

Specific intent to maim must be established to warrant a conviction for an assault to maim. *Davis v. State*, 22 Tex. Cr. App. 45, 50, 2 S. W. 630.

"Willfully" as used in the statute, punishing maiming, does not mean a specific intent to maim. *Davis v. State*, 22 Tex. Cr. App. 45, 50, 2 S. W. 630.

Necessity That Act Be Willful and Malicious.—To constitute the offense of maiming, the act must be done both willfully and maliciously. *Bowers v. State*, 24 Tex. Cr. App. 542, 7 S. W. 247; *High v. State*, 26 Tex. Cr. App. 545, 572, 10 S. W. 238; *Slattery v. State*, 41 Tex. 619.

To willfully and maliciously shoot off the toe of another constitutes the offense of maiming as defined by Penal Code, art. 507. *Davis v. State*, 22 Tex. Cr. App. 45, 2 S. W. 630.

To destroy the hand of another by willfully and maliciously exploding a fire cracker whilst being held by such person constitutes maiming within the Code. *Neblett v. State*, 47 Tex. Cr. App. 573, 85 S. W. 813.

Knocking out another's front tooth constitutes mayhem. *High v. State*, 26 Tex. Cr. App. 545, 572, 10 S. W. 238.

Severed Part Replaced and Made to Join.—If a member of the body be severed and afterward put back and made to grow, it is still maiming under the law. *Slattery v. State*, 41 Tex. 619, 621.

II. Indictment.

Allegations That Act Was Willfully and Maliciously Done.—An indictment charging that defendant made an assault on prosecutor, and then and there unlawfully and maliciously set fire to a cannon cracker held by prosecutor, which exploded, and destroyed prosecutor's hand, sufficiently charged that the hand was blown off willfully and maliciously. *Neblett v. State*, 85 S. W. 813, 47 Tex. Cr. App. 573.

An indictment, otherwise correct, which charges an accused with willfully and maliciously shooting off the toe of another, is sufficient to charge the offense of maiming, as that offense is defined by Pen. Code, art. 507.

Davis v. State, 22 Tex. Cr. App. 45, 2 S. W. 630.

III. Evidence.

Presumption of Intention to Maim.

—On an indictment for willfully and maliciously maiming a person, when it is proved that such person was deprived of a toe, the court will presume an intention to maim, if the means used were such as would result in maiming, without regard to the knowledge of the party using such means as to whether or not the same was calculated to maim. *Davis v. State*, 22 Tex. Cr. App. 45, 2 S. W. 630.

To Show Absence of Evil Intent.

—On an indictment for maiming by "willfully and maliciously" depriving a person of his thumb, it is error to reject any evidence that the injury was not inflicted willfully and maliciously. *Bowers v. State*, 24 Tex. Cr. App. 542, 7 S. W. 247, 5 Am. St. Rep. 901.

Competency of State to Show Acts to Rebut Defense.—Where one, accused of assault with intent to maim, claimed that she acted to repeal an attempt to rape her, the state could show numerous previous acts of intercourse between the parties, and that the victim went to the place of the offense at accused's invitation. *Cole v. State*, 62 Tex. Cr. App. 270, 138 S. W. 109.

Sufficiency.—Evidence in prosecution for maiming held sufficient to support a conviction. *Davis v. State*, 22 Tex. Cr. App. 45, 2 S. W. 630.

IV. Trial.

Questions of Fact for Jury.—On the trial of one charged with maiming, it should be distinctly presented to the jury, as a matter of fact, whether or not the person injured suffered the loss of a member of his body by the willful act of defendant to such an extent as to substantially deprive him of it at the time of the injury. If such an injury was inflicted, the offense of

maiming is complete, though the member of which the party was deprived was put back to its proper place, and afterwards grew there. *Slattery v. State*, 41 Tex. 619.

The court can not assume, in its charge on the trial of one charged with maiming, that a portion of the human body which is not mentioned in the statute against maiming is a "member" of the body. That must be determined as a matter of fact by the jury. *Slattery v. State*, 41 Tex. 619.

On an indictment for maiming under Wilson's Cr. Laws, §§ 876, 877, declaring that "to maim is willfully and maliciously to cut off or otherwise deprive a person of the hand, arm, finger," etc., it appeared that defendant kicked D. on the arm while his thumb was in one E.'s mouth, whereby a portion of the thumb was torn off. Held, that it was a question for the jury whether the offense had been committed. *Bowers v. State*, 24 Tex. Cr. App. 542, 7 S. W. 247, 5 Am. St. Rep. 90.

The evidence being that a "corner tooth" was knocked out, it is a question for the jury whether the "corner tooth" was a "front tooth." *High v. State*, 26 Tex. Cr. App. 545, 10 S. W. 238, 8 Am. St. Rep. 488.

Necessity That Willfully and Maliciously Be Explained.—In a prosecution for maliciously and willfully maiming another, the terms willfully and maliciously, must be explained by the court's charge to the jury. *Bowers v. State*, 24 Tex. Cr. App. 542, 7 S. W. 247.

Issue of Simple Assault.—Where accused, charged with biting off an ear, was convicted on sufficient evidence of aggravated assault, failure to submit the issue of simple assault was not prejudicial error, especially where such submission was not requested. *Pool v. State*, 59 Tex. Cr. App. 482, 129 S. W. 1135.

Submission of Law of Maiming in Connection with Self-Defense.—In this case it was held error to refuse to so submit. *High v. State*, 26 Tex. Cr. App. 545, 574, 10 S. W. 238.

Charge as to Offense Embraced in Indictment—Assault to Murder.—An instruction that there could not be a conviction of assault to murder under an indictment for maiming, held proper, in view of evidence indicating that intent. *Davis v. State*, 22 Tex. Cr. App. 45, 2 S. W. 630.

Mayor and Mayor's Court.

See the title MUNICIPAL CORPORATIONS. As to power to admit to bail, see the title BAIL AND RECOGNIZANCE, vol. 1, p. 589.

Medical Examiners.

See the title PHYSICIANS AND SURGEONS.

Medicine.

See the title PHYSICIANS AND SURGEONS.

Memorandum.

See the titles EVIDENCE, vol. 2, p. 532; EXCEPTIONS, BILL OF, AND STATEMENT OF FACTS ON APPEAL, vol. 3, p. 1.

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Merger.

See the title CRIMINAL LAW, vol. 2, p. 168.

Mexican Money.

See the title LARCENY, ante, p. 195.

Mexico.

See the titles EXTRADITION, vol. 3, p. 221; LARCENY, ante, p. 195. As to right of United States consul to take depositions in Mexico, see the title DEPOSITIONS, vol. 2, p. 224. As to evidence of laws of, see the title EVIDENCE, vol. 2, p. 529.

Michigan.

As to proof of laws, see the title EVIDENCE, vol. 2, p. 529.

Middle Names.

See the title NAMES.

Mileage.

See the title WITNESSES.

Military Law.

See the title ARMY AND NAVY, vol. 1, p. 472.

Minors.

See the title INFANTS, vol. 4, p. 374.

Minutes of Court.

See the title COURTS, vol. 2, p. 165.

Misapplication of Money.

See the title EMBEZZLEMENT, vol. 2, p. 277.

Miscarriage.

See the title ABORTION, vol. 1, p. 4.

MISCEGENATION.

BY M. S. GLEASON.

- I. Nature and Elements of Offenses, 451.**
- II. Persons Liable, 452.**
- III. Indictment and Information, 452.**
- IV. Evidence, 452.**
- V. Instructions, 452.**

CROSS REFERENCES.

See the titles FORNICATION, vol. 3, p. 345; MARRIAGE, ante, p. 441.

I. Nature and Elements of Offenses.

See, generally, the titles CONSTITUTIONAL LAW, vol. 2, p. 9; STATUTES.

Constitutionality of Statutory Provisions.—That the statute against miscegenation (Pen. Code, art. 386) imposes a penalty on a white person who violates its provisions, but imposes no penalty on the negro consort, does not impair its validity, and is a matter for legislative, not judicial, consideration. *Frasher v. State*, 3 Tex. Cr. App. 263, 30 Am. Rep. 131; *Francois v. State*, 9 Tex. Cr. App. 144.

Article 386 of the Penal Code (Pasc. Dig., art. 2016) which makes it felony for a white person to marry a negro or a person of mixed blood, has not been abrogated or invalidated by the adoption, since its enactment, of the 14th and 15th amendments of the federal constitution, nor by the act of congress known as the Civil Rights Bill. *Frasher v. State*, 3 Tex. Cr. App. 263; *Francois v. State*, 9 Tex. Cr. App. 144.

Whether Art. 386, Pen. Code, Repealed.—Neither the emancipation of the slaves nor the consequent legislation of 1866 repealed Pen. Code, art. 386, making it a felony for a white person to marry a negro or person of mixed blood. Nor was it affected by Constitution of 1869, c. 12, § 27, legalizing the marital relations of the emancipated race among themselves. *Frasher v.*

State, 3 Tex. Cr. App. 263; *Francois v. State*, 9 Tex. Cr. App. 144.

Policy of State—Rev. Pen. Code, Art. 326.—It has always been the policy of this state, to maintain separate martial relations between the whites and the blacks. *Frasher v. State*, 3 Tex. Cr. App. 263.

"Art. 386 was but a part and parcel of the law of the state upon the subject—a regulation which she had the right to make and the power to enforce. She has never intended to abrogate this wise social provision; on the contrary, she has by recent enactment so extended the prohibition as to make it doubly effective, by making both the white and negro races alike amenable to punishment for such unlawful marriages. Rev. Penal Code, art. 326. And this latter statute is no evidence of the fact that our law makers deemed the former void, or that it was void." *Francois v. State*, 9 Tex. Cr. App. 144, 147.

Necessity for Marriage.—In a prosecution against a white person, under art. 2016, Paschal's Digest, for knowingly marrying a negro within this state, or for cohabiting with a negro within this state, after an intermarriage in or out of this state, the marriage was an essential constituent of the offense, and it should have been directly averred in the indictment and positively established by the proof. Cohabitation, without a previous marriage, was not

within the said article. *Moore v. State*, 7 Tex. Cr. App. 608.

II. Persons Liable.

See ante, "Nature and Elements of Offenses," I.

"The Penal Code (art. 326) declares, if any white person and negro shall knowingly intermarry with each other within this state, they shall be punished by confinement, etc. The woman may have known she was white, and the negro been ignorant of the fact; one, therefore, may be innocent, and the other guilty. *Alonzo v. State*, 15 Tex. Cr. App. 378, 384." *Bell v. State*, 33 Tex. Cr. App. 163, 25 S. W. 769.

III. Indictment and Information.

See, generally, the title INDICTMENT AND INFORMATION, vol. 4, p. 239.

Allegations in the Alternative.—Under Pen. Code, art. 386, denouncing marriage by a white person with a negro or person of mixed blood, etc., an indictment for marrying a negro need not notice the alternative. It may, however, count separately on each clause of the article, so as to meet the evidence under either. *Frasher v. State*, 3 Tex. Cr. App. 263, 30 Am. Rep. 131; *Francois v. State*, 9 Tex. Cr. App. 144.

Allegation of Name of Negro Consort.—Omission of the indictment to set out the name of defendant's negro consort is not available on motion in arrest, and is cured by verdict. It would have been a good objection on motion to quash. *Frasher v. State*, 3 Tex. Cr. App. 263, 30 Am. Rep. 131.

IV. Evidence.

See, generally, the title EVIDENCE, vol. 2, p. 324.

Burden of Proof.—To convict under Pen. Code 1895, art. 346, prohibiting intermarriage of whites and negroes of the third degree, the state has the burden of showing that one of the parties had sufficient negro blood to prohibit the marriage, and, where

there is a reasonable doubt about it, accused must be acquitted. *Flores v. State*, 60 Tex. Cr. App. 25, 129 S. W. 1111.

Marriage License.—The marriage license, with the officiating minister's certificate thereon, is legal evidence for the state. *Frasher v. State*, 3 Tex. Cr. App. 263, 30 Am. Rep. 131.

Record of Acquittal of Alleged Consort.—In a prosecution against a white woman, under Pen. Code, art. 326, providing for the punishment of whites and negroes who intermarry, the record of the acquittal of her alleged husband for the same offense is inadmissible. *Bell v. State*, 33 Tex. Cr. App. 163, 25 S. W. 769.

Admission.—In a prosecution against a white woman for intermarrying with a negro, evidence that she testified in a civil case that she was a white woman is admissible. *Bell v. State*, 33 Tex. Cr. App. 163, 25 S. W. 769.

Opinion of Witness as to Defendant's Race.—See, generally, the title EXPERT AND OPINION EVIDENCE, vol. 3, p. 175.

On trial of a woman for miscegenation, the issue whether she is a white woman is not affirmatively established by the state by a witness' opinion that "she looks like a white woman." *Moore v. State*, 7 Tex. Cr. App. 608.

First Husband White.—In a prosecution against a white woman evidence that her first husband was a white man is competent. *Bell v. State*, 33 Tex. Cr. App. 163, 25 S. W. 769.

"The fact that he (defendant's former husband) was a Confederate soldier, if inadmissible as tending to prejudice the jury against her, cannot be a ground for reversal, because she received the lowest punishment." *Bell v. State*, 33 Tex. Cr. App. 163, 25 S. W. 769.

V. Instructions.

See, generally, the title INSTRUCTIONS, vol. 4, p. 385.

On trial of an indictment charging marriage with a negro, it is error to instruct for a conviction if the jury find that defendant married a person of mixed blood. *Frasher v. State*, 3 Tex. Cr. App. 263, 30 Am. Rep. 131.

Where, on the trial for a violation of Pen. Code 1895, art. 346, prohibiting intermarriage of whites with negroes of the third degree, no witness testified to the quantity of negro blood in the woman whom accused married, and every witness, when asked with ref-

erence to the degree of negro blood in the woman, answered that they did not know, the refusal to charge that the burden of proof, was on the state to show that he had violated the law in marrying the woman, and that the burden did not shift to him, was erroneous, though the court charged that, if the jury should find that the woman was a negro within the statute, accused was guilty. *Flores v. State*, 60 Tex. Cr. App. 25, 129 S. W. 1111.

Misconduct of Jury.

See the title JURY; ante, p. 110.

Misdemeanors.

See the titles CRIMINAL LAW, vol. 2, p. 175; INDICTMENT AND INFORMATION, vol. 4, p. 239; INSTRUCTIONS, vol. 4, p. 385; JURISDICTION AND VENUE, ante, p. 60; SENTENCE, JUDGMENT, COMMITMENT AND PUNISHMENT.

Misnomer.

See the title INDICTMENT AND INFORMATION, vol. 4, p. 239.

Mistake.

See the titles CRIMINAL LAW, vol. 2, p. 176; LARCENY, ante, p. 195; NAMES; NEGLIGENCE. See, also, the title NEW TRIAL AND ARREST OF JUDGMENT. As to mistake as defense to prosecution for breach of the peace, see the title BREACH OF THE PEACE, vol. 1, p. 685. As to mistake excusing practice of medicine without license, see the title PHYSICIANS AND SURGEONS. As to mistake in indictment, see the title INDICTMENT AND INFORMATION, vol. 4, p. 239. As to mistake as defense in prosecution for murder, see the title HOMICIDE, vol. 3, p. 477. As to mistake as defense to prosecution for cutting timber, see the title TREES AND TIMBER. As to mistake in order for local option election, see the title INTOXICATING LIQUORS, vol. 4, p. 633. As to mistake as defense to prosecution for selling liquor without a license, see the title INTOXICATING LIQUORS, vol. 4, p. 633.

Mistrial.

See the title TRIAL.

Mobs.

See the titles RIOT; UNLAWFUL ASSEMBLY. See, also, the title HOMICIDE, vol. 3, p. 477.

Money.

See the titles BURGLARY, vol. 1, p. 708; COUNTERFEITING, vol. 2, p. 148; EMBEZZLEMENT, vol. 2, p. 277; JUDICIAL NOTICE, ante, p. 53; LARCENY, ante, p. 195; ROBBERY. See, also, the titles BRIBERY, vol. 1, p. 692; INDICTMENT AND INFORMATION, vol. 4, p. 239; JUDICIAL NOTICE, ante, p. 53. As to issuing bills, see the title BANKS AND BANKING, vol. 1, p. 652.

MONOPOLIES.

CROSS REFERENCES.

See the titles CARRIERS, vol. 1, p. 759; CONSPIRACY, vol. 2, p. 1; CONSTITUTIONAL LAW, vol. 2, p. 9; CORPORATIONS, vol. 2, p. 144; EVIDENCE, vol. 2, p. 324; INDICTMENT AND INFORMATION, vol. 4, p. 239; INJUNCTION, vol. 4, p. 379; STATUTES; TRADEMARKS AND TRADENAMES; TRADE UNIONS; TRUSTS.

Offense under Act March 30, 1889.—Act March 30, 1889, relating to conspiracies against trade (Pen. Code 1895, art. 981), provides that any violation of the law is a conspiracy against trade, and any person who may be engaged in any such conspiracy, or who shall, as principal, manager, director, agent, servant, or employee, knowingly, carry out any of the stipulations, purposes, prices, etc., shall be punished, etc. Held, that under such act two or more persons may form a conspiracy against trade, and others, after the conspiracy is formed, may enter therein, and become amenable as co-conspirators with those forming it. *Hathaway v. State*, 36 Tex. Cr. App. 261, 36 S. W. 465.

Constitutionality of Act March 30, 1889.—Act March 30, 1889, relating to conspiracies against trade, has been held by the supreme court to be constitutional. *Hathaway v. State*, 36 Tex. Cr. App. 261, 36 S. W. 465.

Railroad-Ticket Act as Creating a Monopoly.—Laws 1893, p. 97, making

it a penal offense for any other than the agent of a railroad company to sell its tickets, does not create a monopoly. *Jannin v. State*, 51 S. W. 1126, 62 S. W. 419, 42 Tex. Cr. App. 631, 96 Am. St. Rep. 821.

The ordinance of the city of Bryan prohibiting the sale of meat except at a public market and exacting a reasonable license fee from persons occupying stalls therein, is not invalid as creating a monopoly. *Ex parte Canto*, 21 Tex. Cr. App. 61, 64, 17 S. W. 155. See the title MUNICIPAL CORPORATIONS.

Where the indictment does not charge defendant as principal or agent, or that he in any capacity acted for a trust, and knowingly carried out any of the purposes or orders thereunder or in pursuance thereof, proof of such facts will not support a conviction. *Hathaway v. State*, 36 Tex. Cr. App. 261, 36 S. W. 465. See the title INDICTMENT AND INFORMATION, vol. 4, p. 239.

Necessity for Proof of Knowledge of Conspiracy.—Where one is charged with being a party to the conspiracy, proof merely that he was an agent, without proof that he had knowledge of the conspiracy, is insufficient to support a conviction. *Hathaway v. State*, 36 Tex. Cr. App. 261, 36 S. W. 465.

Monte.

See the titles BAIL AND RECOGNIZANCE, vol. 1, p. 606; GAMING, vol. 3, p. 353.

Month.

See the title TIME. See, also, the title SENTENCE, JUDGMENT, COMMITMENT AND PUNISHMENT.

Moral Turpitude.

As to evidence of, see the titles CRIMINAL LAW, vol. 2, p. 168, et seq.; WITNESSES.

Motion in Arrest of Judgment.

See the title NEW TRIAL AND ARREST OF JUDGMENT.

MOTIONS.

CROSS REFERENCES.

See the titles APPEAL, ERROR AND CERTIORARI, vol. 1, p. 87; CONTINUANCES, vol. 2, p. 65; CRIMINAL LAW, vol. 2, p. 168; EVIDENCE, vol. 2, p. 324; INDICTMENT AND INFORMATION, vol. 4, p. 239; JURISDICTION AND VENUE, ante, p. 60; NEW TRIAL AND ARREST OF JUDGMENT; SENTENCE, JUDGMENT, COMMITMENT AND PUNISHMENT; TRIAL; VERDICT.

As to motions for arrest of judgment, see the title NEW TRIAL AND ARREST OF JUDGMENT. As to motions for continuances, see the title CONTINUANCES, vol. 2, p. 65. As to motions to dismiss appeal, see the title APPEAL, ERROR AND CERTIORARI, vol. 1, p. 205. As to motions to reinstate dismissed case on appeal, see the title APPEAL, ERROR AND CERTIORARI, vol. 1, p. 210. As to motions for rehearing, see the title APPEAL, ERROR AND CERTIORARI, vol. 1, p. 213. As to motions to set aside indictment, see the title INDICTMENT AND INFORMATION, vol. 4, p. 239. As to motions for change of venue, see the title JURISDICTION AND VENUE, ante, p. 60. As to motion for new trial, see the title NEW TRIAL AND ARREST OF JUDGMENT. As to motions to set aside the verdict, see the title VERDICT.

Requisite Notice.—In civil practice, notice of motions in the suit pending is given by filing of motion and entry thereof in the docket during the term. but, where the motion does not relate to the pending suit and the time of service is not elsewhere prescribed, the adverse party is entitled to three days' notice of motion. *Madison v. State*, 17 Tex. Cr. App. 479, 485.

Motion to Quash.

See the titles INDICTMENT AND INFORMATION, vol. 4, p. 239; JURY, ante, p. 110.

Motion to Rehear.

See the title APPEAL, ERROR AND CERTIORARI, vol. 1, p. 87.

Motion to Retax Costs.

See the title COSTS, vol. 2, p. 146.

Motive.

See the title CRIMINAL LAW, vol. 2, p. 174. See, also, the titles treating of the specific crimes. As to necessity for proof of motive, see the title PRESUMPTIONS AND BURDEN OF PROOF. As to evidence of, see the title EVIDENCE, vol. 2, pp. 355, 378.

MUNICIPAL CORPORATIONS.

BY RICHARD K. BRIDGES.

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CROSS REFERENCES.

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p. 324; HABEAS CORPUS, vol. 3, p. 430; HAWKERS AND PEDDLERS, vol. 3, p. 473; INDICTMENT AND INFORMATION, vol. 4, p. 239; INJUNCTION, vol. 4, p. 379; INSTRUCTIONS, vol. 4, p. 385; INTOXICATING LIQUORS, vol. 4, p. 633; JURISDICTION AND VENUE, ante, p. 60; JURY, ante, p. 110; JUSTICES OF THE PEACE, ante, p. 189; LICENSES, ante, p. 413; NEGLIGENCE; NEW TRIAL AND ARREST OF JUDGMENT; NUISANCE; STATUTES; STREETS AND HIGHWAYS; SUNDAYS AND HOLIDAYS; TAXATION; THEATERS AND SHOWS.

I. Creation and Existence.

Creation—Manner.—See post, "Dissolution," IX; "Reorganization," X.

"It is well settled that 'municipal corporations can be created only in the manner provided by law.'" Ex parte Cross, 44 Tex. Cr. App. 376, 379, 71 S. W. 289; Harness v. State, 76 Tex. 566, 13 S. W. 535.

The legislature being the mere creature of the constitution, has no power to disobey a provision of the constitution, requiring the creation of municipal corporations. Ex parte Anderson, 46 Tex. Cr. App. 372, 81 S. W. 973.

Who May Create.—"The inhabitants of a given territory have no inherent power to create therein a municipal corporation. This can be done only by special act of the legislature, or by a compliance with the general law providing the manner in which inhabitants may give life to such an incorporation." Ex parte Cross, 44 Tex. Cr. App. 376, 379, 71 S. W. 289; State v. Dunson, 71 Tex. 65, 9 S. W. 103.

Proof of Corporate Existence.—Where a locality has been incorporated by legislative enactment, the primary evidence thereof is the original charter or incorporative act or an authenticated copy thereof, but when it is shown that such primary evidence is lost or can not be had, secondary evidence is competent by proof of long continued user and reputation or prescription. Temple v. State, 15 Tex. Cr. App. 304.

The sufficiency of secondary evidence of corporate existence by proof of long continued user, reputation or pre-

scription, is ordinarily for the determination of the jury. Temple v. State, 15 Tex. Cr. App. 304. See, generally, the title EVIDENCE, vol. 2, p. 324.

Rev. St. 1895, art. 586, provides that the county judge within twenty days after receipt of the returns of an election resulting in favor of a town's incorporation shall make an entry upon the records of the commissioners' court that the inhabitants of the town are incorporated within the boundaries thereof, etc. Held, that the entry by the county judge is but record evidence of the fact, and it is immaterial whether the entry is made by the judge or under his direction. Ex parte Drake, 55 Tex. Cr. App. 233, 116 S. W. 49.

Under Rev. Civ. St. 1895, art. 558, which provides that "all ordinances of the city, where furnished and published by authority of the city council, shall be admitted and received in all courts without further proof," it is proper to read in evidence a book of city ordinances on the back of which is printed, "Ordinances of the City of M., Printed and Published by the Authority of the City Council," and signed at the end by the mayor, and attested by the city secretary. Starks v. State, 42 S. W. 379, 38 Tex. Cr. App. 233.

Where it appears that a city passing an ordinance, is an incorporated city, the appellate court in the absence of a contrary showing, will presume that the city was incorporated under the general law regarding the incorporation of cities. Ex parte Bowen, 34 Tex. Cr. App. 107, 110, 29 S. W. 269; Ex parte McCarver, 39 Tex. Cr. App. 448, 451, 46 S. W. 936. See the title JUDICIAL NOTICE, ante, p. 53.

Validity of Existence.—Where by law a county judge is authorized to pass on the qualifications of petitioners for ordering an election to determine whether a town shall be incorporated, and he does so pass on their qualifications, and the town is incorporated, in habeas corpus proceedings to secure the release of a resident of the incorporated town from arrest for the violation of an order requiring the resident to work the roads outside the city limits, the qualifications of the petitioners can not be collaterally attacked, so as to render the incorporation invalid and the arrest legal, since it is only by direct proceedings, such as quo warranto, that the corporation could be attacked. *Ex parte Koen*, 58 Tex. Cr. App. 279, 125 S. W. 401.

How Corporate Existence Tried.—The legality of the corporate existence of a city and the election and incumbency of its officers, including respondent, restraining relator under a *capias*, may only be attacked in quo warranto, under Rev. St. 1895, art. 4343, and may not be inquired into by habeas corpus for the release of one from arrest under an ordinance of the city and commitment thereunder. *Ex parte Keeling*, 54 Tex. Cr. App. 118, 121 S. W. 605. See, generally, the title QUO WARRANTO.

II. Charter.

Grant or Amendment of Charter.—Const., art. 11, § 5, providing that cities having more than 10,000 inhabitants may have their charters granted or amended by a special act of the legislature, takes such cities out of the pervue of the general law whenever their amended charter provides a different rule or confers a greater power than that given by the general law. *Ex parte Wilson*, 14 Tex. Cr. App. 592.

Act May 12, 1899, attempting to amend Act Feb. 19, 1899, § 1, defining the limits of a city, is void; reference in

the calls to "said" line showing the omission of calls, and the calls as given embracing no territory. *Miller v. State*, 69 S. W. 522, 44 Tex. Cr. App. 99.

The general rule that, of several conflicting statutes, the latest prevails, is applicable, though such latest statute be but a municipal charter, or a special act. *Davis v. State*, 2 Tex. Cr. App. 425. See, generally, the title STATUTES.

Repeal by Implication.—The statutes of a general nature do not repeal, by implication, charters and special acts passed for the benefit of particular municipalities. *Davis v. State*, 2 Tex. Cr. App. 425, 429.

Superseding General Law Licensing Unlawful Occupation.—A municipal charter and by-laws may, expressly or by necessary implication, supersede a general law concerning the licensing of illegal occupations, within the limits of the corporation. *Davis v. State*, 2 Tex. Cr. App. 425, 429.

III. Corporate Name.

Where for more than thirty years a city continuously used a certain name as that of the city in all official acts, though occasionally with the added word "Texas," the name was that of the city in fact. *Ex parte Keeling*, 54 Tex. Cr. App. 118, 121 S. W. 605.

IV. Powers.

In General.—See post, "Ordinances," V.

Municipal corporations have only such powers as have been granted to them and these are in part conferred by special grants of power and partly in general terms authorizing them to pass all ordinances applicable to them and not repugnant to the constitution or laws of the state. *Craddock v. State*, 18 Tex. Cr. App. 567; *Ex parte Grace*, 9 Tex. Cr. App. 381, 385; *Ex parte Garza*, 28 Tex. Cr. App. 381, 13 S. W. 779; *Ex parte Robinson*, 30 Tex. Cr. App. 493, 494, 17 S. W. 1057; *Ex*

**parte Powell*, 43 Tex. Cr. App. 391, 66 S. W. 298; *Ex parte Epperson*, 61 Tex. Cr. App. 204, 134 S. W. 685; *Ex parte Farnsworth*, 61 Tex. Cr. App. 342, 135 S. W. 538.

It is a general rule that where a mode is prescribed by which a city is authorized to do a certain thing that mode must be pursued. *Miller v. State*, 44 Tex. Cr. App. 99, 69 S. W. 522.

Whence Derived.—Municipal corporations derive their powers from legislative grant and can do no act for which authority is not expressly given or may not be reasonably inferred. *Flood v. State*, 19 Tex. Cr. App. 584.

Construction.—In construing the powers of a corporation whether public or private, courts must adopt a strict construction and hold that only such powers and rights can be exercised under charters as are clearly comprehended within the words of the grant or derived therefrom by necessary implication and in case of ambiguity or doubt arising out of the terms used by the legislature it must be resolved against the power. *Flood v. State*, 19 Tex. Cr. App. 584; *Ex parte Grace*, 9 Tex. Cr. App. 381; *Ex parte Garza*, 28 Tex. Cr. App. 381, 382, 13 S. W. 779; *Ex parte Robinson*, 30 Tex. Cr. App. 493, 17 S. W. 1057; *Ex parte Powell*, 43 Tex. Cr. App. 391, 398, 66 S. W. 298; *Ex parte Epperson*, 61 Tex. Cr. App. 204, 134 S. W. 685.

Power in Conflict with General Law.—If there is an apparent conflict in the authority granted to a city and the state law on the same subject, the conflict is to be reconciled if possible so as to apply the law to those things which the municipality can prohibit without the repeal of the state law. *Ex parte Powell*, 43 Tex. Cr. App. 391, 66 S. W. 298. See, also, *Ex parte Slaren*, 3 Tex. Cr. App. 662, 667; *Craddock v. State*, 18 Tex. Cr. App. 567.

Special Powers.—There is a question as to the authority of the legislature to

delegate special powers to be exercised in cities or particular localities. *Craddock v. State*, 18 Tex. Cr. App. 567, 572.

To Pass Ordinances.—As regards the power of a municipal corporation to pass ordinances, see post, "Ordinances," V.

To Make By-Laws.—The power of municipal corporations to make by-laws is necessarily subject to all limitations imposed by the federal and state constitutions, the general laws of the state, and the provisions of their respective charters. *Ex parte Slaren*, 3 Tex. Cr. App. 662. See, also, *Hamilton v. State*, 3 Tex. Cr. App. 643, 645.

Acceptance of General Liquor Law.—See, generally, the title INTOXICATING LIQUORS, vol. 4, p. 633.

Acts 1875, c. 100, authorizing any city, "by a two-thirds vote of the city council," to accept the provisions of the general liquor law, imports a two-thirds vote of a quorum of the city council present and voting. *English v. State*, 7 Tex. Cr. App. 171.

V. Ordinances.

See ante, "Powers," IV; post, "Officers," VII.

A. IN GENERAL.

Authority to Make.—Under the general law, cities and towns have authority to pass, publish, amend, or repeal all ordinances, rules and police regulations not contrary to the constitution of the state. *Ex parte Boland*, 11 Tex. Cr. App. 159. See, also, *Lynn v. State*, 33 Tex. Cr. App. 153, 156, 25 S. W. 779.

The charter, being the organic law of municipal corporation, contains the only authority by virtue of which its ordinances can be created. *Lynn v. State*, 33 Tex. Cr. App. 153, 159, 25 S. W. 779.

Where the power of a municipal corporation to enact a law must be clearly expressed or necessarily implied in the charter, it is not a safe or sound doc-

trine to invoke authority under a general welfare power to do anything which may appear to the council to be for the peace and good order of the municipality. *Ex parte Powell*, 43 Tex. Cr. App. 391, 66 S. W. 298.

Determination of Power.—In determining the power of a municipality to enact an ordinance, the charter should receive a reasonable construction—that is, a construction which accords with the intention of the legislature—and all reasonable intendments in support of the validity of the ordinance will be indulged. *Ex parte Garza*, 28 Tex. Cr. App. 381, 13 S. W. 779.

Form of Ordinance.—The enacting clause of an ordinance of the city of Calvert, in the form prescribed by Rev. St. 1895, art. 559, providing that the style of ordinances shall be, "Be it ordained by the city council of the city of —" (inserting the name of the city), is sufficient, though the corporate name of the city is the "Mayor, Aldermen, and Inhabitants of the City of Calvert," and the word "Calvert" alone is used. *Ex parte Keeling*, 54 Tex. Cr. App. 118, 121 S. W. 605.

Construction of Ordinance.—In analogy to the construction of legislative acts under Rev. Stat., art. 3138, subd. 6, requiring the court to look for the legislative intention and Penal Code, art. 9, requiring every criminal law to be construed according to the plain import of the language, without regard to the penal character of the law, a municipal ordinance should be given a reasonable construction so as to interpret the intentions of the counsel, and all reasonable intendments are indulged in favor of their validity. *Ex parte Gregory*, 20 Tex. Cr. App. 210.

The title and the body of an ordinance may be taken together in construing it so as to give the necessary certainty to sustain it. *Ex parte Gregory*, 20 Tex. Cr. App. 210.

While the courts are not inclined to

inquire into the reasonableness of municipal ordinances, where they are passed under an express grant of power by the legislature as distinguished from a grant of general powers, if an ordinance is clearly unreasonable they will not hesitate to declare it void. *Ex parte McCarver*, 39 Tex. Cr. App. 448, 46 S. W. 936.

Proof and Establishment of Ordinance.—Where the original ordinance was destroyed, a printed compilation, which the city attorney, who had carefully compared it with the original in the minutes, testified was correct, was admissible to establish the ordinance. *Ex parte Canto*, 21 Tex. Cr. App. 61, 17 S. W. 155, 57 Am. Rep. 609.

B. VALIDITY IN GENERAL.

See post, "Specific Ordinances," V, C.

General Consideration.—No ordinance of an incorporated city is valid unless and until the statutory prerequisites to its enactment are substantially complied with. *Ex parte Farnsworth*, 61 Tex. Cr. App. 342, 135 S. W. 538.

Wherever the penalty in a city ordinance is in excess of or less than the penalty prescribed by the state law, the ordinance is invalid. *Ex parte McHenry* (Cr. App.), 103 S. W. 390, 391; *Ex parte Boland*, 11 Tex. Cr. App. 159; *Angerhoffer v. State*, 15 Tex. Cr. App. 613; *Flood v. State*, 19 Tex. Cr. App. 584; *Ex parte Freeland*, 38 Tex. Cr. App. 321, 42 S. W. 295; *Ex parte Fagg*, 38 Tex. Cr. App. 573, 44 S. W. 294; *Ex parte Coombs*, 38 Tex. Cr. App. 648, 44 S. W. 854; *Ex parte Cross*, 44 Tex. Cr. App. 376, 71 S. W. 289; and *Clark v. State*, 46 Tex. Cr. App. 566, 81 S. W. 722.

Must Be Reasonable.—A municipal ordinance must be either expressly authorized or incidental to express powers, and must be reasonable. *Ex parte Battis*, 40 Tex. Cr. App. 112, 114, 48 S. W. 513. See post, "Specific Ordinances," V, C.

"The doctrine is, that the courts are not authorized to declare an ordinance unreasonable and void, unless its unreasonableness shall clearly appear. *Ex parte Battis*, 40 Tex. Cr. App. 112, 48 S. W. 513." *Ex parte Vance*, 42 Tex. Cr. App. 619, 623, 62 S. W. 568.

Concurrent Operation of State Law and Ordinance.—A state law and a municipal ordinance upon the same subject may concurrently operate, if consistent with each other and in harmony with the constitution. *Hamilton v. State*, 3 Tex. Cr. App. 643.

Offenses Covered by Statute—In General.—A city council has no authority, and can not be authorized by the legislature, to pass an ordinance punishing an act which is made an offense, and punished by the statute. *Ballard v. Dallas* (Cr. App.), 44 S. W. 834. See, also, *Leach v. State*, 36 Tex. Cr. App. 248, 36 S. W. 471; *Ex parte Knox* (Cr. App.), 39 S. W. 670; *Ex parte Fagg*, 38 Tex. Cr. App. 573, 44 S. W. 294; *Coombs v. State*, 38 Tex. Cr. App. 648, 44 S. W. 854; *Crowley v. Dallas* (Cr. App.), 44 S. W. 865; *Ex parte Wickson* (Cr. App.), 47 S. W. 643.

Same—Exception.—Under the general law of the state, municipal councils may make acts already made penal by the state, offenses against the city, where such state offenses are triable by justices of the peace. *Ex parte Fagg*, 38 Tex. Cr. App. 573, 587, 44 S. W. 294.

Prohibiting or Regulating Acts Not Prohibited or Regulated by State Laws.—By way of police regulation, a municipal corporation may, acting within its powers, prohibit acts not unlawful in themselves and not defined and punishable by the Penal Code. *Ayres v. Dalles*, 32 Tex. Cr. App. 603, 610, 25 S. W. 631.

Must Not Conflict with Statute.—It is a general rule, that municipal by-laws must be in harmony with the general laws of the state, and also with the

provisions of the municipal charter; and whenever they come in conflict with either, the by-laws must give way. The city can not pass an ordinance antagonistic to the state law. *McLain v. State*, 31 Tex. Cr. App. 558, 21 S. W. 365; *Flood v. State*, 19 Tex. Cr. App. 584; *Bingham v. State*, 2 Tex. Cr. App. 21, 23; *Bohmy v. State*, 21 Tex. Cr. App. 597, 2 S. W. 886.

Article 896 of the Code of Criminal Procedure provides, that no ordinance of a city or town shall be valid which provides a less penalty for any act, omission, or offense than is prescribed by the statutes where such an act or omission is an offense against the state. *McLain v. State*, 31 Tex. Cr. App. 558, 21 S. W. 365.

Contravening Common Right.—No ordinance can legally be made which contravenes a common right, unless the power to do so be plainly conferred by legislative grant; and in cases relating to such right, authority to regulate, conferred upon towns of limited power, has been held not necessarily to include the power to prohibit. *Ex parte Robinson*, 30 Tex. Cr. App. 493, 17 S. W. 1057.

C. SPECIFIC ORDINANCES.

Abating Nuisances.—See, generally, the titles ANIMALS, vol. 1, p. 64; NUISANCE.

Rev. St. 1895, art. 538, which authorizes the city council to abate nuisances which may become injurious to the public health and to pass ordinances for the preservation of health, empowers the council of a city extending one and a half miles in each direction from the courthouse to adopt an ordinance forbidding the keeping of hogs within one mile of the courthouse; the ordinance not being unreasonable merely because it permits the keeping of hogs outside the one mile limit. *Ex parte Glass*, 90 S. W. 1108, 49 Tex. Cr. App. 87. See, also, *Ex parte Neil*, 32 Tex. Cr. App. 275, 22 S. W. 923.

Animals Running at Large.—As to municipal control of animals running at large and an officer's right under an ordinance to kill same, see the title ANIMALS, vol. 1, p. 76.

Arrest for Violation of Ordinance.—See, generally, the title ARREST, vol. 1, p. 473.

A city charter and ordinance authorizing policemen to arrest without warrant, when an ordinance is violated in their view, is valid. *Vann v. State*, 77 S. W. 813, 45 Tex. Cr. App. 434, 108 Am. St. Rep. 961.

Bowling Alleys.—Under a statute giving to a city the right to regulate bowling alleys, an ordinance is unreasonable which forbids the maintenance of such alleys within the fire limits of a city of about two thousand inhabitants, or within one hundred yards of any residence or business house, where the only location possible under such ordinance is about six hundred yards from the business portion of the town, and remote from any thoroughfare or public place, since such restriction is a virtual prohibition. *Ex parte Patterson*, 58 S. W. 1011, 42 Tex. Cr. App. 256, 51 L. R. A. 654.

Breeding Animals.—As to municipal control of breeding of animals within corporate limits, see the title ANIMALS, vol. 1, p. 64.

Curfew Ordinance.—A "curfew ordinance," prohibiting persons under twenty-one from the streets after nine p. m. unless with parent or guardian, or in search of a physician, is an unreasonable exercise of the general powers of a city to preserve the public peace, and to protect the good order and morals of the community, as authorized by Rev. St., art. 457, and therefore void. *Ex parte McCarver*, 46 S. W. 936, 39 Tex. Cr. App. 448, 42 L. R. A. 587, 73 Am. St. Rep. 946.

Elections.—See, generally, the title ELECTIONS, vol. 2, p. 270.

Where statutes authorize a city to levy a tax by virtue of an election to

be had under an ordinance passed for that purpose, an election had under a mere resolution is void. *Miller v. State*, 69 S. W. 522, 44 Tex. Cr. App. 99.

Firearms.—The charter of Waco limits the city's authority to punish only those crimes whose penalty is not greater than \$100 fine or fifteen days' imprisonment, "unless a larger fine and a longer imprisonment is herein allowed," and provides that, where there is an ordinance in force punishing any misdemeanor "with as great a penalty as the statutes of the state, the police court of Waco shall have jurisdiction." Held, that the city has power to confer upon the police court jurisdiction of those crimes whose penalty is greater than \$100 fine or fifteen days' imprisonment only where the crime is expressly provided for in the charter, or by an ordinance "in force" at the time of the adoption of the charter, and that an ordinance adopted afterwards, prescribing the extreme penalty, for carrying firearms at \$200 fine or thirty days' imprisonment, is void. *McNeil v. State*, 29 Tex. Cr. App. 48, 14 S. W. 393.

Fire Limits and Fireproof Buildings.—Independent of legislative grant, cities have the inherent power to establish fire limits and to prohibit the use of inflammable materials in buildings or repairs thereto within such limits. *Ex parte Cain*, 56 Tex. Cr. App. 538, 120 S. W. 999.

Under Rev. St. 1895, art. 523, authorizing cities to establish fire limits and to prohibit the erection or repair of wooden buildings therein, except the rebuilding or repairing of buildings damaged not over fifty per cent of their value, etc., a city ordinance establishing fire limits and prohibiting the erection of wooden buildings therein, or repairing such buildings, except when the repairs are less than twenty per cent of the value of the buildings, is valid, except to the extent of a conflict between the statute and

the ordinance as to repairs, and as to the extent of such conflict the ordinance is void. *Ex parte Cain*, 56 Tex. Cr. App. 538, 120 S. W. 999.

A city ordinance, prohibiting the erection of any building within fire limits, except buildings constructed of "brick" or "stone," does not prohibit the construction of a concrete building, since "concrete" is either a species of brick, or is an artificial stone; and the ordinance is not in conflict with Rev. St. 1895, art. 523, authorizing cities to establish fire limits, and to prohibit the construction of buildings therein, except buildings of fireproof materials. *Ex parte Morris*, 56 Tex. Cr. App. 553, 120 S. W. 1007.

Garbage, Removal of.—An ordinance providing that any person shall have a right to remove or have removed from his own premises any stable manure, swill, or other garbage having a value, and excluding night soil from its provisions, provided he does so before it becomes a nuisance, and provided, further, that all garbage of a watery kind shall be removed in watertight vessels, with tight covering, preventing the escape of same or offensive odor, therefrom, and containing provisions as to the place of dumping, was a reasonable municipal regulation. *Ex parte Anderson*, 53 Tex. Cr. App. 243, 109 S. W. 193.

Hacks and Other Vehicles.—The court may pass on the reasonableness of a city ordinance fixing stands for hacks and other vehicles for the transportation of goods and passengers. *Ex parte Vance*, 62 S. W. 568, 42 Tex. Cr. App. 619.

A city ordinance requiring drivers of hacks to remain with their vehicles while at a hack stand does not forbid such drivers from alighting to assist passengers to enter the vehicles. *Ex parte Vance*, 62 S. W. 568, 42 Tex. Cr. App. 619.

A city ordinance establishing a hack stand at a depot at a greater distance therefrom than the place at which

street cars are permitted to stop is not a discrimination, and hence does not render the ordinance void. *Ex parte Vance*, 42 Tex. Cr. App. 619, 62 S. W. 568.

A city ordinance establishing hack and street car stands at a depot, which requires hack drivers to remain with their vehicles, but which makes no similar requirement as to persons in charge of cars, is unreasonable discrimination, rendering the ordinance invalid. *Ex parte Vance*, 42 Tex. Cr. App. 619, 62 S. W. 568.

A city ordinance regulating hacks and street cars at a depot held not to prohibit the employees of the street cars from leaving the cars. *Ex parte Vance*, 42 Tex. Cr. App. 619, 62 S. W. 568.

Under Sayles' Ann. Civ. St. 1897, art. 430, authorizing a city to regulate hackmen, draymen, omnibus drivers, and drivers of baggage wagons, etc., a city has no power of prohibition, and therefore an ordinance making it unlawful for any person under the age of sixteen years to operate any automobile or other motor vehicle upon the city streets is invalid. *Ex parte Epperson*, 61 Tex. Cr. App. 204, 134 S. W. 685.

Intoxication, Regulation of.—See, generally, the title INTOXICATING LIQUORS, vol. 4, p. 633.

An ordinance making it an offense for a person to be found intoxicated in any public place within the corporate limits is not inconsistent with the constitution and laws of the state. *Ex parte Oliver*, 3 Tex. Cr. App. 345.

Where the charter of a city authorizes it "to locate and regulate variety theaters," and "to prevent the sale * * * of any intoxicating liquors" therein, an ordinance is valid, declaring it a penal offense for one connected with a variety theater to sell intoxicating liquors, though such offense is not defined in the Penal Code. *Ayres v. City of Dallas*, 32 Tex. Cr. App. 603, 25 S. W. 631.

Market Houses.—Under a charter

which confers authority upon a city "to regulate the erection, use, and continuance of market houses," the city has power to pass an ordinance prohibiting the sale of fresh meats outside the market house. *Ex parte Canto*, 21 Tex. Cr. App. 61, 17 S. W. 155, 57 Am. Rep. 609.

Charges of \$30 per quarter for the use of a stall in a market house, and \$5 for the use of a stand, which are provided for by ordinance, are reasonable, and do not render the ordinance void, as creating a monopoly. *Ex parte Canto*, 21 Tex. Cr. App. 61, 17 S. W. 155, 57 Am. Rep. 609.

Occupation Tax.—As to the imposition of an occupation tax by a city, see the title LICENSES, ante, p. 413.

Peddlers and Hawkers.—See, generally, the title HAWKERS AND PEDDLERS, vol. 3, p. 473.

The legislature may confer on cities the power to regulate peddling within their jurisdictions. *Ex parte Henson*, 90 S. W. 874, 49 Tex. Cr. App. 177.

The power of the state to license peddlers does not exclude the right of cities under the authority of statute to regulate them and to prohibit their use of certain streets and the public square. *Ex parte Henson*, 90 S. W. 874, 49 Tex. Cr. App. 177.

Sayles' Ann. Civ. St. 1897, art. 419, vests in cities of less than 10,000 inhabitants exclusive control and power over their streets and public grounds, and art. 428 gives them authority to regulate or suppress and prevent hawkers and peddlers. An ordinance declared it unlawful to peddle or in any other manner sell any kind of merchandise on the public square or certain streets. Held, that the invalidity of the provision relating to other sales does not affect the validity of that relating to peddling; the two being separable. *Ex parte Henson*, 90 S. W. 874, 49 Tex. Cr. App. 177.

Pool Selling.—See the title GAMING, vol. 3, p. 353.

"The legislature has licensed turf exchanges or the selling of pools on horse-races. It therefore can not delegate authority to a municipal corporation to create or pass ordinances violative of that law, either by repealing or suspending it. *Angerhoffer v. State*, 15 Tex. Cr. App. 613; *Flood v. State*, 19 Tex. Cr. App. 584; *Bohmy v. State*, 21 Tex. Cr. App. 597, 2 S. W. 886; *Ex parte Sundstrom*, 25 Tex. Cr. App. 133, 153, 8 S. W. 207; *Ex parte Coombs*, 38 Tex. Cr. App. 648, 44 S. W. 854; Const., Bill of Rights, art. 1, § 28." *Ex parte Ogden*, 43 Tex. Cr. App. 531, 532, 66 S. W. 1100; *Ex parte Powell*, 43 Tex. Cr. App. 391, 66 S. W. 298.

Railroad Tickets; Sale of.—Const., art. 3, § 1, vests the legislative power of the state in the legislature. Article 10, § 2, provides that the legislature shall pass laws to regulate railway freight and passenger tariffs, and correct abuses, and prevent unjust discrimination, etc., and may enforce the same by adequate penalties, and to the further accomplishment of these objects and purposes may provide and establish all requisite means and agencies, invested with such powers as may be deemed adequate and advisable. San Antonio City Charter, § 96, grants power "to restrict sale of tickets, passes, or other evidence of the right to travel on any railroad to duly authorized agents of the railroad issuing or authorizing the same, and to prohibit the sale of all tickets, passes, or other evidence of the right to travel on any railroad by any person other than duly authorized agents of the railroad issuing or authorizing the same, and to provide penalties for violation of any ordinance passed under this power." Held, that an ordinance making it unlawful for any person, firm, or corporation, or for any officer, agent, or servant, etc., of any corporation, to sell, barter, or transfer in the city of San Antonio for any consideration whatever the whole or any part of any

railroad ticket, etc., unless duly authorized in writing so to do by the railroad issuing the same, is constitutional and in pursuance of a valid delegation of the police power of the state, in the absence of any statute on the subject. *Ex parte Hughes*, 50 Tex. Cr. App. 614, 100 S. W. 160.

Saloons, Opening on Sunday.—See, generally, the title SUNDAYS AND HOLIDAYS.

Provision in the charter of Dallas authorizing the city to regulate the opening and closing of saloons on Sunday, and ordinances passed pursuant thereto, were invalid, and did not abrogate the state law on the same subject. *Fay v. State*, 71 S. W. 603, 44 Tex. Cr. App. 381.

Streets and Highways—Obstruction.—See, generally, the title, STREETS AND HIGHWAYS.

Where a state law provides a penalty for the obstruction of the streets of towns a fine not to exceed \$500, a town ordinance punishing the obstruction of its streets by fine not in excess of \$25 conflicts with the state law, and is void. *Ex parte Cross*, 71 S. W. 289, 44 Tex. Cr. App. 376.

If a city ordinance authorizes the obstructing of city streets in a certain manner, one is sufficiently justified by proving the ordinance when prosecuted for maintaining such obstruction. *Echols v. State*, 12 Tex. Cr. App. 615.

Same—Work on.—Rev. St. 1895, art. 419, empowers cities and towns to cause all able-bodied male inhabitants above eighteen years of age to work on the roads and to enforce the provision by appropriate ordinances. Rev. St. 1895, art. 4730a, amends the article by limiting the ages of persons liable to such work to from twenty-one to forty-five years. Held, that the legislature delegated full power to the cities and towns, and they might impose such penalties to enforce the labor of citizens as they saw fit, without reference to the state law in regard to work-

ing the roads, subject to the limitation of punishment as fixed by the jurisdiction of their local courts, and hence an ordinance providing for a fine not exceeding \$25 was not invalid because imposing a penalty in excess of White's Ann. Pen. Code, art. 491, providing a fine not to exceed \$10 in such cases. *Ex parte Drake*, 55 Tex. Cr. App. 233, 116 S. W. 49. See further *Ex parte Grace*, 9 Tex. Cr. App. 381, 387; *Ex parte Campbell* (Cr. App.), 22 S. W. 1020; *Ex parte Taylor* (Cr. App.), 37 S. W. 422; *Ex parte Bowen*, 34 Tex. Cr. App. 107, 29 S. W. 269.

Sunday Sales.—The aldermen of a town having less than one thousand inhabitants may, under Rev. St., art. 520, which empowers it to enact ordinances not inconsistent with the laws of the state, incorporate into an ordinance Pen. Code, arts. 186, 186a, prohibiting bartering and selling on Sunday. *Ex parte Abram*, 34 Tex. Cr. App. 10, 28 S. W. 818.

Sunday Traffic.—Where traffic on Sunday is prohibited by a law of the state, an ordinance of a city allowing such traffic between certain hours is void. *Bohmy v. State*, 21 Tex. Cr. App. 597, 2 S. W. 886.

Taxation—Restraint of Power.—See, generally, the title TAXATION.

So long as a municipality keeps within its lawful power to tax, the courts are not authorized to restrain its exercise of that power on the ground that the municipal tax may operate a local prohibition of a lawful pursuit. *Ex parte Schmidt*, 2 Tex. Cr. App. 196.

Telephone Rates.—Sp. Acts 30th Leg., c. 71, approved April 13, 1907, enacted a city charter containing initiative and referendum provisions, which by art. 2, § 8, subd. 27, empowered the city to regulate and fix charges of local telephones, and by subdivision seven delegated such power to the board of commissioners or city council, who were required to give notice and grant

hearings to parties affected by the regulations, and by art. 8, § 1, provided for petition for a proposed ordinance and a submission of it to vote. The board without itself enacting any ordinance relating to telephone rates or making rules for notice and hearing of a proposed ordinance relating thereto received a petition for a proposed ordinance regulating telephone rates, and submitted it to the people at a special election, at which it received a majority of votes, and by order of the board was placed with the city ordinances as an enacted ordinance. Held, that the ordinance as enacted was invalid. *Ex parte Farnsworth*, 61 Tex. Cr. App. 342, 135 S. W. 538.

Theaters and Shows.—Under its charter, the city of Dallas has the power to pass an ordinance "regulating variety theaters" and prohibiting the sale of intoxicating liquors "in variety theaters or places where theatrical or other exhibitions are given." *Ayres v. Dallas*, 32 Tex. Cr. App. 603, 610, 25 S. W. 631. See, generally, the title THEATERS AND SHOWS.

An ordinance defining a variety show as "any place or institution known or recognized as a variety show," and punishing the keeper of such show, is too indefinite to support a conviction. *Ex parte Bell*, 32 Tex. Cr. App. 308, 22 S. W. 1040, 40 Am. St. Rep. 778.

VI. Courts.

As to the creation and existence of all corporate courts, see the title COURTS, vol. 2, p. 150. As to all matters relating to the jurisdiction of corporate courts, see the title JURISDICTION AND VENUE, ante, p. 60.

"A municipal court is not a state court, except in a limited sense (that is, a state court for municipal purposes only)." *Ex parte Fagg*, 38 Tex. Cr. App. 573, 584, 44 S. W. 294.

VII. Officers.

Whence Office Derived.—All municipal officers must derive office from

the corporation. *Ex parte Lewis*, 45 Tex. Cr. App. 1, 73 S. W. 811.

Appointment—Commissioners of Police, Fire and Health Departments.

A provision of a city charter giving the governor power to appoint a commission having certain jurisdiction of the police, fire, street, and health departments of the city is unconstitutional. *Ex parte Levine*, 81 S. W. 1206, 46 Tex. Cr. App. 364.

Quære, whether commissioners appointed by the governor, under special charter of a city, are purely municipal officers or quasi state officers, not decided. *Ex parte Levine*, 46 Tex. Cr. App. 364, 81 S. W. 1206.

Policemen—Appointments.—A provision in a city charter for appointment of a chief of police and policemen by commissioners appointed by the governor is constitutional and valid. *Ex parte Tracey* (Cr. App.), 93 S. W. 538.

Same—Officer De Facto.—Where two persons acted as peace officers for a long time prior to the arrest in question, the same being necessary for the well-being of the corporation, and they did so with the acquiescence of the mayor and council of the corporation and received pay therefor, and they were regarded during such time by the general public as officers, it would constitute them officers de facto, though they may not have been inducted or appointed to such offices by color of right or title. *Ex parte Tracey* (Cr. App.), 93 S. W. 538.

Same—Character.—See the title ARREST, vol. 1, p. 473.

A policeman is an officer, within the meaning of Cr. Code, § 488, defining aggravated assaults on officers. *Sanner v. State*, 2 Tex. Cr. App. 458.

Same—Rights.—A peace officer is exempt from the operation of the law inhibiting the carrying of a pistol only while in his own bailiwick, except when he goes outside of his immediate jurisdiction to perform some official

duty in another section. His official character only pertains where he can perform his official duty. *Ray v. State*, 44 Tex. Cr. App. 158, 70 S. W. 23, overruling *Clayton v. State*, 21 Tex. Cr. App. 343, 17 S. W. 261.

Mayor and Aldermen.—The act of April 19, 1901 (Galveston special charter), authorizing appointment of mayor and aldermen by the governor, held, notwithstanding constitution, art. 11, § 5, to violate the principle of local self-government embodied in the Bill of Rights, §§ 1, 2, Const., art. 6, § 2, and Laws 1895, page 113, chapter 100. *Ex parte Lewis*, 45 Tex. Cr. App. 1, 73 S. W. 811.

VIII. Prosecutions.

In What Name.—The Texas constitution provides, that all "prosecutions" shall be carried on in the name and by the authority of the state, etc., Const., art. 5, § 12. Proceedings by a municipal corporation to enforce fines and penalties for petty offenses, as are ordinarily enforced by them, are only quasi criminal, and are not prosecutions. *Ex parte Fagg*, 38 Tex. Cr. App. 573, 44 S. W. 294.

Prosecutions for offenses against state laws must be in the name of "The State of Texas," but an incorporated city may ordain that violations of its ordinances may be prosecuted in the name of the municipality. *Bautsch v. Galveston*, 27 Tex. Cr. App. 342, 346, 11 S. W. 414; *Ex parte Boland*, 11 Tex. Cr. App. 159, 166.

A prosecution in a recorder's court for repairing a wooden building in violation of a city ordinance, though prosecuted in the name of the municipality, and not in the name of the state, is a "criminal case" or "criminal action," within Pen. Code, art. 26, defining a criminal action as "the whole or any part of the procedure which the law provides for bringing offenders to justice," and Code Cr. Proc., art. 61, which provides that "a criminal ac-

tion is prosecuted in the name of the state of Texas," etc. *Bautsch v. City of Galveston*, 27 Tex. Cr. App. 342, 11 S. W. 414.

An act granting a municipal corporation authority to make an offense against the state also an offense against the city, with power to prosecute therefor in the city court, as contrary to ordinance, violates Const., art. 5, § 12, requiring all prosecutions of offenses against the state to be in the name of the state, and to conclude against its peace and dignity. *Ex parte Fagg*, 44 S. W. 294, 38 Tex. Cr. App. 573, 40 L. R. A. 212.

On Whom Served.—In suits against a municipal corporation, citation may be served on the mayor, clerk, secretary or treasurer thereof. *Shultz v. Galveston*, 3 App. Civ. Cases, § 438.

Who Liable to Punishment.—*Quære*, whether a defendant who has been convicted and punished before a justice of the peace, for an assault and battery, can be tried and punished in a mayor's court for the same act under an ordinance of the town. *Burns v. La Grange*, 17 Tex. 415.

Jurisdiction.—See the title JURISDICTION AND VENUE, ante, p. 60.

Appeal.—See, generally, the title APPEAL, ERROR AND CERTIORARI, vol. 1, p. 87.

It is the general object and purpose of the statutes to give the right of appeal in all cases tried before mayors and recorders, to the same extent and in the same manner as they are permitted to be prosecuted from justices courts. *Bautsch v. State*, 27 Tex. Cr. App. 342, 11 S. W. 414.

A provision in a city charter that no appeal shall lie from the city court, unless the fine is twenty dollars or more, and then only to the court of appeals is unconstitutional, where the court is at the same time authorized to try state offenses. *Leach v. State*, 36 Tex. Cr. App. 248, 254, 36 S. W. 471.

Proceedings of a mayor's court in a

prosecution for violation of a town ordinance are examinable on certiorari from the district court, but the prosecution is not triable de novo. *Burns v. Town of La Grange*, 17 Tex. 415.

On appeal from a conviction of violating a town ordinance, the bond may be made payable to the town, when the forbidden act is not prohibited by any state law. *Irish v. State* (Cr. App.), 24 S. W. 516.

IX. Dissolution.

There is only one way to dissolve the corporation after it is once put in existence, except in case of nonuser, and that is by quo warranto proceedings instituted by the state. See, also, *Ex parte Roberts*, 28 Tex. Cr. App. 43, 11 S. W. 782; *El Paso v. Ruckman*, 92 Tex. 86, 46 S. W. 25; *Ex parte Koen*, 58 Tex. Cr. App. 279, 282, 125 S. W. 401. See, generally, the title QUO WARRANTO.

"The inhabitants of a municipal corporation are as powerless to dissolve it, unless this be done in the mode prescribed by law, as are they to create such a corporation in a mode not prescribed by law." *Ex parte Cross*, 44 Tex. Cr. App. 376, 379, 71 S. W. 289; *Largen v. State*, 76 Tex. 323, 13 S. W.

161; *Lum v. Bowie* (Tex.), 18 S. W. 142. See, also, *Buford v. State*, 72 Tex. 182, 10 S. W. 401; *State v. Dunson*, 71 Tex. 65, 9 S. W. 103; *Harness v. State*, 76 Tex. 566, 13 S. W. 535.

Rev. St. 1895, art. 615 (Rev. St. 1879, art. 540), provides that, when fifty of the voters of any incorporated town or village of less than one thousand inhabitants shall desire the abolition of such corporation, they may petition the county judge, who shall thereupon order an election, etc. Held, that this act did not authorize a town otherwise within its provisions, but incorporated under a special charter, to abolish its incorporation; the act only applying to towns organized under the general law. *Ex parte Cross*, 71 S. W. 289, 44 Tex. Cr. App. 376.

X. Reorganization.

An attempted reorganization of a town or village under the general law is without authority and void, where the legislature has not attempted to authorize such towns and villages to dissolve their charters under special acts and reincorporate under the general law. *Ex parte Cross*, 44 Tex. Cr. App. 376, 71 S. W. 289.

Murder.

See the title HOMICIDE, vol. 3, p. 477.

Mutilation.

See references under MAIMING, ante, p. 431.

Mutual Combat.

See the titles ASSAULT AND BATTERY, vol. 1, p. 493; HOMICIDE, vol. 3, p. 477.

NAMES.

BY M. S. GLEASON.

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As to the allegation of names in indictments and informations, see the title INDICTMENT AND INFORMATION, vol. 4, p. 239.

I. Requisites and Sufficiency.

A. IN GENERAL.

See post, "Identity," II.

A penal bond recited the surety's name as Sherman Dodd, but his signature thereto was S. D. Dodd. The judgment nisi was entered against Sherman Dodd; the scire facias was issued for, and returned as served upon, Sherman D. Dodd; and the judgment final was entered against Sherman Dodd. Held, that these discrepancies

in the appellation of the surety do not affect the validity of the final judgment against him. *Dodd v. State*, 2 Tex. Cr. App. 58.

B. CHRISTIAN NAMES.

"Men, in this country, as universally have a Christian as a surname; and the one is, in general, as essential as the other, where the law requires the name of a person to be stated in judicial proceedings. To dispense with one in an indictment would be an innovation

upon established usage in legal proceedings, which, it is believed, the code did not contemplate." *State v. Vandever*, 21 Tex. 335, 336. See, also, *English v. State*, 30 Tex. Cr. App. 470, 18 S. W. 94.

"When a party or third person is designated in a pleading, warrant, or indictment by a surname preceded by one or more capital letters only, the court, in the absence of evidence, will not presume that he has any Christian name other than such letter or letters." 16 Amer. & Eng. Enc. Law, p. 116." *English v. State*, 30 Tex. Cr. App. 470, 18 S. W. 94, 95.

C. MIDDLE NAMES.

See post, "Names in Common Use," I, G.

"The law seems to be well settled in this state, however much it may conflict with modern ideas on the subject, that a middle name or initial is not known in law, and is treated as of no consequence whatever, unless it be made to appear that it has worked an injury to a different person than the one designed. *McKay v. Speak*, 8 Tex. 376; *Dixon v. State*, 2 Tex. Cr. App. 530; *Dodd v. State*, 2 Tex. Cr. App. 58; *Sullivan v. State*, 6 Tex. Cr. App. 319." *Delphino v. State*, 11 Tex. Cr. App. 30, 31; *State v. Manning*, 14 Tex. 402, 405; *Stockton v. State*, 25 Tex. 772, 774; *Steen v. State*, 27 Tex. 86, 88; *English v. State*, 30 Tex. Cr. App. 470, 18 S. W. 94, 95.

D. PREFIXES AND SUFFIXES.

"But the proof in the case does not support the indictment. The indictment charges appellant with swindling Brooks, Knox & Co. The proof is that there was no such partnership firm, and that the offense was committed against Brooks & Knox. Although certainty to a common intent only was necessary in the pleading, we think this is a fatal variance." *Mathews v. State*, 33 Tex. 102, 107.

E. ABBREVIATIONS.

See post, "Derivations and Corruptions," I, F.

"That the affidavit upon which the information was based was signed William Hunt, and charged that defendant committed an assault upon Wm. Hunt, and that the information charged the assault to have been committed upon Wm. instead of William Hunt, is not an objection fatal to the prosecution. We think the defendant's motion to quash the information upon the ground of the supposed variance above stated was properly overruled. (Code Crim. Proc., Art. 425; Clark's Crim. Law, p. 423, note.)" *Roberson v. State*, 15 Tex. Cr. App. 317, 319.

F. DERIVATIONS AND CORRUPTIONS.

"Where two names have the same derivation, or where one is an abbreviation or corruption of the other; but both are taken promiscuously and according to common use to be the same, though differing in sound, the use of one for the other is not a material misnomer. *Gordon v. Holliday*, Wash. Ct. 285; 7 Bac. Abr., title Misnomer; *Weaver v. McElhenon*, 12 Mo. 89; *Wilkerson v. The State*, 12 Mo. 91." *Goode v. State*, 2 Tex. Cr. App. 520, 524. See, also, *Williams v. State*, 5 Tex. Cr. App. 226.

In *Alsup v. State*, 36 Tex. Cr. App. 535, 38 S. W. 174, it is said: "Jack is an abbreviation of John; Rich, of Richard." See Bish. Cr. Proc., § 689. If Jack is an abbreviation of John, evidently Bob is an abbreviation of Robert; and proof that the deceased's name was Bob Thomas meets the allegation that the appellant had killed Robert Thomas. In *Walter v. State*, 105 Ind. 589, 5 N. E. 737, et seq., Chief Justice Niblack, on this question, says: "The rule fairly deducible from the authorities is that, if two names are taken promiscuously to be the same name, in common use, though they differ in

sound, there is no variance between them. Where two names are derived from the same source, or where one is an abbreviation or corruption of another, but both are taken by common use to be the same, though differing in sound, the use of the one for the other is not a misnomer. 1 Bish. Cr. Proc., § 689. Jack and Jock are ordinarily only diminutive names for John; and Jack, *prima facie*, at least, stands for John. See *Webst. Dict.* In the cited case the charge was a sale to Jack Murphy, and the proof showed that his name was John Murphy. Held, it did not constitute a variance. See, also, *Wilkerson v. State*, 13 Mo. 95. We are of opinion that it was unnecessary to introduce any evidence to show that Bob meant Robert. This court will take judicial knowledge of the contraction, derivation, and corruption of names." See the title JUDICIAL NOTICE, ante, p. 53.

G. NAMES IN COMMON USE.

One may be designated in legal proceedings by the name by which he is commonly known, although not his true name. *Owen v. State*, 7 Tex. Cr. App. 329. See, also, *Cotton v. State*, 4 Tex. 260; *Hunter v. State*, 8 Tex. Cr. App. 75, 78; *Plumley v. State*, 8 Tex. Cr. App. 529, 531; *Ben v. State*, 9 Tex. Cr. App. 107, 109; *Henry v. State*, 7 Tex. Cr. App. 388, 393.

"To allege Hiram, and prove that he was commonly known as Hiram would be sufficient, though Hiram be the middle name." *McAfee v. State*, 14 Tex. Cr. App. 668, 674.

II. Identity.

See ante, "In General," I, A; post, "Questions for Jury," IV.

On a prosecution for petty theft, a copy of a chattel mortgage on the alleged stolen article, signed by W. G. S., was admissible, where it was shown that accused signed his name in this manner, though he was generally

known as "Green S." *Swanner v. State* (Cr. App.), 65 S. W. 186.

III. Idem Sonans.

A. GENERAL RULE.

"Whenever 'the names may be sounded alike without doing violence to the power of the letters found in the variant orthography, or if the name as stated be idem sonans with the true name, the misspelling and variance is immaterial.' *Milontree v. State*, 30 Tex. Cr. App. 151, 16 S. W. 764; *Foster v. State*, 1 Tex. Cr. App. 531; *Goode v. State*, 2 Tex. Cr. App. 520; *Henry v. State*, 7 Tex. Cr. App. 388." *Cline v. State*, 34 Tex. Cr. App. 415, 31 S. W. 175, 176. See, also, *Walker v. State*, 13 Tex. Cr. App. 618, 641.

"If the sound of the letters gives the pronunciation, or be, as expressed in the books, idem sonans, the demands of the law are satisfied. It is well settled that in the employment of names of common derivation even less particularity is required." *Williams v. State*, 5 Tex. Cr. App. 226, 230. See ante, "Derivations and Corruptions," I, F.

"If an abbreviation of a name would make no variance, we can see no reason why a combination of two given or Christian names, where they produce a word or name having the same sound, should produce a fatal variance." *Goode v. State*, 2 Tex. Cr. App. 520, 525.

"We think, also, that the doctrine of idem sonans applies to and governs verdicts in the same manner, and to the same extent, that it does in other matters. (*Haney v. State*, 2 Tex. Cr. App. 504; *Taylor v. State*, 5 Tex. Cr. App. 569; *Huffman v. Com.*, 6 Rand., Va., 685; *Williams v. State*, 5 Tex. Cr. App. 226; *State v. Smith*, 33 La. Ann., 1414.)" *Walker v. State*, 13 Tex. Cr. App. 618, 641. See the title VERDICT.

B. NAMES WITHIN RULE.

Blackenship and Blankenship, Mc-

Innis and McGinnis, Edmindson and Edmundson, Deadema and Diadema have been held to be idem sonans. *Foster v. State*, 1 Tex. Cr. App. 531, 533.

"Chatam" and Chatham.—Indictment charged theft of a note on the "Chatam National Bank;" but the note as proved and exhibited was on the Chatham National Bank. Held, idem sonans, and not a material variance between the alleged and the proved appellation of the bank. *Roth v. State*, 10 Tex. Cr. App. 27.

"Cocks" and "Cox."—The information contained the name "Edith Cocks." The proof showed the named to be "Edie Cox." The surnames though not spelled alike are idem sonans. *Waters v. State* (Cr. App.), 31 S. W. 642.

"Fauntleroy" and "Fontleroy," used for the name of the injured person in an indictment for assault with intent to kill, are idem sonans, and the variance is immaterial. *Wilks v. State*, 27 Tex. Cr. App. 381, 11 S. W. 415.

"J. R. Fenn" and "J. R. Finn" are idem sonans. *Alexander v. State* (Cr. App.), 25 S. W. 127.

"Foster" and "Faster" are idem sonans. *Foster v. State*, 1 Tex. Cr. App. 531.

"Frederico" and Fedrico.—An indictment for homicide alleged that deceased's name was "Frederico Tersero," while the proof showed his name to be "Fedrico Tersero." The evidence showed that the two names sounded alike in Spanish, that decedent went by both names, and that the letter "r" was silent in the pronunciation of the name in Mexican. Held, that the variance in the name did not require reversal of a conviction. *Hernandez v. State*, 53 Tex. Cr. App. 468, 110 S. W. 753.

"Garzia" and "Garcia."—On an indictment for assault on one "Garzia," a conviction may be had on proof of an assault on one "Garcia," in the absence of proof as to the pronunciation

of the letter "z" in the Mexican name "Garzia." *Rape v. State*, 34 Tex. Cr. App. 615, 31 S. W. 652.

"George" and "Georg" are idem sonans. *Hall v. State*, 32 Tex. Cr. App. 594, 25 S. W. 292.

"Guadalupe" and "Gadalupu."—An indictment should not be quashed because the name "Guadalupe county" is in one place spelled with a "u" instead of an "e" for its final letter, the two spellings being idem sonans. *Cabelero v. State*, 80 S. W. 1014, 46 Tex. Cr. App. 457.

"Guadlupe" and "Guadalupu."—An indictment for rape, alleging that the crime was committed in "Guadlupe" instead of "Guadalupe" county, was not fatally defective, the names being idem sonans. *Reys v. State*, 76 S. W. 457, 45 Tex. Cr. App. 463, rehearing denied in 77 S. W. 213.

"Hillmer" and "Helmer."—Proof of theft from a person named "Hillmer" is not a variance from an indictment charging theft from a person named "Helmer." *Cline v. State*, 34 Tex. Cr. App. 415, 31 S. W. 175.

"Hix Nowells" and "Hicks Nowells." are idem sonans. *Spoonemore v. State*, 25 Tex. Cr. App. 358, 8 S. W. 280.

The names **"Georgia Holland" and "Georgia Harland"** are idem sonans, and such discrepancy in an executive warrant will not warrant release on habeas corpus. *Ex parte Holland*, 53 Tex. Cr. App. 301, 108 S. W. 1181.

"Ichman" and "Eichman" are idem sonans. *Eichman v. State*, 22 Tex. Cr. App. 137, 2 S. W. 538.

"Isreal" and "Israel" are idem sonans. *Boren v. State*, 32 Tex. Cr. App. 637, 643, 25 S. W. 775.

"Janury" Is Idem Sonans with "January."—*Hutto v. State*, 7 Tex. Cr. App. 44.

"July" and "Julia."—As used in an indictment, to indicate the Christian name of prosecutrix, and as proved on the trial, "July" and "Julia" are idem sonans. *Dickson v. State*, 34 Tex. Cr.

App. 1, 28 S. W. 815, 30 S. W. 307, 53 Am. St. Rep. 694.

"Lindsay," "Lindsey," "Lindsay" and "Lindly."—"Lindsay," "Lindsey," and "Lindsy" are idem sonans; but neither of these names can be held idem sonans with "Lindly." *Roberts v. State*, 2 Tex. Cr. App. 4.

"Mallie" and "Mollie."—Where the complaint and information in a prosecution for using abusive language stated the given name of the injured party to be "Mallie," and the proof showed that her name was "Mollie," there was no variance sufficient to vitiate a verdict of conviction. *Howard v. State* (Cr. App.), 65 S. W. 519.

"Maple" and "Mable."—Where accused was charged with committing rape on one "Maple" Norred, evidence that the crime was committed on "Mable" Norred was properly received; the names "Maple" and "Mable" being idem sonans. *Smith v. State* (Cr. App.), 140 S. W. 1096.

"Mary Etta" and "Marrietta" are idem sonans. *Goode v. State*, 2 Tex. Cr. App. 520.

"Mikel" and "Mikil."—A motion to quash an indictment for murder on the ground that one count charged the defendant with killing Nancy "Mikel," while the second count charged the killing of Nancy "Mikil," was properly overruled, the names being idem sonans. *Mikel v. State*, 68 S. W. 512, 43 Tex. Cr. App. 615.

"Morris" and "Maurice."—Where an indictment for violating the local option law alleged a sale to "Morris Walton," charges of the court based on a sale to "Maurice Walton," did not constitute a fatal variance; the names "Morris" and "Maurice" being idem sonans. *Thompson v. State* (Cr. App.), 97 S. W. 316.

The words **"mrder" and "murder"** are idem sonans. *Walker v. State*, 13 Tex. Cr. App. 618.

"Noberto" and "Norberto."—A judgment on a forfeited bond signed with

the Christian name "Noberto" was entered against "Norberto." Held, not a fatal variance. *Salinas v. State*, 39 Tex. Cr. App. 319, 45 S. W. 900.

"Noland" and "Nolen."—Where an indictment for theft gave the owner's name as "John Noland," and the proof showed it to be "John Nolen," the variance was not fatal. *Burks v. State* (Cr. App.), 35 S. W. 173.

"Piland" and "Pelan."—"The information uses the name 'Henry Piland' throughout. It is contended that the use of the name 'Pelan' in the first instance in the complaint is a variance from the name 'Henry Piland,' subsequently used in said complaint and in the information. We do not believe this is a variance." *Piland v. State* (Cr. App.), 47 S. W. 1007, 1008.

"Pittis" is idem sonans with "Pettis."—*Hutto v. State*, 7 Tex. Cr. App. 44.

"Sawyer" and "Sawyers."—Where a warrant issues for the arrest of "Sawyer," and the evidence shows the name to be "Sawyers," there is no variance, as the names are idem sonans. *Ex parte Sawyers* (Cr. App.), 48 S. W. 512. See, also, *Williams v. State*, 5 Tex. Cr. App. 226. But see *Neiderluck v. State*, 21 Tex. Cr. App. 320, 17 S. W. 467; *Brown v. State*, 28 Tex. Cr. App. 65, 70, 11 S. W. 1022.

"Spirituos" and "Spiritous" are idem sonans.—*Brumley v. State*, 11 Tex. Cr. App. 114.

"Wantingly" and "Wantonly" are idem sonans.—*Smith v. State*, 36 Tex. 317.

"Whitman" and "Whiteman" are idem sonans. *Henry v. State*, 7 Tex. Cr. App. 388.

"Williams" and "William."—On trial of "John Williams" for larceny, a verdict finding "the defendant, John William," guilty, held not to be a material variance. These names are idem sonans. *Williams v. State*, 5 Tex. Cr. App. 226. See, also, *Ex parte Sawyers* (Cr. App.), 48 S. W. 512. But see *Neiderluck v. State*, 21 Tex. Cr. App. 320,

17 S. W. 467; *Brown v. State*, 28 Tex. Cr. App. 65, 70, 11 S. W. 1022.

"Woodlin," "Woodline," "Woodlon" and "Woodland."—"The indictment charges the appellant with the murder of George Woodlin. We find in different parts of the record, this name is spelled 'Woodlin,' 'Woodline,' 'Woodlon,' and 'Woodland.' * * * On the trial, neither the court, the jury, the counsel, the witnesses, nor the appellant appear to have been aware of any variance between the name of the deceased as spelled in the indictment, as used by the courts, the attorneys, and witnesses; and this fully convinces us that the doctrine of idem sonans should apply here, unless the clerk has misspelled the name in the record with reiterated carelessness. This we believe to have been the case." *Dawson v. State*, 33 Tex. 492, 506.

C. NAMES NOT WITHIN RULE.

"Abie" and "Avie" are not idem sonans. *Burgemy v. State*, 4 Tex. Cr. App. 572.

"Burglary" and "burgerally" are not idem sonans. *Haney v. State*, 2 Tex. Cr. App. 504, 506.

"Daniel Aeri" is not idem sonans with "dandle oulal."—*Potter v. State*, 9 Tex. Cr. App. 55.

The names Edith and Edie are not idem sonans.—*Waters v. State* (Cr. App.), 31 S. W. 642.

"Fist" is not idem sonans with "First."—*Wooldridge v. State*, 13 Tex. Cr. App. 443.

"Frank" and "Franks," etc.—"In *Parchman v. State*, 2 Tex. Cr. App. 228, it is held that 'Frank' and 'Franks' are neither the same name, nor idem sonans. 'Thompsons' and 'Thompson' and 'Richards' and 'Richard' are held not to be idem sonans. See, also, examples given by Mr. Wharton in the first volume, § 57, of his work on criminal law. Under the authorities, 'Woods' and 'Wood' are not idem sonans, and hence there is a variance."

Neiderluck v. State, 21 Tex. Cr. App. 320, 17 S. W. 467. See, also, *Brown v. State*, 28 Tex. Cr. App. 65, 11 S. W. 1022. But see *Williams v. State*, 5 Tex. Cr. App. 226; *Ex parte Sawyers* (Cr. App.), 48 S. W. 512.

"Franz Masoh," and "Frank Mozach" are not idem sonans. *Schindler v. State*, 17 Tex. Cr. App. 408.

"Guity" is not idem sonans with the word "guilty." *Taylor v. State*, 5 Tex. Cr. App. 569.

"Hall" and "Wall."—Conviction can not be had under an indictment charging sale of liquor to "Henry Hall" on proof of sale to "Henry Wall," the names not being idem sonans. *Henderson v. State* (Cr. App.), 38 S. W. 618.

"Pauline Leitz" and "Pauline Seitz" are not idem sonans. *Nance v. State*, 17 Tex. Cr. App. 385.

"Lindsay," "Lindsey," "Lindsy" and "Lindly."—*Lindsay, Lindsey and Lindsy* are idem sonans; but neither can be held idem sonans with "Lindly." *Roberts v. State*, 2 Tex. Cr. App. 4, 6.

"Nellie Raglin" and "Nelly Ragsley" are not idem sonans. *Mindex v. State* (Cr. App.), 38 S. W. 995.

"Schneider" and "Schineoder."—There is a variance between an information under Rev. Cr. Code, art. 966, for sending a threatening letter to "Jules E. Schneider," and evidence of a letter addressed to "Jules E. Schineoder." *Hansen v. State*, 35 Tex. Cr. App. 593, 34 S. W. 929.

"We think there is a fatal variance between the name 'Wm. Seaffers' and 'Wm. Seaforth' or 'Seafort,' and that the allegation of the name in the indictment can not be sustained under the rule of idem sonans, because the pronunciation of the two names does not make them sound alike." *Milontree v. State*, 30 Tex. Cr. App. 151, 16 S. W. 764, 765.

"Wilkin" and "Wilkins."—Scire facias described the sureties as "Wilkins, palm, and Wilkin," alleges forfeiture

against "Wilkins, Palm, and Wilkins," and commanded service on "Wilkin, Palm, and Wilkin;" the officer's return showing the latter. The judgment nisi in evidence was against "Wilkins, Palm, and Wilkins," and the bond in evidence was signed by "Wilkin, Palm, and Wilkin." Held, "Wilkin," and "Wilkins" were not idem sonans, and the variance was fatal. *Brown v. State*, 28 Tex. App. 65, 11 S. W. 1022. See, also, *Neiderluck v. State*, 21 Tex. Cr. App. 320, 17 S. W. 467. But see *Williams v. State*, 5 Tex. Cr. App. 226; *Ex parte Sawyers* (Cr. App.), 48 S. W. 512.

"Woods" and "Wood."—Where an indictment or theft alleges that the property taken belonged to "E. S. Woods," and the evidence shows that it belonged to "E. S. Wood," there is a variance; "Woods" and "Wood" not being idem sonans. *Neiderluck v. State*, 21 Tex. Cr. App. 320, 17 S. W. 467.

IV. Questions for Jury.

See, generally, the titles INSTRUCTIONS, vol. 4, p. 385; TRIAL.

Name of Particular Person.—"Some of the witnesses knew the prosecutrix as 'Nora Lee Simmons,' and others as 'Nora Lee Slaughter,' and we think the court properly submitted the issue to the jury as to the name of said prosecutrix." *Gonzales v. State* (Cr. App.), 31 S. W. 371.

Where the indictment alleged an assault and battery upon Mrs. George W. Bell, the defense insisting that her name was Sallie Bell, held, that it was matter of proof to the jury as to what was her name, and that the court erred

in instructing them that "if George W. Bell is the name of the defendant, his wife is correctly described when called 'Mrs. George W. Bell.'" *Bell v. State*, 25 Tex. 574.

Identity of Person Where Name Alleged Not Sustained by Proof.—In an indictment for theft it was alleged that "T. C. Lucky" was the owner of the property; whereas, on the trial the evidence proved that the name of the owner was "C. C. Lucky." Held, that the court below correctly instructed the jury that if they were satisfied from the evidence that "T. C. Lucky" and "C. C. Lucky" is one and the same person, and that the difference in the name is a mere variance in the description of but one person, who was the owner of the property stolen, then the variance is immaterial, and the evidence sustains the charge in the indictment as to the ownership of the property. *Brown v. State*, 32 Tex. 125.

Idem Sonans.—Where an indictment for theft alleges the name of the owner of the stolen property to be "Fraude," while the name as actually and properly spelled is "Freude," the question of variance should be submitted to the jury; and it is error to rule that the names are idem sonans. *Weitzel v. State*, 28 Tex. Cr. App. 523, 13 S. W. 864, 19 Am. St. Rep. 855. But see *Spoonmore v. State*, 25 Tex. Cr. App. 358, 8 S. W. 280, where it is held that, "Hix Nowels" and "Hicks Nowells" being idem sonans, the court rightly withholds from the jury, in a trial for theft, the question of whether the name proved is the name in the indictment.

National Bank.

See the title BANKS AND BANKING, vol. 1, p. 652.

Naturalization.

See the title JURY, ante, p. 110.

Necessity.

See the title CRIMINAL LAW, vol. 2, p. 177.

NEGLIGENCE.

CROSS REFERENCES.

See the titles CRIMINAL LAW, vol. 2, p. 174; HOMICIDE, vol. 4, p. 1.

As to the nature of a mistake of fact such as will constitute a defense to a criminal prosecution, see the titles BIGAMY, vol. 1, p. 660; CRIMINAL LAW, vol. 2, p. 176.

Statutory Provisions.—Article 44 of the Penal Code reads: "No act done by accident is an offense, except in certain cases specially provided for, where there has been a degree of carelessness or negligence which the law regards as criminal." These certain cases which the law provides for will be found in chapter 13 of the Penal Code. *Richards v. State* (Cr. App.), 30 S. W. 805.

Necessity for Duty.—"As we under-

stand both the common law and the statute, there can be no criminal negligence or carelessness by omission to act, unless it was the especial duty of the party to perform the act omitted." *Anderson v. State*, 27 Tex. Cr. App. 177, 11 S. W. 33, 34.

The question as to proper care depends upon the facts and circumstances of each case. *Watson v. State*, 13 Tex. Cr. App. 76, 82. See the title INSTRUCTIONS, vol. 4, p. 385.

Negligent Homicide.

See the title HOMICIDE, vol. 3, p. 477.

Negroes.

See the titles INDICTMENT AND INFORMATION, vol. 4, p. 239. As to objection to indictment for discrimination against in grand jury, see the titles JURY, ante, p. 110; MISCEGENATION, ante, p. 451; REMOVAL OF CAUSES. See, also, the title HOMICIDE, vol. 3, p. 477.

Newly Discovered Evidence.

See the title NEW TRIAL AND ARREST OF JUDGMENT.

New Mexico.

See the title LARCENY, ante, p. 195.

Newspapers.

As to freedom of press, see the title CONSTITUTIONAL LAW, vol. 2, p. 25. As to obscene matter, see the title OBSCENITY. As to newspaper report as hearsay, see the title EVIDENCE, vol. 2, p. 630. As to juries and newspapers, see the title NEW TRIAL AND ARREST OF JUDGMENT. As to publication of notice of local option election, see the title INTOXICATING LIQUORS, vol. 4, p. 633.

NEW TRIAL AND ARREST OF JUDGMENT.

BY M. S. GLEASON.

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CROSS REFERENCES.

See the titles APPEAL, ERROR AND CERTIORARI, vol. 1, p. 87; ARGUMENT AND CONDUCT OF COUNSEL, vol. 1, p. 397; CONTINUANCES, vol. 2, p. 65; CRIMINAL LAW, vol. 2, p. 168; EVIDENCE, vol. 2, p. 324; EXCEPTIONS AND OBJECTIONS, vol. 2, p. 743; HOMICIDE, vol. 4, p. 1; INDICTMENT AND INFORMATION, vol. 4, p. 239; INSTRUCTIONS, vol. 4, p. 385; JURISDICTION AND VENUE, ante, p. 60; JURY, ante, p. 110; SENTENCE, JUDGMENT, COMMITMENT AND PUNISHMENT; VERDICT; WITNESSES.

I. New Trial.

A. DEFINITION, NATURE AND EFFECT.

Definition.—"Our statutes provide that a new trial is the rehearing of a criminal action after verdict, before the judge or another jury, as the case may be." *Mathis v. State*, 40 Tex. Cr. App. 316, 50 S. W. 368, 369.

Nature and Effect.—Article 783 provides that the effect of a new trial is to place the cause in the same position as before trial. *Drake v. State*, 29 Tex. Cr. App. 265, 15 S. W. 725; *Cox v. State*, 7 Tex. Cr. App. 495; *Robinson v. State*, 21 Tex. Cr. App. 160, 17 S. W. 632; *Moore v. State*, 21 Tex. Cr. App. 666, 2 S. W. 887; *Robinson v. State*, 23 Tex. Cr. App. 315, 4 S. W. 904; *Mathis v. State*, 40 Tex. Cr. App. 316, 50 S. W. 368, 369.

It would appear under the Texas criminal statutes, that the granting of a new trial in a criminal case is a finality, and not subject to a reconsideration during the term. *Mathis v. State*, 40 Tex. Cr. App. 316, 50 S. W. 368, 369.

B. APPLICATION, HEARING AND GRANT.

1. The Application.

Motions for New Trial and Arrest of Judgment Must Be Separate.—A motion "to set aside and arrest a judgment and grant a new trial," assigning grounds in support of both remedies, must be treated either as a motion for a new trial, or in arrest, and can not be considered as embracing both. *State v. Mann*, 13 Tex. 61.

Time of Making Motion.—It is provided by the Code that application for

new trial should be filed within two days after conviction, but for good cause shown for delay it is within the sound discretion of the judge to grant a new trial when the motion is filed at any time during the trial term. *Branch v. State*, 1 Tex. Cr. App. 99; *Valentine v. State*, 6 Tex. Cr. App. 439, 445; *White v. State*, 10 Tex. Cr. App. 167; *Bullock v. State*, 12 Tex. Cr. App. 42; *Wilkins v. State*, 15 Tex. Cr. App. 420; *Hernandez v. State*, 18 Tex. Cr. App. 134, 147; *Hart v. State*, 21 Tex. Cr. App. 163, 17 S. W. 421; *Leache v. State*, 22 Tex. Cr. App. 279, 3 S. W. 539; *Mathis v. State*, 40 Tex. Cr. App. 316, 50 S. W. 368; *Carusales v. State*, 47 Tex. Cr. App. 1, 82 S. W. 1038; *Bird v. State*, 48 Tex. Cr. App. 188, 87 S. W. 146; *Kindred v. State* (Cr. App.), 68 S. W. 796; Code Crim. Proc. art. 779.

A motion to strike a motion for new trial, because not filed within two days after the trial, nor until after sentence, is addressed to the sound discretion of the court. *Moray v. State*, 61 Tex. Cr. App. 547, 135 S. W. 569.

Defendant filed a motion for a new trial within two days after the verdict was returned, but subsequently, and before the motion was acted on, filed an amended motion, in which he set up the misconduct of the jury, which was not contained in the original motion, alleging that one of the jurors while the jury were deliberating had stated that defendant was guilty, and that the juror had been in a certain place where the sale of liquor was alleged to have occurred two or three times a week and passed by the "frosty joint" where the offense was alleged to have been committed, and that he personally knew defendant was selling whisky, and the affidavit of the attorney for defendant showed that, when he made the original motion, he did not know of the misconduct of the jury. Held that, while the statute requires a motion for a new trial to be filed within two days after ver-

dict, it also provides for a motion for a new trial thereafter, if sufficient merit is shown, and the court should have investigated the alleged misconduct of the jury, and it was error to strike the amended motion. *Covington v. State*, 51 Tex. Cr. App. 48, 100 S. W. 368.

For a defendant to bring himself within Code Cr. Proc., art. 839, subd. 3, providing that, where there has not been a motion for new trial or in arrest of judgment, either or both motions may be entered and disposed of, though more than two days have elapsed from rendition of judgment, he must allege and prove that he has not previously filed a motion for either a new trial or in arrest of judgment. *Hines v. State*, 70 S. W. 955, 44 Tex. Cr. App. 319.

Paschal's Dig., art. 1471, disallowing a motion for a new trial after a motion in arrest of judgment, was repealed by the enactment of the Code of Criminal Procedure, so far as criminal causes were concerned. *Mathews v. State*, 33 Tex. 102.

It is error to refuse to entertain a motion for a new trial, in a criminal cause, because a motion in arrest had been previously made and overruled. *Mathews v. State*, 33 Tex. 102.

The fact that one has appealed from a judgment of conviction of a misdemeanor does not deprive the court of jurisdiction to grant, at the same term, a new trial on a second motion. *Fricke v. State*, 11 Tex. Cr. App. 6.

In a prosecution for embezzlement, an amended motion for new trial, supported by affidavits that jurors in reaching their verdict had considered the fact that the accused did not testify in his own behalf, should have been determined by the court on the merits, though not filed until the last day of the term. *Cowan v. State*, 93 S. W. 553, 49 Tex. Cr. App. 466.

Time of Filing Evidence.—Evidence under a motion for a new trial must be filed during the trial term in order

to be reviewable. *Reinhard v. State*, 52 Tex. Cr. App. 59, 106 S. W. 128.

Necessity for Writing.—"All motions for new trials shall be in writing." *Mathis v. State*, 40 Tex. Cr. App. 316, 50 S. W. 368.

Must Set Forth Grounds.—See post, "Grounds," I, C.

All motions for new trial shall set forth definitely the grounds upon which the new trial is asked. *Mathis v. State*, 40 Tex. Cr. App. 316, 50 S. W. 368; *Bertroug v. State*, 2 Tex. Cr. App. 160.

A motion for a new trial for burglary was based on affidavits of defendant's father and brother, alleging that the gun alleged to have been taken from the burglarized house was the property of affiants; that defendant was under the age of fifteen years, was unable to speak the English language, and had not been represented by counsel at the trial. The district attorney, by affidavit, controverted the allegations in the affidavits for the motion, and alleged that in appearance defendant seemed to be nineteen or twenty years of age; that defendant was not convicted solely on the evidence that defendant was in possession of the gun shown to have been taken. Held that, in the absence of a statement of facts, it does not appear that the court erred in denying a new trial. *Acebedo v. State* (Cr. App.), 20 S. W. 714.

Motion Should Be Sworn to.—A motion for a new trial, in a criminal case, should be sworn to. *Terry v. State*, 3 Tex. Cr. App. 236.

Form of Motion.—It is improper to make a motion for a new trial in the form of an argument. *Jackson v. State* (Cr. App.), 51 S. W. 389.

A statement of facts in a criminal case has no place in a motion for a new trial. *Terry v. State*, 50 Tex. Cr. App. 438, 97 S. W. 1043.

Must Be Disposed of When.—A motion for a new trial must be disposed

of at the term at which it was made. *Wilcox v. State*, 31 Tex. 586.

Right of State to Question Grounds.

—Under Code Cr. Proc. 1895, art. 821, the state may take issue with the defendant upon the truth of the causes set forth in the motion for new trial, and in such case the judge shall hear evidence, by affidavit or otherwise, and determine the issue. *Mathis v. State*, 40 Tex. Cr. App. 316, 50 S. W. 368.

Counter affidavits are receivable on motion for new trial. *Dignowitty v. State*, 17 Tex. 521, 67 Am. Dec. 670.

Under the provisions of the Revised Code of Criminal Procedure allowing the State to "take issue with the defendant upon the truth of the causes set forth in the motion for a new trial," counter affidavits may be filed in opposition to the motion. *Reynolds v. State*, 7 Tex. Cr. App. 516; *Childs v. State*, 10 Tex. Cr. App. 183; *Harris v. State*, 18 Tex. Cr. App. 287; *Pickett v. State*, 56 Tex. Cr. App. 68, 118 S. W. 1039; *Johnson v. State*, 59 Tex. Cr. App. 11, 127 S. W. 559; *Dougherty v. State*, 59 Tex. Cr. App. 464, 128 S. W. 398.

Right to Strike Subpoenas from Motion.—Subpoenas issued to various

counties for a witness are properly stricken from a motion for a new trial where they are neither pertinent nor relevant thereto. *Anderson v. State*, 45 S. W. 15, 39 Tex. Cr. App. 83.

Effect of Loss of Indictment.—When, in a motion for a new trial, it is shown to the trial court that the indictment is lost, it is the duty of the prosecution to substitute the lost indictment, and, on failure so to do, the case will be reversed. *Wolff v. State* (Cr. App.), 23 S. W. 799.

2. The Hearing.

Examination of Witnesses.—See, generally, the title WITNESSES.

It is improper to allow oral examination of witnesses whose affidavits have been presented in support of a

motion for a new trial. *Keef v. State*, 44 Tex. 582.

Motion for Further Time.—A motion for further time to answer contradictory affidavits, filed by the state, on motion by defendant for a new trial for newly-discovered evidence, is properly denied, where it is not made until after the parties had gone into a discussion of the motion for a new trial. *Lawrence v. State*, 36 Tex. Cr. App. 173, 36 S. W. 90.

Inquiry as to Truthfulness of Testimony.—Though, in a contest over a motion for a continuance to procure absent testimony, there can be no inquiry into the truthfulness or materiality of the testimony (Code Cr. Proc., arts. 564, 565), such inquiry may be made where a new trial is sought because of alleged error in overruling the motion. *Attaway v. State*, 31 Tex. Cr. App. 475, 20 S. W. 925.

Basis of Decision of Judge.—The decision on a motion for a new trial because of the refusal of a continuance must be based upon affidavits or evidence, given on the hearing before the judge, as required by Code Crim. Proc., arts. 565, 780, where the causes for the motion are controverted as provided by the Code. *Richardson v. State*, 28 Tex. Cr. App. 216, 12 S. W. 870.

Under Code Cr. Proc., art. 781, providing that where the truth of the causes set forth in the motion for a new trial is controverted the judge shall hear the evidence by affidavit or otherwise, it is improper for the judge to base his decision on information obtained from private sources. *Richardson v. State*, 28 Tex. Cr. App. 216, 12 S. W. 870.

Necessity for Controverting Affidavits.—Where defendant attaches to his motion for a new trial, on the ground of newly-discovered evidence, an affidavit, but the facts set out therein are not new, the state need not file a controverting affidavit, in order that the

court may hear evidence in relation to the issue raised. *Kelly v. State*, 31 Tex. Cr. App. 211, 20 S. W. 365.

Duty of Court as to Weighing Evidence.—While a motion for continuance on the ground of the absence of material witnesses may be properly denied for want of due diligence, yet, on motion for a new trial, after conviction, where the proposed evidence appears to have been material and probably true, it is the duty of the court, under Code Cr. Proc., art. 560, subd. 6, to reconsider and weigh the evidence proposed on the motion for continuance, in connection with the evidence actually adduced at the trial. *Jackson v. State*, 23 Tex. Cr. App. 183, 5 S. W. 371.

Ruling on Weight and Credibility of Testimony.—Where accused, after conviction, moved for a new trial for refusal of a continuance to procure the attendance of a witness whom defendant claimed would support his plea of an alibi, the court, in hearing the motion, should not have passed upon a statement of a witness for the state that the absent witness told him he retired early the night involved in the alibi and did not know where defendant was after that, nor upon the credibility and weight to be given the absent witness' testimony. *Sneed v. State* (Cr. App.), 100 S. W. 922.

Duty of Judge as to Change of Venue.—See, generally, the title JURISDICTION AND VENUE, ante, p. 60.

A motion for a new trial, in a capital case, alleged, in substance, the making of threats and determined attempts to lynch defendant by mobs in the county where the case was pending; that no one dared to move for a change of venue; that the trial judge, on being applied to personally to order a change on his own motion, refused to do so, giving no reason, although he had full knowledge of the facts; that defendant was obliged to

go to trial without time for preparation, and with a prejudiced jury, for fear of the mob; and only obtained an attorney to defend him by the court's compelling an attorney, against his will, to do so. Held, that the refusal of a new trial, on such motion, without taking evidence on the matters alleged, was error. *Steagald v. State*, 22 Tex. Cr. App. 464, 3 S. W. 771.

Necessity for Presence of Accused.

—Both at common law and under the Code, absence of the defendant, in a felony case, during the hearing and determination of his motion for a new trial, is a ground for a new trial. *Gibson v. State*, 3 Tex. Cr. App. 437.

It is not proper practice for the court to have entertained the motion for a new trial in the absence of defendant, unless his presence was waived. See *Gibson v. State*, 3 Tex. Cr. App. 437. In ordinary practice it frequently occurs that, there being no occasion for the presence of a defendant on motion for a new trial, he is not present, and no objection is made on account of his absence. *Gonzales v. State*, 38 Tex. Cr. App. 62, 41 S. W. 605; *Sweat v. State*, 4 Tex. Cr. App. 617.

An order overruling the motion for a new trial which recited that accused appeared by attorney and nowise negatived his personal presence, when the motion was heard and determined, was sufficient. *Cordova v. State*, 6 Tex. Cr. App. 207.

Though improper to consider and overrule accused's motion for a new trial, when he is not present in court, such action may be corrected by setting it aside, and, when accused is present in court, again considering and determining the motion. *Berkley v. State*, 4 Tex. Cr. App. 122; *Krautz v. State*, 4 Tex. Cr. App. 534; *Garcia v. State*, 5 Tex. Cr. App. 337.

Necessity for Reading Motion.—The court is authorized to overrule a motion for a new trial without having

the same read, when informed that it is on the ground of error in charges given and refused. *Pollard v. State*, 73 S. W. 953, 45 Tex. Cr. App. 121.

3. The Grant.

See post, "Rules Regulating Grant," I, C, 5, a, (1).

Discretionary with Judge.—The granting or refusing a new trial is within the discretion of the trial judge. *Ethington v. State*, 35 Tex. 125; *White v. State*, 1 Tex. Cr. App. 167; *Smith v. State*, 15 Tex. Cr. App. 139; *Covey v. State*, 23 Tex. Cr. App. 388, 5 S. W. 283; *Brown v. State*, 16 Tex. 122, 127; *Augustine v. State*, 20 Tex. 405; *Shaw v. State*, 27 Tex. 750; *Johnson v. State*, 27 Tex. 758; *Goins v. State*, 41 Tex. 334; *Koontz v. State*, 41 Tex. 570, 572; *Bronson v. State*, 2 Tex. Cr. App. 46, 47; *Alexander v. State*, 4 Tex. Cr. App. 261; *Branch v. State*, 35 Tex. Cr. App. 304, 33 S. W. 356; *Price v. State*, 36 Tex. Cr. App. 143, 35 S. W. 988; *Jefferson v. State* (Cr. App.), 41 S. W. 601.

Privilege Only of Defendant.—Code Crim. Proc., Tex. art. 776, provides that a new trial in a criminal case can in no case be granted, where the verdict or judgment is for defendant. *Drake v. State*, 29 Tex. Cr. App. 265, 15 S. W. 725; *Mathis v. State*, 40 Tex. Cr. App. 316, 50 S. W. 368.

Scire facias proceedings on a forfeited bail bond in a criminal prosecution are not within the provisions of the Code of Crim. Proc. [Pasch. Dig., art. 3135], prohibiting a new trial after verdict for the defendant. *Gary v. State*, 11 Tex. Cr. App. 527.

A new trial can not be granted to the state, in a criminal case, and, if one be allowed, the further proceedings are coram non iudice and void. *Robertson v. State*, 14 Tex. Cr. App. 211.

A verdict of "not guilty," in the prosecution for a criminal offense, puts a final termination to the prosecution. There can be no new trial in such case. *State v. Burris*, 3 Tex. 118.

Comments on Evidence by Judge.—"In granting or refusing a new trial the judge shall not sum up or comment on the evidence in the case, but shall simply grant or refuse the motion, without prejudice to either the state or the defendant." *Mathis v. State*, 40 Tex. Cr. App. 316, 50 S. W. 368.

Reconsideration of Motion.—The district court, after overruling defendant's motion for a new trial, had power at the instance of the district attorney, and during the same term, to set aside its order and reinstate the motion, in order to permit the district attorney to strengthen his case with an additional affidavit, and thereupon to again overrule the motion. *Ransom v. State* (Cr. App.), 70 S. W. 960.

An order or a judgment granting a new trial may be reconsidered and vacated at the same term. *Ex parte Matthews* (Cr. App.), 49 S. W. 623.

Where a new trial has been granted on motion of defendant, who has been convicted of an offense, the court has no authority to set aside the order for new trial and reinstate the judgment of conviction. *Jones v. State*, 51 Tex. Cr. App. 3, 100 S. W. 150.

After a motion for a new trial was overruled, and sentence was pronounced, the motion was reargued, without formally setting aside the sentence, and again overruled. Held not to affect the sentence. *Fletcher v. State*, 39 S. W. 116, 37 Tex. Cr. App. 193.

It is not necessary to formally set aside the sentence pronounced in a criminal case before reconsidering a motion for new trial, which has been overruled, and where the new trial is denied on such reconsideration, the sentence remains in full force and effect. *Fletcher v. State*, 37 Tex. Cr. App. 193, 39 S. W. 116.

C. GROUNDS.

1. In General.

An objection embodied in a motion for a new trial must point out the er-

ror relied upon that the court may know in what the complaint consists. *Ellington v. State* (Cr. App.), 140 S. W. 1102. See ante, "The Application," I, B, 1.

Defendant will not be granted a new trial on grounds which should have been urged on an application for a continuance. *McGibbon v. State* (Cr. App.), 29 S. W. 775.

2. Errors in Preliminary Proceedings.

Service of Venire.—It is too late to raise an objection to the service of the venire, in a motion for a new trial when no exception was taken when the venire was presented in court or when the jury was impaneled. *Flores v. State* (Cr. App.), 53 S. W. 634.

Matters Relating to Venue.—See, generally, the title JURISDICTION AND VENUE, ante, p. 60.

The error in failing to grant a change of venue because of local prejudice, is a sufficient ground to warrant the granting of a new trial. *Steagald v. State*, 22 Tex. Cr. App. 464, 3 S. W. 771.

The court's omission to have accused arraigned before a change of venue is no ground for a new trial. *Goode v. State*, 57 Tex. Cr. App. 220, 123 S. W. 597.

It is no ground for a new trial that the court omitted to have the defendant arraigned before change of venue. *Caldwell v. State*, 41 Tex. 86.

Jurisdiction.—Where defendant has pleaded to an indictment without a plea to the jurisdiction or motion to quash, he can not for the first time raise an objection to the jurisdiction of the court as a ground for a motion for a new trial. *Abbott v. State*, 42 Tex. Cr. App. 8, 57 S. W. 97.

False Statement on Voir Dire.—In support of a motion for a new trial founded on a false statement made by a juror on his voir dire, the juror himself is not a competent witness. *Brennan v. State*, 33 Tex. 266.

Rulings Relative to Action of Grand Jury.—"It is a well-settled rule that, when the grand jury could have ascertained the name of the owner of stolen property by the use of reasonable diligence, it is their duty to do so, and, failing in this duty, a new trial should be granted." *Atkinson v. State*, 19 Tex. Cr. App. 462, citing *Jorasco v. State*, 6 Tex. Cr. App. 238; *Williamson v. State*, 13 Tex. Cr. App. 514; *Brewer v. State*, 18 Tex. Cr. App. 456." *Langham v. State*, 26 Tex. Cr. App. 533, 10 S. W. 113.

The fact that some of the grand jurors are alleged to have been disqualified by reason of the fact they had not paid their poll tax, is immaterial, and would not constitute a ground for new trial. *Doss v. State*, 28 Tex. Cr. App. 506, 13 S. W. 788; *Hudson v. State*, 40 Tex. 12; *Matkins v. State*, 33 Tex. Cr. App. 605, 28 S. W. 536; *Woods v. State*, 26 Tex. Cr. App. 490, 10 S. W. 108; *Reed v. State*, 1 Tex. Cr. App. 1; *Cubine v. State*, 45 Tex. Cr. App. 108, 74 S. W. 39.

Where an indictment alleges that property was stolen from an unknown person, but evidence shows that the owner could have been discovered by the use of reasonable diligence on the part of the grand jury, a new trial should be granted. *Atkinson v. State*, 19 Tex. Cr. App. 462, 466.

3. Errors in Conduct of Trial.

Defendant Too Speedily Tried.—A new trial will not be granted on the ground that defendant was too speedily tried, though the record shows that he was convicted on the same day that he was indicted, if he was represented by counsel, and went to trial without objection. *Butler v. State* (Cr. App.), 38 S. W. 787.

Material Evidence Introduced While Defendant Absent from Courtroom.—Where accused during a recess of court retired to a room to await the resuming of the trial, expecting to be advised when the court would be ready to

proceed, and while he was absent the state introduced material evidence, a new trial must be granted, under Code Cr. Proc. 1895, art. 633, providing that accused must be present during the trial. *Foreman v. State*, 60 Tex. Cr. App. 576, 132 S. W. 937.

Motion for New Trial Overruled During Absence of Counsel.—At the instance of counsel for accused the court below twice postponed action on his motion for a new trial, and ultimately overruled it while the counsel was absent from the court room, and it did not appear that the counsel's absence was involuntary or unavoidable, or that injury resulted to the defendant, and no steps were taken by the counsel in the court below to rectify the matter. Held, that no error is apparent. *Berkley v. State*, 4 Tex. Cr. App. 122.

Absence of Judge from Courtroom During Trial.—The withdrawal of the judge from the courtroom during a trial for murder is not ground for a new trial, where it is not shown that the trial was not suspended during his absence, or that he was not within view of the jury, so as to retain control of the proceedings. *Gabler v. State*, 95 S. W. 521, 49 Tex. Cr. App. 623.

A motion for a new trial in a criminal case, on the ground that the judge was absent from the courtroom during the argument of counsel to the jury, so that he could neither see nor hear what was transpiring, might properly be presented by affidavit. *Bateson v. State*, 80 S. W. 88, 46 Tex. Cr. App. 34.

The mere unsworn statement of the judge in contradiction of such affidavits was not sufficient. *Bateson v. State*, 80 S. W. 88, 46 Tex. Cr. App. 34.

Presence in Court of Offspring of Adulterous Intercourse.—In a prosecution for adultery it is not a ground for a new trial that the prosecutrix's father was present in court carrying the

baby claimed to be the product of the adulterous intercourse, and that he held it in view of the jury, where its likeness to accused might be noted, no objection having been made at the time by accused to such conduct. *Green v. State* (Cr. App.), 70 S. W. 22.

Failure of Defense to Enter Plea or Misunderstanding of Same.—Where the record shows affirmatively that defendant entered no plea, as required by statute, to the information on which he was convicted, the error can be raised on motion for new trial and appeal, without a bill of exceptions, notwithstanding Code Cr. Proc. 1895, art. 904, requiring such matter to be presented by bill of exceptions. *Thompson v. State*, 80 S. W. 623, 46 Tex. Cr. App. 412.

A new trial should be granted in a criminal prosecution, where defendant failed to enter a plea as required by art. 553, Code Cr. Proc., requiring a plea of not guilty to be entered upon the minutes of the court, and that, if defendant refuses to answer, the plea of not guilty will in like manner be entered. *Noble v. State*, 50 Tex. Cr. App. 581, 99 S. W. 996.

Defendant pleaded guilty in one of two criminal cases pending against him. On motion for new trial the state's testimony tended to show it was agreed he should plead guilty in one case and that the other was to be dismissed. His testimony tended to show he did not understand he was pleading guilty, but that he agreed to do so at some future time. Held, that the motion was properly overruled. *Allen v. State* (Cr. App.), 101 S. W. 804.

Sickness or Unconsciousness of Defendant.—Where defendant moved for a new trial on the ground that during his trial he was in an unconscious condition, as the result of an epileptic fit, but the evidence as to whether such illness was real or simulated was conflicting, the denial of the application was not an abuse of discretion. *Gainer*

v. State, 81 S. W. 736, 46 Tex. Cr. App. 516.

Allusion to Failure of Accused to Testify.—Sec, generally, the title ARGUMENT AND CONDUCT OF COUNSEL, vol. 1, p. 397.

Where a bill of exceptions evidencing the fact that state's counsel in his closing argument alluded to accused's failure to testify in his own behalf was not approved by the court in the form tendered, but had indorsed a statement by the judge that he was at the time paying no attention and did not know what was said, and there was no effort to prove up a bill by bystanders, testimony was inadmissible on a motion or new trial to prove as a matter of fact that the allusion claimed was in fact made, as a bill of exceptions was necessary to perpetuate the matter. *Reyes v. State*, 55 Tex. Cr. App. 422, 117 S. W. 152.

Election of Counts.—A motion to require the prosecution to elect between two counts was refused, and evidence was admitted on behalf of the state, which, under one count, was admissible; under the other, not. Defendant was found guilty of murder in the first degree. Held, that a new trial should be had. *Simms v. State*, 10 Tex. Cr. App. 131.

Misconduct of Judge.—Simply stating as a ground of a motion for a new trial certain conduct of the judge in answering a question of the jury after their retirement, without verifying the statement, and without taking a bill of exceptions to the action of the court, does not sufficiently present the matter for review. *Roberson v. State*, 53 Tex. Cr. App. 297, 109 S. W. 160.

4. Want of Preparation.

In General.—Defendant is not entitled to a new trial on the ground that he was not prepared because he was induced to believe his case would be dismissed, the county attorney having merely said that he would dismiss if a witness testified as it was said he

would, and defendant having said he had no witnesses, and wanted none, and not having shown what defense he had, or what preparation he desired to make. *Berry v. State* (Cr. App.), 75 S. W. 858.

Time to Object.—The objection that defendant did not have time to prepare for trial comes too late, where made for the first time on motion for new trial. *Conway v. State*, 53 Tex. Cr. App. 216, 108 S. W. 1185.

Objection that defendant was compelled to go to trial before his case was regularly reached on the call of the docket, while parties in another criminal case, in advance of his, were ready for trial, should be taken at the time, and comes too late on motion for a new trial. *Willis v. State* (Cr. App.), 33 S. W. 341.

Must Use Diligence.—That a party can not obtain bail and so stays in prison is no legal excuse for want of diligence in preparing for trial, and no ground for a new trial. *Yanez v. State*, 20 Tex. 656.

Absence of Counsel to Defend.—The absence of counsel from trial, even in a capital case, is not ground for new trial, when no postponement was asked on that ground and the result appears unaffected thereby. *Boothe v. State*, 4 Tex. Cr. App. 202.

Absence of counsel is no cause for new trial. *Williams v. State*, 10 Tex. Cr. App. 528.

Where the evidence was clearly sufficient to sustain a conviction of a felony, accused was not entitled to a new trial on the ground that he was not represented by an attorney, in the absence of anything to show that he was fraudulently imposed on, preventing the employment of an attorney. *Hayden v. State*, 61 Tex. Cr. App. 211, 134 S. W. 703.

That accused, charged with violating the Sunday law, was not represented by an attorney at his trial, was no ground for a new trial. *Burnett v.*

State, 62 S. W. 1063, 42 Tex. Cr. App. 600.

Where the record shows that the statement of facts and the motion for a new trial are both signed by an attorney for defendant, and the judgment recites that defendant, "in person and by counsel," etc., a motion for a new trial on the ground that he was not defended by counsel at his trial, verified by defendant, but uncorroborated by other evidence, is properly refused. *Moore v. State* (Cr. App.), 30 S. W. 239.

Counsel Requested and Refused.—It is no ground for new trial in a case not a capital one that the defendant requested counsel to be appointed by the court for him, which request was refused. *Hoffman v. State* (Cr. App.), 42 S. W. 309.

Under Code Cr. Proc. 1895, art. 817, requiring a new trial where a defendant has been denied counsel, a defendant's failure to employ counsel when not prevented by the state or court, is not ground for new trial, as the statute contemplates that the denial should be by the court or state. *Patton v. State*, 62 Tex. Cr. App. 28, 136 S. W. 42.

Defendant moved for a new trial, on the ground that she was deprived of counsel without any fault on her part. The record failed to show anything else in relation to the matter. Held, that the order overruling the motion could not be reviewed. *Barnett v. State* (Cr. App.), 29 S. W. 43.

Inability to Secure Attorney.—Where accused, in support of a motion for a new trial on the ground of his inability to secure an attorney, showed that he endeavored to secure the services of an attorney at the county seat and failed, but did not show what effort he made and that he offered to pay any attorney for his services, the motion was properly denied. *Goen v. State* (Cr. App.), 101 S. W. 232.

Failure of Attorney to Appear.—The necessary absence of the leading coun-

sel for the defense not being within one of the nine grounds for a new trial in felony cases enumerated by Pasch. Dig., art. 3137 (Code Civ. Proc., art. 672), which expressly provides that a new trial will be granted for no other, a new trial on that ground was properly refused. *Madden v. State*, 1 Tex. Cr. App. 204.

A motion for a new trial based on defendant's affidavit that counsel employed by him did not appear to defend him was properly overruled, where it is shown that the failure of counsel to appear was due to the nonpayment of their fees and no objection was made to the absence of counsel until after conviction. *Mullens v. State*, 35 Tex. Cr. App. 149, 32 S. W. 691.

In a prosecution for theft, the fact that defendant prior to her pleading guilty thought she had employed an attorney to defend her, but that he did not put in an appearance, and she did not hear from him for some eight days thereafter, was not ground for a new trial. *Smith v. State* (Cr. App.), 102 S. W. 407.

Defendant shows no right to a reversal of a conviction of assault with intent to murder because he had no counsel, on the affidavit of his wife, the assaulted person, that she would have testified to certain matter favorable to defendant had she been questioned thereon, where an attorney stated that he had been consulted with a view to employment and had been willing to defend, but that defendant evaded paying or securing the fee demanded. *Dawson v. State* (Cr. App.), 105 S. W. 496.

A motion for a new trial, on the ground that movant was not represented by counsel, alleged that immediately after his arrest he employed counsel, and relied upon them to prepare his case until the state docket was being called for trial, when his counsel withdrew, and that he undertook to make his own defense, but did not

name the attorneys, nor state the date of such withdrawal, nor that movant made any attempt to employ other counsel, or asked for any postponement to permit him to employ counsel, procure witnesses, etc. Held, that the motion did not show sufficient diligence. *Horn v. State*, 55 Tex. Cr. App. 150, 115 S. W. 836.

Absence of Counsel—Attorney Appointed.—A new trial will not be granted because, defendant having no counsel on the day of trial, the court assigned him counsel, who thereupon proceeded with the trial, where no objection was made by defendant to proceeding with the trial, and it does not appear that any preparation was necessary, or that defendant suffered anything at the hands of his counsel. *Barton v. State*, 34 Tex. Cr. App. 613, 31 S. W. 671.

5. Newly Discovered Evidence.

a. In General.

(1) Rules Regulating Grant.

See ante, "The Grant," I, B, 3.

The rules regulating the granting of new trials on the ground of newly discovered evidence are the same in criminal prosecutions as in civil suits. *Shaw v. State*, 27 Tex. 750; *Bell v. State*, 1 Tex. Cr. App. 598; *Burns v. State*, 12 Tex. Cr. App. 269; *Shultz v. State*, 5 Tex. Cr. App. 390; *Halliburton v. State*, 34 Tex. Cr. App. 410, 31 S. W. 297; *Ray v. State* (Cr. App.), 75 S. W. 798, 800.

Stringent rules and the strictest scrutiny are necessary in regard to applications of this character. *Templeton v. State*, 5 Tex. Cr. App. 398.

(2) Discretion of Court.

The grant or refusal of a new trial on the ground of newly-discovered evidence is discretionary. *Davidson v. State*, 33 Tex. 247; *Poage v. State*, 43 Tex. 454; *Bronson v. State*, 2 Tex. Cr. App. 46; *Burns v. State*, 12 Tex. Cr.

App. 269; *White v. State*, 10 Tex. Cr. App. 167; S. C., 19 Tex. Cr. App. 343.

(3) Record Should Show Testimony Adduced on Trial.

Where appellant relies for a reversal on newly-discovered evidence, the record should show enough of the testimony adduced on the trial to enable the court to judge of the probable effect of the newly-discovered evidence. *Sarvis v. State* (Cr. App.), 47 S. W. 463; *Blackshire v. State*, 33 Tex. Cr. App. 160, 25 S. W. 771; *Fletcher v. State*, 37 Tex. Cr. App. 193, 39 S. W. 116; *Maloney v. State* (Cr. App.), 43 S. W. 980; *Glasscock v. State* (Cr. App.), 43 S. W. 985; *Douglass v. State* (Cr. App.), 76 S. W. 468.

(4) Motion Should Show What the New Evidence Is.

In the absence of affidavits of the purported witnesses showing what their testimony will be, a new trial for newly-discovered evidence is properly denied. *Parker v. State* (Cr. App.), 140 S. W. 337; *Winfield v. State* (Cr. App.), 54 S. W. 584; *Graves v. State* (Cr. App.), 38 S. W. 38; *Bryant v. State* (Cr. App.), 47 S. W. 373; *Davis v. State*, 60 Tex. Cr. App. 620, 132 S. W. 932.

(5) Motion Must Show Source of Information.

It is not sufficient that the application shows that the newly-discovered evidence will reach the facts stated. It must show, also, the source of information. *Tooney v. State*, 5 Tex. Cr. App. 163.

(6) Presumptions on Appeal.

When the evidence or a statement of facts is not before the appellate court, the presumption is that the lower court acted properly in refusing a new trial on the ground of newly-discovered evidence. *Gamble v. State* (Cr. App.), 50 S. W. 458. See, generally, the title APPEAL, ERROR AND CERTIORARI, vol. 1, p. 87.

(7) Necessity for Affidavits.

(a) By Party Making Motion.

In General.—Under Willson's Cr. St., § 2544, subd. 6, the facts stated in an application for a new trial on the ground of newly-discovered evidence must be sworn to by applicant. *Gamble v. State* (Cr. App.), 50 S. W. 458; *Delany v. State*, 41 Tex. 601; *Gordon v. State*, 29 Tex. Cr. App. 410, 16 S. W. 337; *Hall v. State*, 33 Tex. Cr. App. 191, 26 S. W. 72; *Carrasco v. State*, 34 Tex. Cr. App. 565, 31 S. W. 397; *Barber v. State*, 35 Tex. Cr. App. 70, 31 S. W. 649; *Juley v. State*, 45 Tex. Cr. App. 391, 76 S. W. 468; *Baxter v. State* (Cr. App.), 43 S. W. 87; *Carpenter v. State* (Cr. App.), 51 S. W. 227; *Vick v. State* (Cr. App.), 51 S. W. 1117; *Winfield v. State* (Cr. App.), 54 S. W. 584; *Winters v. State* (Cr. App.), 68 S. W. 991; *Gay v. State* (Cr. App.), 69 S. W. 511; *Berry v. State* (Cr. App.), 75 S. W. 858; *Morales v. State* (Cr. App.), 95 S. W. 125; *Hall v. State* (Cr. App.), 105 S. W. 177; *Mitchell v. State*, 52 Tex. Cr. App. 231, 106 S. W. 135.

Illustrations.—After conviction for incest, where the evidence showed that defendant alone had opportunity for intercourse with prosecutrix, who was pregnant, defendant applied for a new trial on the ground of newly-discovered evidence, stating that his attorney had information from one H. that one R. would testify that prosecutrix had intercourse with two other men within twelve months, and had confessed the same; but it was not shown that R. had any personal knowledge of such fact, or that prosecutrix had admitted it to him; and while it was claimed that R., though in the county, was inaccessible, neither the affidavit of H. nor of the attorney was appended to the application. Held properly refused. *Jackson v. State* (Cr. App.), 40 S. W. 998.

Where a motion for a new trial for newly discovered evidence, predicated

upon an allegation of accused's partial insanity, was not verified even by the affidavit of accused, and no witnesses were named by whom the alleged facts could be established, and the motion was not accompanied by any affidavit of any witness, the matter can not be considered on appeal. *Sykes v. State*, 53 Tex. Cr. App. 165, 108 S. W. 1179.

The question of newly-discovered evidence can not be reviewed because of noncompliance with the statute in reference to setting it up, where a motion is filed having attached the affidavit of defendant, claiming a new trial on the ground of newly-discovered evidence, but the affidavit of the person by whom he proposes to prove the newly-discovered facts is not attached, and on the next day defendant files a motion containing the affidavit of the person by whom he expects to prove the newly-discovered evidence, but not his own affidavit. *Marquez v. State*, 51 S. W. 1119, 41 Tex. Cr. App. 35.

The mere unsworn statement of defendant in a motion for a new trial after conviction of murder and imposition of death sentence, that he had discovered testimony since the trial showing that he was only seventeen years old, is not enough to show error in refusal of the motion. *Brown v. State* (Cr. App.), 55 S. W. 176.

Where defendant, in a trial for rape, made affidavit for a new trial, alleging that the prosecuting witness, on whose testimony he was convicted, admitted that she had testified falsely as to her want of consent, and the state did not controvert such affidavit, a new trial should have been granted. *Townsend v. State* (Cr. App.), 22 S. W. 405.

Defendant moved for a new trial on the ground of newly-discovered evidence of Dr. H., by whom it was expected to prove that in his opinion defendant was insane. H. had been present during a large part of the trial, to the knowledge of defendant and his counsel, but was not examined. Neither

defendant nor his counsel made affidavit that the evidence was newly-discovered. Held, that the motion was properly overruled. *Fisher v. State*, 30 Tex. Cr. App. 502, 18 S. W. 90.

Sufficiency of Affidavit.—The affidavit accompanying a motion for a new trial on the ground of newly-discovered evidence must negative the fact that the moving party was cognizant of the alleged newly-discovered evidence at the time of the trial. *Carasco v. State*, 34 Tex. Cr. App. 565, 31 S. W. 397.

In applications for a new trial on account of newly-discovered evidence, the affidavit must at least be such as would have sufficed for a continuance, stating the source of affiant's information and his belief of its truth, and show that he had not been remiss in point of diligence. *Simms v. State*, 1 Tex. Cr. App. 627.

(b) By Witnesses.

In General.—Under Code Cr. Proc., art. 672, div. 6, providing that motions for new trials for newly-discovered evidence shall be governed by the same rules as those regulating civil suits, the motion should be supported by affidavit of the person by whom the party expects to prove the facts alleged, and, if not obtained, the failure so to do must be accounted for. *Campbell v. State*, 29 Tex. 490.

It is only when the proposed absent testimony upon which a motion for new trial is based is claimed to be newly discovered that the affidavit of the absent witness to the effect that he would testify as stated in the motion is necessary to the validity of the motion. In all other respects it is only when the state has taken issue with the defendant on the truth of the matters set forth in the motion for new trial that the trial judge is required or authorized to hear evidence by affidavit or otherwise. *Stanley v. State*, 16 Tex. Cr. App. 392; *Cole v. State*, 40 Tex. 147; *West v. State*, 2 Tex. Cr. App. 209;

Love v. State, 3 Tex. Cr. App. 501; *Polser v. State*, 6 Tex. Cr. App. 510; *Evans v. State*, 6 Tex. Cr. App. 513; *Williams v. State*, 7 Tex. Cr. App. 163; *Mabbit v. State* (Cr. App.), 22 S. W. 412; *Bass v. State* (Cr. App.), 65 S. W. 919; *Shutt v. State* (Cr. App.), 71 S. W. 18; *McClarney v. State* (Cr. App.), 80 S. W. 1142; *Conway v. State*, 53 Tex. Cr. App. 216, 108 S. W. 1185; *Terry v. State* (Cr. App.), 117 S. W. 801; *Burrell v. State*, 62 Tex. Cr. App. 635, 138 S. W. 707; *Parker v. State* (Cr. App.), 140 S. W. 337.

Illustrations.—Where two of the defendant's witnesses, being present when the trial commenced, disappeared without leave or notice, and the party, in support of a motion for a new trial, filed, the next day, his own affidavit, and that of another, of the fact, the court held, that his affidavit ought to have been accompanied by the affidavit of the witnesses, showing the facts to which they would testify, it ought to have stated that the defendant could not prove the same facts by other testimony, and, if the affidavits of the absent witnesses could not be procured, that fact should be stated. *Cotton v. State*, 4 Tex. 260.

A new trial will not be granted for newly-discovered evidence on the affidavit of a person who swears that he has been told by another that a certain person was present when the offense was committed, and would prove the facts set out in the motion. *Hutchinson v. State*, 6 Tex. Cr. App. 468.

One of the jurors made affidavit that before their verdict was rendered, and while returning from supper, he had heard some one say that one of the witnesses for the defense had been arrested for perjury committed in the case; that nothing had been said about it in the jury room; that he had already consented to a conviction, but that he would not have agreed to the punishment assessed if it had not been for the remark regarding the witness.

Held, that the affidavit was insufficient to warrant a new trial. *Snodgrass v. State*, 36 Tex. Cr. App. 207, 36 S. W. 477.

In a prosecution for hog theft, evidence that an absent witness, a justice of the peace, would show that, while the accused paid \$10 to the prosecuting witness for the hog on the advice of the justice, he denied to the justice that he had stolen the hog, is not ground for new trial, in the absence of an affidavit of the witness, and where no process is asked for to obtain such witness. *Washington v. State* (Cr. App.), 105 S. W. 789.

On a motion for a new trial in a criminal case on the ground of newly discovered evidence, there was no affidavit of the witness by whom the new evidence would be proved, nor any good reason shown why his affidavit was not procured. A third person made an affidavit averring that he had heard the witness make the statements sought to be proved by him. Held, that the motion was properly overruled; the proof being hearsay merely. *Tyler v. State*, 90 S. W. 33, 48 Tex. Cr. App. 611.

On a motion for a new trial in a criminal case, on ground of newly-discovered evidence, accused did not attach the affidavits showing what the testimony would be, but attempted to excuse himself on the ground that it was the last day of the term when the motion was presented. Held, that if between the trial and the application he had discovered the testimony he could have procured the affidavits of the witnesses or of his informant, and hence the excuse was of no merit. *Winn v. State* (Cr. App.), 73 S. W. 807.

Where defendant, convicted as an accomplice in a murder, moves for a new trial on the ground of newly-discovered evidence, in that his principal, who turned state's evidence against him, has afterwards recanted and declared defendant innocent, but states

that he can not furnish affidavits either of the principal or those to whom the recantation was made, and the motion is supported only by the affidavit of his attorney, it is not error to overrule it, since the existence of newly-discovered evidence is not established by the party's admission that he has no evidence. *Wilkerson v. State* (Cr. App.), 57 S. W. 956.

b. Prerequisites.

(1) Discovery Since Trial.

To constitute cause for new trial, an application based on newly-discovered evidence must clearly show that it has been discovered since the trial. *Templeton v. State*, 5 Tex. Cr. App. 398; *Cotton v. State*, 4 Tex. 260; *West v. State*, 2 Tex. Cr. App. 209; *Harmon v. State*, 3 Tex. Cr. App. 51; *Terry v. State*, 3 Tex. Cr. App. 236; *Gross v. State*, 4 Tex. Cr. App. 249; *Yanez v. State*, 6 Tex. Cr. App. 429; *Hutchinson v. State*, 6 Tex. Cr. App. 468; *Evans v. State*, 6 Tex. Cr. App. 513; *Williams v. State*, 7 Tex. Cr. App. 163; *Duval v. State*, 8 Tex. Cr. App. 370; *Burton v. State*, 9 Tex. Cr. App. 605; *White v. State*, 10 Tex. Cr. App. 167; *Bird v. State*, 16 Tex. Cr. App. 528; *Fisher v. State*, 30 Tex. Cr. App. 502, 18 S. W. 90; *Price v. State*, 36 Tex. Cr. App. 403, 37 S. W. 743; *Frickie v. State*, 40 Tex. Cr. App. 626, 51 S. W. 394; *O'Hara v. State*, 57 Tex. Cr. App. 577, 124 S. W. 95; *Wilson v. State* (Cr. App.), 21 S. W. 361; *Dillingham v. State* (Cr. App.), 62 S. W. 919; *Taylor v. State* (Cr. App.), 87 S. W. 1039.

Rule Modified—Motion Should Show What the New Evidence Is.—A motion for a new trial for newly-discovered evidence must show what the evidence is. *Allen v. State*, 36 Tex. Cr. App. 436, 37 S. W. 738.

A motion for new trial on the ground of newly-discovered evidence, although the additional evidence may not in strictness be regarded as such, should be granted, where fairness and justice

require it. *Roy v. State*, 24 Tex. Cr. App. 369, 377, 6 S. W. 186; *Ford v. State*, 41 Tex. Cr. App. 1, 53 S. W. 869.

(2) Diligence in Discovery.

In General.—To constitute ground for new trial based on newly-discovered evidence, the application must show that it could not with due diligence have been discovered prior thereto. *Templeton v. State*, 5 Tex. Cr. App. 398; *Madden v. Shepard*, 3 Tex. 49; *Cotton v. State*, 4 Tex. 260; *Watts v. Johnson*, 4 Tex. 311; *Herber v. State*, 7 Tex. 69; *Brown v. State*, 16 Tex. 122; *Shaw v. State*, 27 Tex. 750; *Davidson v. State*, 33 Tex. 247; *Dansby v. State*, 34 Tex. 392; *Goins v. State*, 41 Tex. 334; *Koontz v. State*, 41 Tex. 570; *Simms v. State*, 1 Tex. Cr. App. 627, 628; *Franklin v. State*, 2 Tex. Cr. App. 8; *West v. State*, 2 Tex. Cr. App. 209; *Peeler v. State*, 2 Tex. Cr. App. 455; *Johnson v. State*, 2 Tex. Cr. App. 456; *Harmon v. State*, 3 Tex. Cr. App. 51; *Terry v. State*, 3 Tex. Cr. App. 236; *Gross v. State*, 4 Tex. Cr. App. 249; *Williams v. State*, 4 Tex. Cr. App. 255; *Tooney v. State*, 5 Tex. Cr. App. 163; *Shultz v. State*, 5 Tex. Cr. App. 390; *Hasselmeyer v. State*, 6 Tex. Cr. App. 21; *Yanez v. State*, 6 Tex. Cr. App. 429; *Hutchinson v. State*, 6 Tex. Cr. App. 468; *Evans v. State*, 6 Tex. Cr. App. 513; *Duval v. State*, 8 Tex. Cr. App. 370; *Burton v. State*, 9 Tex. Cr. App. 605; *White v. State*, 10 Tex. Cr. App. 167; *Wheeler v. State*, 15 Tex. Cr. App. 607; *Makinson v. State*, 16 Tex. Cr. App. 133; *Frazier v. State*, 18 Tex. Cr. App. 434; *De Olles v. State*, 20 Tex. Cr. App. 145; *Smith v. State*, 22 Tex. Cr. App. 350, 3 S. W. 238; *McVey v. State*, 23 Tex. Cr. App. 659, 5 S. W. 174; *Langham v. State*, 26 Tex. Cr. App. 533, 10 S. W. 113; *Reagan v. State*, 28 Tex. Cr. App. 227, 12 S. W. 601; *Huffman v. State*, 28 Tex. Cr. App. 174, 12 S. W. 588; *Blackwell v. State*, 29 Tex. Cr. App. 194, 15 S. W. 597; *Fisher v. State*, 30 Tex. Cr. App. 502, 18 S. W. 90; *Smith v. State*, 31 Tex. Cr. App. 14, 19 S. W.

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- S. C., 80 S. W. 1197; Archibald *v.* State, 47 Tex. Cr. App. 153, 83 S. W. 189; Knight *v.* State, 48 Tex. Cr. App. 41, 85 S. W. 1067; Hanna *v.* State, 48 Tex. Cr. App. 269, 87 S. W. 702; Sexton *v.* State, 48 Tex. Cr. App. 497, 88 S. W. 348; Alexander *v.* State, 49 Tex. Cr. App. 93, 90 S. W. 1112; Richardson *v.* State, 49 Tex. Cr. App. 391, 94 S. W. 1016; Curry *v.* State, 50 Tex. Cr. App. 158, 94 S. W. 1058; Sellman *v.* State, 56 Tex. Cr. App. 280, 119 S. W. 682; Woodland *v.* State, 57 Tex. Cr. App. 352, 123 S. W. 141; Reagan *v.* State, 57 Tex. Cr. App. 642, 124 S. W. 685; Moore *v.* State (Cr. App.), 15 S. W. 204; Bell *v.* State (Cr. App.), 20 S. W. 362; Barner *v.* State (Cr. App.), 20 S. W. 559; Has-kins *v.* State (Cr. App.), 20 S. W. 832; Parker *v.* State (Cr. App.), 21 S. W. 684; Turner *v.* State (Cr. App.), 22 S. W. 145; Mabbit *v.* State (Cr. App.), 22 S. W. 412; Clay *v.* State (Cr. App.), 22 S. W. 973; Hearn *v.* State (Cr. App.), 25 S. W. 770; Williams *v.* State (Cr. App.), 34 S. W. 271; Owens *v.* State (Cr. App.), 34 S. W. 614; Anderson *v.* State (Cr. App.), 36 S. W. 97; Holliday *v.* State (Cr. App.), 37 S. W. 751; English *v.* State (Cr. App.), 38 S. W. 778; Wells *v.* State (Cr. App.), 38 S. W. 997; Foreman *v.* State (Cr. App.), 39 S. W. 942; Thomas *v.* State (Cr. App.), 41 S. W. 638; Taylor *v.* State (Cr. App.), 42 S. W. 285; Booker *v.* State (Cr. App.), 42 S. W. 298; Holmes *v.* State (Cr. App.), 42 S. W. 979; Watts *v.* State (Cr. App.), 42 S. W. 984; Simnacher *v.* State (Cr. App.), 43 S. W. 354; S. C., 43 S. W. 512; McNeal *v.* State (Cr. App.), 43 S. W. 792; Blades *v.* State (Cr. App.), 43 S. W. 979; Cunningham *v.* State (Cr. App.), 43 S. W. 988; Wade *v.* State (Cr. App.), 43 S. W. 990; Tanner *v.* State (Cr. App.), 44 S. W. 489; Williams *v.* State (Cr. App.), 45 S. W. 572; Sarvis *v.* State (Cr. App.), 47 S. W. 463; Rivers *v.* State, 40 Tex. Cr. App. 14, 48 S. W. 172; Os-good *v.* State (Cr. App.), 49 S. W. 94; Breeland *v.* State (Cr. App.), 50 S. W. 722; Wynne *v.* State (Cr. App.), 51 S. W. 909; Wolf *v.* State (Cr. App.), 53 S. W. 108; Hill *v.* State (Cr. App.), 53 S. W. 845; Moore *v.* State (Cr. App.), 53 S. W. 862; Sullivan *v.* State (Cr. App.), 55 S. W. 48; Sanders *v.* State (Cr. App.), 55 S. W. 50; Cavitt *v.* Reed (Cr. App.), 55 S. W. 349; Hays *v.* State (Cr. App.) 56 S. W. 57; Orn *v.* State (Cr. App.), 57 S. W. 830; Pippin *v.* Sher-man, etc., R. Co. (Civ. App.), 58 S. W. 961; Wright *v.* State (Cr. App.), 58 S. W. 1013; Garnett *v.* State (Cr. App.), 60 S. W. 765; Caskey *v.* State (Cr. App.), 62 S. W. 753; Saunders *v.* Saunders (Cr. App.), 62 S. W. 797; Ash *v.* State (Cr. App.), 63 S. W. 881; Randell *v.* State (Cr. App.), 64 S. W. 255; Parsley *v.* State (Cr. App.), 64 S. W. 257; Passmore *v.* State (Cr. App.), 64 S. W. 1040; Meyer *v.* State (Cr. App.), 67 S. W. 109; Webb *v.* State (Cr. App.), 68 S. W. 276; Rogers *v.* State (Cr. App.), 69 S. W. 507; Prim *v.* State (Cr. App.), 70 S. W. 545; Mosely *v.* State (Cr. App.), 70 S. W. 546; Simmons *v.* State (Cr. App.), 72 S. W. 586; Newberry *v.* State (Cr. App.), 74 S. W. 774; Ray *v.* State (Cr. App.), 75 S. W. 798; Duncan *v.* State (Cr. App.), 77 S. W. 13; Reddick *v.* State (Cr. App.), 95 S. W. 516; Wood-ward *v.* State, 50 Tex. Cr. App. 294, 97 S. W. 499; Harrall *v.* State (Cr. App.), 97 S. W. 1057; Mayes *v.* State (Cr. App.), 100 S. W. 386; Jeffereys *v.* State, 51 Tex. Cr. App. 566, 103 S. W. 886; Coffman *v.* State, 51 Tex. Cr. App. 478, 103 S. W. 1128; Washington *v.* State (Cr. App.), 105 S. W. 789; Davis *v.* State, 52 Tex. Cr. App. 149, 106 S. W. 144; Bidby *v.* State (Cr. App.), 108 S. W. 692; Marsden *v.* State, 54 Tex. Cr. App. 70, 111 S. W. 945; Ringo *v.* State, 54 Tex. Cr. App. 561, 114 S. W. 119; Fleming *v.* State (Cr. App.), 114 S. W. 383; Horn *v.* State, 55 Tex. Cr. App. 150, 115 S. W. 836; Evans *v.* State, 55 Tex. Cr. App. 649, 117 S. W. 820; Williams *v.* State, 58 Tex. Cr. App. 284, 124 S. W. 916; Nicholas *v.* State, 58 Tex. Cr. App. 243, 125 S. W.

30; *Coleman v. State*, 58 Tex. Cr. App. 451, 126 S. W. 573; *Cooper v. State*, 58 Tex. Cr. App. 598, 126 S. W. 862; *La Flour v. State*, 59 Tex. Cr. App. 645, 129 S. W. 351; *Jones v. State*, 60 Tex. Cr. App. 56, 130 S. W. 1001; *Huggins v. State*, 60 Tex. Cr. App. 214, 131 S. W. 596; *Polk v. State*, 60 Tex. Cr. App. 462, 132 S. W. 134; *Davis v. State*, 60 Tex. Cr. App. 620, 132 S. W. 932; *Jackson v. State*, 60 Tex. Cr. App. 273, 131 S. W. 1076; *Turner v. State*, 61 Tex. Cr. App. 97, 133 S. W. 1052; *Johnson v. State*, 61 Tex. Cr. App. 104, 134 S. W. 225; *Sellers v. State*, 61 Tex. Cr. App. 140, 134 S. W. 348; *Kirksey v. State*, 61 Tex. Cr. App. 577, 135 S. W. 577; *Lee v. State*, 61 Tex. Cr. App. 607, 135 S. W. 1174; *Sullivan v. State*, 61 Tex. Cr. App. 657, 136 S. W. 456; *Drake v. State*, 62 Tex. Cr. App. 130, 136 S. W. 1064; *Wilson v. State* (Cr. App.), 138 S. W. 409; *Johns v. State* (Cr. App.), 140 S. W. 1093.

Exception—Insanity.—A new trial will be granted for newly-discovered evidence of insanity, though no diligence was used to procure it before. *Horhouse v. State* (Cr. App.), 50 S. W. 361.

A new trial may be granted for newly-discovered evidence of insanity, which might have been discovered before but for the objection of defendant to avail himself of defense of insanity. *Schuessler v. State*, 19 Tex. Cr. App. 472.

Affidavits in support of a motion for new trial on the ground of defendant's insanity which set up no fact tending to show insanity nor any evidence whatever to support affiants' opinion as to his insanity are insufficient. *Burton v. State*, 33 Tex. Cr. App. 138, 25 S. W. 782.

A motion for a new trial because of newly-discovered evidence as to accused's sanity is properly refused, where the evidence could have been produced with slight diligence, and did

not show such insanity as would justify the reversal of a conviction. *Smith v. State*, 50 S. W. 938, 40 Tex. Cr. App. 391.

Under Code Cr. Proc., art. 518, providing that a plea of guilty shall not be received unless defendant is sane, his sanity must be shown before conviction; and a new trial will not be granted on the ground of insanity, where defendant was convicted on a plea of guilty, when the testimony on which his counsel rely was known to them at the time of the trial. *Burton v. State*, 33 Tex. Cr. App. 138, 25 S. W. 782.

(3) Must Be Material to Result and Probably True.

In General.—Alleged newly-discovered evidence is not ground for new trial, where such evidence is not material, is probably not true, and is not calculated to change the result of the case. *Prewett v. State*, 41 Tex. Cr. App. 262, 53 S. W. 879; *Goins v. State*, 41 Tex. 334; *Johnson v. State*, 41 Tex. 608; *West v. State*, 2 Tex. Cr. App. 209; *Johnson v. State*, 2 Tex. Cr. App. 456; *Harmon v. State*, 3 Tex. Cr. App. 51; *Terry v. State*, 3 Tex. Cr. App. 236; *Higginbotham v. State*, 3 Tex. Cr. App. 447; *Cotton v. State*, 4 Tex. 260; *Shultz v. State*, 5 Tex. Cr. App. 390; *Templeton v. State*, 5 Tex. Cr. App. 398; *Hasselmeyer v. State*, 6 Tex. Cr. App. 21; *Yanez v. State*, 6 Tex. Cr. App. 429; *Hutchinson v. State*, 6 Tex. Cr. App. 468; *Polser v. State*, 6 Tex. Cr. App. 510; *Duval v. State*, 8 Tex. Cr. App. 370; *Burton v. State*, 9 Tex. Cr. App. 605; *White v. State*, 10 Tex. Cr. App. 167; *Burns v. State*, 12 Tex. Cr. App. 269; *Wheeler v. State*, 15 Tex. Cr. App. 607; *Lewis v. State*, 15 Tex. Cr. App. 647; *Escareno v. State*, 16 Tex. Cr. App. 85; *Trimble v. State*, 16 Tex. Cr. App. 115; *Cole v. State*, 16 Tex. Cr. App. 461; *Wilson v. State*, 17 Tex. Cr. App. 525; *Moore v. State*, 18 Tex. Cr. App. 212; *Miller v. State*, 18 Tex. Cr. App. 232; *Wilson v. State*, 18 Tex. Cr.

- App. 576; *Hart v. State*, 21 Tex. Cr. App. 163, 17 S. W. 421; *Jones v. State*, 23 Tex. Cr. App. 501, 5 S. W. 138; *McVey v. State*, 23 Tex. Cr. App. 659, 5 S. W. 174; *Blackwell v. State*, 29 Tex. Cr. App. 194, 15 S. W. 597; *Tweedle v. State*, 29 Tex. Cr. App. 586, 16 S. W. 544; *Fisher v. State*, 30 Tex. Cr. App. 502, 18 S. W. 90; *Burgess v. State*, 33 Tex. Cr. App. 9, 24 S. W. 286; *Lawrence v. State*, 36 Tex. Cr. App. 173, 36 S. W. 90; *Fletcher v. State*, 37 Tex. Cr. App. 193, 39 S. W. 116; *Mitchell v. State*, 38 Tex. Cr. App. 170, 41 S. W. 816; *Sellman v. State*, 56 Tex. Cr. App. 280, 119 S. W. 682; *O'Hara v. State*, 57 Tex. Cr. App. 577, 124 S. W. 95; *Wilson v. State* (Cr. App.), 21 S. W. 361; *Cruse v. State* (Cr. App.), 21 S. W. 370, 371; *Screws v. State* (Cr. App.), 23 S. W. 796; *Hickman v. State* (Cr. App.), 25 S. W. 126; *Albritton v. State* (Cr. App.), 26 S. W. 398; *Kirby v. State* (Cr. App.), 38 S. W. 180; *Henderson v. State* (Cr. App.), 38 S. W. 605; *Taylor v. State* (Cr. App.), 39 S. W. 372; *Wright v. State* (Cr. App.), 40 S. W. 1096; *Jefferson v. State* (Cr. App.), 41 S. W. 601; *Bluitt v. State* (Cr. App.), 45 S. W. 495; *Barber v. State* (Cr. App.), 46 S. W. 233; *Shilling v. State* (Cr. App.), 51 S. W. 240; *Gass v. State* (Cr. App.), 56 S. W. 338; *Ford v. State* (Cr. App.), 56 S. W. 338; *Harris v. State* (Cr. App.), 56 S. W. 622; *Wilkerson v. State* (Cr. App.), 57 S. W. 956; *Parker v. State* (Cr. App.), 65 S. W. 1066; *Rogers v. State* (Cr. App.), 69 S. W. 507; *Kluting v. State* (Cr. App.), 80 S. W. 84; *Taylor v. State* (Cr. App.), 87 S. W. 1039; *Anderson v. State* (Cr. App.), 100 S. W. 153; *Davis v. State*, 52 Tex. Cr. App. 149, 106 S. W. 144; *Anderson v. State* (Cr. App.), 114 S. W. 144; *Fleming v. State* (Cr. App.), 114 S. W. 383; *Hunter v. State*, 59 Tex. Cr. App. 439, 129 S. W. 125; *Huggins v. State*, 60 Tex. Cr. App. 214, 131 S. W. 596; *Kirksey v. State*, 61 Tex. Cr. App. 641, 135 S. W. 577; *Boyce v. State*, 62 Tex. Cr. App. 374, 137 S. W. 116.
- For specific illustrations of rule, see *Henderson v. State*, 12 Tex. 525; *Brown v. State*, 23 Tex. 195; *Murray v. State*, 36 Tex. 642; *Powell v. State*, 37 Tex. 348; *Lyles v. State*, 41 Tex. 172; *Mann v. State*, 44 Tex. 642; *Rich v. State*, 1 Tex. Cr. App. 206; *Huebner v. State*, 3 Tex. Cr. App. 458; *Dunham v. State*, 3 Tex. Cr. App. 465; *Williams v. State*, 4 Tex. Cr. App. 5; *Brown v. State*, 6 Tex. Cr. App. 286; *Williams v. State*, 7 Tex. Cr. App. 163; *Young v. State*, 7 Tex. Cr. App. 461; *Rucker v. State*, 7 Tex. Cr. App. 549; *Howell v. State*, 10 Tex. Cr. App. 298; *Ellis v. State*, 10 Tex. Cr. App. 540; *Strickland v. State*, 13 Tex. Cr. App. 364; *Duran v. State*, 14 Tex. Cr. App. 195; *Heskew v. State*, 14 Tex. Cr. App. 606; *Helm v. State*, 20 Tex. Cr. App. 41; *Lawson v. State*, 21 Tex. Cr. App. 172, 17 S. W. 427; *Jackson v. State*, 23 Tex. Cr. App. 183, 5 S. W. 371; *Barren v. State*, 23 Tex. Cr. App. 462, 5 S. W. 237; *Jones v. State*, 23 Tex. Cr. App. 501, 5 S. W. 138; *Criswell v. State*, 24 Tex. Cr. App. 606, 7 S. W. 337; *Potts v. State*, 26 Tex. Cr. App. 633, 14 S. W. 456; *Reed v. State*, 27 Tex. Cr. App. 317, 11 S. W. 372; *Black v. State*, 27 Tex. Cr. App. 495, 11 S. W. 485; *Chumley v. State*, 28 Tex. Cr. App. 87, 12 S. W. 491; *Smith v. State*, 28 Tex. Cr. App. 309, 12 S. W. 1104; *Estrada v. State*, 29 Tex. Cr. App. 169, 15 S. W. 644; *Lincecum v. State*, 29 Tex. Cr. App. 328, 15 S. W. 818; *Pitts v. State*, 29 Tex. Cr. App. 374, 16 S. W. 189; *Clark v. State*, 29 Tex. Cr. App. 437, 16 S. W. 171; *Watts v. State*, 30 Tex. Cr. App. 533, 17 S. W. 1092; *Gibbs v. State*, 30 Tex. Cr. App. 581, 18 S. W. 88; *Barbee v. State*, 30 Tex. Cr. App. 669, 18 S. W. 680; *Dillard v. State*, 31 Tex. Cr. App. 67, 19 S. W. 895; *Bruce v. State*, 31 Tex. Cr. App. 590, 21 S. W. 681; *McCay v. State*, 32 Tex. Cr. App. 233, 22 S. W. 974; *Chumley v. State*, 32 Tex. Cr. App. 255, 26 S. W. 406; *Dawson v. State*, 32 Tex. Cr. App. 535, 25 S. W. 21; *Franklin v. State*, 34 Tex. Cr. App. 203, 29 S. W. 1088; *Magruder v. State*, 35 Tex. Cr. App. 214, 33 S. W. 233; *Owens v. State*, 35

Tex. Cr. App. 345, 33 S. W. 875; *Wilson v. State*, 37 Tex. Cr. App. 156, 38 S. W. 1013; *Hines v. State*, 37 Tex. Cr. App. 339, 39 S. W. 935; *Clark v. State*, 38 Tex. Cr. App. 30, 40 S. W. 992; *Trevino v. State*, 38 Tex. Cr. App. 64, 41 S. W. 608; *White v. State*, 40 Tex. Cr. App. 366, 50 S. W. 705; *Nite v. State*, 41 Tex. Cr. App. 340, 54 S. W. 763; *Grant v. State*, 42 Tex. Cr. App. 275, 58 S. W. 1025; *Le Roy v. State*, 43 Tex. Cr. App. 556, 67 S. W. 409; *Brock v. State*, 44 Tex. Cr. App. 335, 71 S. W. 20; *McFadden v. State*, 44 Tex. Cr. App. 420, 71 S. W. 972; *Thompson v. State*, 45 Tex. Cr. App. 244, 76 S. W. 561; *Harris v. State*, 47 Tex. Cr. App. 554, 85 S. W. 12; *French v. State*, 47 Tex. Cr. App. 571, 85 S. W. 4; *Tyler v. State*, 48 Tex. Cr. App. 611, 90 S. W. 33; *True v. State*, 48 Tex. Cr. App. 631, 89 S. W. 1066; *Green v. State*, 49 Tex. Cr. App. 204, 91 S. W. 585; *Curry v. State*, 50 Tex. Cr. App. 158, 94 S. W. 1058; *Sanders v. State*, 52 Tex. Cr. App. 465, 107 S. W. 839; *Gill v. State*, 56 Tex. Cr. App. 202, 119 S. W. 684; *Piper v. State*, 57 Tex. Cr. App. 605, 124 S. W. 661; *Reagan v. State*, 57 Tex. Cr. App. 642, 124 S. W. 685; *Reed v. State* (Cr. App.), 12 S. W. 413; *Lyons v. State* (Cr. App.), 12 S. W. 740; *Chalk v. State* (Cr. App.), 18 S. W. 864; *Rodgers v. State* (Cr. App.), 20 S. W. 709; *Flippo v. State* (Cr. App.), 22 S. W. 139; *Johnson v. State* (Cr. App.), 22 S. W. 595; *Williams v. State* (Cr. App.), 23 S. W. 14; *Jones v. State* (Cr. App.), 23 S. W. 796; *Wallace v. State* (Cr. App.), 24 S. W. 99; *Peterson v. State* (Cr. App.), 24 S. W. 518; *Zedlitz v. State* (Cr. App.), 26 S. W. 725; *Henry v. State* (Cr. App.), 30 S. W. 802; *Gowen v. State* (Cr. App.), 34 S. W. 123; *Ramos v. State* (Cr. App.), 35 S. W. 378; *Belcher v. State* (Cr. App.), 37 S. W. 428; *Sebastian v. State* (Cr. App.), 39 S. W. 680; *Wade v. State* (Cr. App.), 40 S. W. 983; *Jefferson v. State* (Cr. App.), 41 S. W. 601; *Price v. State* (Cr. App.), 43 S. W. 96; *Hodge v. State* (Cr. App.), 43 S. W. 994; *Bluitt v. State* (Cr. App.), 45 S. W. 495; *Barber v. State* (Cr. App.), 46 S. W. 233; *Wash v. State* (Cr. App.), 47 S. W. 469; *Osgood v. State* (Cr. App.), 49 S. W. 94; *Taylor v. State* (Cr. App.), 49 S. W. 388; *Combs v. State* (Cr. App.), 49 S. W. 585; *Wynne v. State* (Cr. App.), 51 S. W. 909; *Bryant v. State* (Cr. App.), 51 S. W. 1125; *Thompson v. State* (Cr. App.), 55 S. W. 330; *Gass v. State* (Cr. App.), 56 S. W. 73; *Wilkerson v. State* (Cr. App.), 57 S. W. 956; *Bruno v. State* (Cr. App.), 58 S. W. 85; *Ash v. State* (Cr. App.), 63 S. W. 881; *Driver v. State* (Cr. App.), 65 S. W. 528; *Bass v. State* (Cr. App.), 65 S. W. 919; *Castillo v. State* (Cr. App.), 69 S. W. 517; *Ross v. State* (Cr. App.), 70 S. W. 424; *Ray v. State* (Cr. App.), 75 S. W. 798; *Walters v. State* (Cr. App.), 79 S. W. 539; *Roberson v. State* (Cr. App.), 91 S. W. 578; *Morales v. State* (Cr. App.), 95 S. W. 125; *Woodward v. State*, 50 Tex. Cr. App. 294, 97 S. W. 499; *Lindsey v. State*, 50 Tex. Cr. App. 435, 98 S. W. 856; *Biard v. State* (Cr. App.), 100 S. W. 937; *Austin v. State*, 51 Tex. Cr. App. 327, 101 S. W. 1162; *Garza v. State* (Cr. App.), 102 S. W. 1130; *Clark v. State*, 51 Tex. Cr. App. 519, 102 S. W. 1136; *Johnson v. State*, 51 Tex. Cr. App. 605, 103 S. W. 893; *Coffman v. State*, 51 Tex. Cr. App. 478, 103 S. W. 1128; *Weaver v. State*, 52 Tex. Cr. App. 11, 105 S. W. 189; *Washington v. State* (Cr. App.), 105 S. W. 789; *Stewart v. State*, 52 Tex. Cr. App. 100, 105 S. W. 809; *Davis v. State*, 52 Tex. Cr. App. 149, 106 S. W. 144; *Merrinweather v. State*, 52 Tex. Cr. App. 410, 108 S. W. 661; *Pate v. State*, 54 Tex. Cr. App. 462, 113 S. W. 759; *Reyes v. State*, 55 Tex. Cr. App. 422, 117 S. W. 152; *Ross v. State*, 57 Tex. Cr. App. 372, 123 S. W. 419; *Hunter v. State*, 59 Tex. Cr. App. 439, 129 S. W. 195; *Pitts v. State*, 60 Tex. Cr. App. 524, 132 S. W. 801; *Vaughan v. State*, 62 Tex. Cr. App. 24, 136 S.

W. 476; *Johnson v. State*, 62 Tex. Cr. App. 284, 136 S. W. 1058; *Cox v. State* (Cr. App.), 140 S. W. 445.

"The rule to test a motion for new trial under such circumstances is, even conceding the materiality and probable truth of the testimony, would the testimony have redounded to the benefit of appellant, securing a more favorable verdict to appellant if said witnesses had been present? *Land v. State*, 34 Tex. Cr. App. 330, 30 S. W. 788; *Gallagher v. State*, 34 Tex. Cr. App. 306, 30 S. W. 557; *Easterwood v. State*, 34 Tex. Cr. App. 400, 31 S. W. 294." *Francis v. State*, 44 Tex. Cr. App. 246, 70 S. W. 751, 752.

Doubt Resolved in Favor of Accused.—A doubt whether newly-discovered evidence would change the verdict should be resolved in favor of the accused, and a new trial granted. *Lindley v. State*, 11 Tex. Cr. App. 283.

(4) Must Show Witness Will Testify to Same.

To constitute ground for new trial for newly-discovered evidence, the application must show that the witness will testify to it. *Templeton v. State*, 5 Tex. Cr. App. 398.

(5) Not Offered to Prove New Defense.

An application for new trial for newly-discovered evidence must show that it is not offered to prove a new defense. *Templeton v. State*, 5 Tex. Cr. App. 398.

(6) Must Not Merely Impeach Witness.

Motions for new trial, based on evidence newly-discovered, but tending to impeach the testimony of a witness sworn on the trial, are not favored by the courts. The general rule against allowance of such motions, though subject to exceptions, applies with equal stringency to criminal as to civil causes. *Gibbs v. State*, 1 Tex. Cr. App. 12; *Herber v. State*, 7 Tex. 69; *Davidson v. State*, 33 Tex. 247; *Dansby*

v. State, 34 Tex. 392; *Hauck v. State*, 1 Tex. Cr. App. 357; *West v. State*, 2 Tex. Cr. App. 209; *Thompson v. State*, 2 Tex. Cr. App. 289; *Terry v. State*, 3 Tex. Cr. App. 236, 239; *Love v. State*, 3 Tex. Cr. App. 501; *Boothe v. State*, 4 Tex. Cr. App. 202; *Watson v. State*, 5 Tex. Cr. App. 11; *Tooney v. State*, 5 Tex. Cr. App. 163; *Templeton v. State*, 5 Tex. Cr. App. 398; *Polser v. State*, 6 Tex. Cr. App. 510; *Hutchinson v. State*, 6 Tex. Cr. App. 469; *Walker v. State*, 6 Tex. Cr. App. 576; *Duval v. State*, 8 Tex. Cr. App. 370; *Burton v. State*, 9 Tex. Cr. App. 605; *Atkins v. State*, 11 Tex. Cr. App. 8; *Brown v. State*, 13 Tex. Cr. App. 59; *Jackson v. State*, 18 Tex. Cr. App. 586; *Grate v. State*, 23 Tex. Cr. App. 458, 5 S. W. 245; *Fisher v. State*, 30 Tex. Cr. App. 502, 18 S. W. 90; *Matkins v. State*, 33 Tex. Cr. App. 605, 28 S. W. 536; *Barber v. State*, 35 Tex. Cr. App. 70, 31 S. W. 649; *Miller v. State*, 35 Tex. Cr. App. 209, 33 S. W. 227; *Butts v. State*, 35 Tex. Cr. App. 364, 33 S. W. 866; *Scruggs v. State*, 35 Tex. Cr. App. 622, 34 S. W. 951; *Holt v. State*, 39 Tex. Cr. App. 282, 45 S. W. 1016, 46 S. W. 829; *Fields v. State*, 39 Tex. Cr. App. 488, 46 S. W. 814; *Whitfield v. State*, 40 Tex. Cr. App. 14, 48 S. W. 173; *Ford v. State*, 41 Tex. Cr. App. 1, 51 S. W. 935, reversed on rehearing in 53 S. W. 869; *Boyce v. State*, 43 Tex. Cr. App. 459, 66 S. W. 568; *Williams v. State*, 44 Tex. Cr. App. 115, 69 S. W. 415; *Hilscher v. State*, 48 Tex. Cr. App. 357, 88 S. W. 227; *Woodland v. State*, 57 Tex. Cr. App. 352, 123 S. W. 141; *Reagan v. State*, 57 Tex. Cr. App. 642, 124 S. W. 685; *Cruse v. State* (Cr. App.), 21 S. W. 370, 371; *Lewis v. State* (Cr. App.), 22 S. W. 687; *Walker v. State* (Cr. App.), 33 S. W. 372; *Priest v. State* (Cr. App.), 34 S. W. 611; *Little v. State* (Cr. App.), 35 S. W. 659; *Storms v. State* (Cr. App.), 37 S. W. 439; *Porter v. State* (Cr. App.), 42 S. W. 305; *Alexander v. State* (Cr. App.), 42 S. W. 989; *Poteet v. State* (Cr. App.), 43

S. W. 339; *McNeal v. State* (Cr. App.), 43 S. W. 792; *Bluitt v. State* (Cr. App.), 45 S. W. 495; *Navarro v. State* (Cr. App.), 45 S. W. 724; *Fields v. State*, 39 Tex. Cr. App. 488, 46 S. W. 814; *Hood v. State* (Cr. App.), 49 S. W. 382; *Lawson v. State* (Cr. App.), 50 S. W. 345; *Mirando v. State* (Cr. App.), 50 S. W. 714; *Shilling v. State* (Cr. App.), 51 S. W. 240; *Johnson v. State* (Cr. App.), 60 S. W. 45; *Brice v. State* (Cr. App.), 61 S. W. 121; *Driver v. State* (Cr. App.), 65 S. W. 528; *May v. State* (Cr. App.), 67 S. W. 108; *Gay v. State* (Cr. App.), 69 S. W. 511; *McClarney v. State* (Cr. App.), 80 S. W. 1142; *Owens v. State* (Cr. App.), 89 S. W. 837; *Bivens v. State* (Cr. App.), 97 S. W. 86; *White v. State* (Cr. App.), 98 S. W. 264; *Fizini v. State* (Cr. App.), 100 S. W. 394; *Ingersoll v. State* (Cr. App.), 100 S. W. 778; *Jones v. State* (Cr. App.), 105 S. W. 349; *Drennan v. State*, 53 Tex. Cr. App. 311, 109 S. W. 1090; *Harrolson v. State*, 54 Tex. Cr. App. 452, 113 S. W. 544; *Hopkins v. State*, 61 Tex. Cr. App. 590, 135 S. W. 553; *Patton v. State*, 62 Tex. Cr. App. 28, 136 S. W. 42; *Wilson*, Crim. St., § 2544.

Newly-discovered evidence which merely tends to impeach a witness is no ground for a new trial. This proposition is found in the books, and when properly understood is correct. If the new evidence is simply for the purpose of showing that a witness who has testified in the case is unworthy of credit, a new trial will not be granted. The rule itself has some exceptions, for it has been held a good ground for new trial that a material witness has since the trial been convicted of perjury on his own confession. *Estrada v. State*, 29 Tex. Cr. App. 169, 15 S. W. 644, 645.

The granting of a new trial will not, be defeated by the impeaching character of newly-discovered evidence, if it be otherwise competent and material to the defense. *Jackson v. State*, 18 Tex. Cr. App. 586.

(7) Must Not Be Cumulative.

In General.—A new trial on the ground of newly-discovered evidence in a criminal case, will not be granted where such evidence is merely cumulative. *Turner v. State*, 37 Tex. Cr. App. 451, 40 S. W. 980; *Cotton v. State*, 4 Tex. 260; *Shaw v. State*, 27 Tex. 750; *Kemp v. State*, 38 Tex. 110; *Henderson v. State*, 1 Tex. Cr. App. 432; *West v. State*, 2 Tex. Cr. App. 209; *Johnson v. State*, 2 Tex. Cr. App. 456; *Harmon v. State*, 3 Tex. Cr. App. 51; *Terry v. State*, 3 Tex. Cr. App. 236; *Higginbotham v. State*, 3 Tex. Cr. App. 447; *Boothe v. State*, 4 Tex. Cr. App. 202; *Shultz v. State*, 5 Tex. Cr. App. 390; *Templeton v. State*, 5 Tex. Cr. App. 398; *Hutchinson v. State*, 6 Tex. Cr. App. 468; *Hutto v. State*, 7 Tex. Cr. App. 44; *Duval v. State*, 8 Tex. Cr. App. 370; *Burton v. State*, 9 Tex. Cr. App. 605; *White v. State*, 10 Tex. Cr. App. 167; *Blackwell v. State*, 29 Tex. Cr. App. 194, 15 S. W. 597; *Young v. State*, 30 Tex. Cr. App. 308, 17 S. W. 413; *Garner v. State*, 34 Tex. Cr. App. 356, 30 S. W. 782; *Washington v. State*, 35 Tex. Cr. App. 154, 32 S. W. 693; *Scruggs v. State*, 35 Tex. Cr. App. 622, 34 S. W. 951; *Riojas v. State*, 36 Tex. Cr. App. 182, 36 S. W. 268; *Price v. State*, 36 Tex. Cr. App. 403, 37 S. W. 743; *Whitfield v. State*, 40 Tex. Cr. App. 14, 48 S. W. 173; *Thompson v. State*, 45 Tex. Cr. App. 244, 76 S. W. 561; *Sexton v. State*, 48 Tex. Cr. App. 497, 88 S. W. 348; *O'Hara v. State*, 57 Tex. Cr. App. 577, 124 S. W. 95; *Reagan v. State*, 57 Tex. Cr. App. 642, 124 S. W. 685; *Fisher v. State*, 30 Tex. Cr. App. 502, 18 S. W. 90; *Williams v. State* (Cr. App.), 22 S. W. 877; *Screws v. State* (Cr. App.), 23 S. W. 796; *Hickman v. State* (Cr. App.), 25 S. W. 126; *Granger v. State* (Cr. App.), 31 S. W. 671; *Porter v. State* (Cr. App.), 32 S. W. 695; *Little v. State* (Cr. App.), 35 S. W. 659; *Turner v. State* (Cr. App.), 36 S. W. 87; *Duke v. State* (Cr. App.), 38 S. W. 43; *Baxter v. State* (Cr. App.), 43 S.

W. 87; *Simmacher v. State* (Cr. App.), 43 S. W. 512; *Austin v. State* (Cr. App.), 47 S. W. 371; *Adler v. State* (Cr. App.), 50 S. W. 358; *Dansby v. State* (Cr. App.), 53 S. W. 105; *Wolf v. State* (Cr. App.), 53 S. W. 108; *Johnson v. State* (Cr. App.), 58 S. W. 105; *Ray v. State* (Cr. App.), 75 S. W. 798; *Mathews v. State* (Cr. App.), 77 S. W. 218; *Taylor v. State* (Cr. App.), 87 S. W. 1039; *Owens v. State* (Cr. App.), 89 S. W. 837; *White v. State* (Cr. App.), 98 S. W. 264; *Goen v. State* (Cr. App.), 101 S. W. 232; *Coffman v. State*, 51 Tex. Cr. App. 478, 103 S. W. 1128; *Jones v. State* (Cr. App.), 105 S. W. 349; *Harrolson v. State*, 54 Tex. Cr. App. 452, 113 S. W. 544; *Evans v. State*, 55 Tex. Cr. App. 649, 117 S. W. 820; *Roberts v. State*, 57 Tex. Cr. App. 199, 122 S. W. 388; *Haley v. State*, 59 Tex. Cr. App. 338, 128 S. W. 1133.

Exception.—Where the defense in a prosecution for theft is kleptomania, the fact that testimony of absent witnesses on that issue would have been cumulative did not destroy its materiality as a ground for new trial. *Harris v. State*, 18 Tex. Cr. App. 287.

(8) Injustice Done Accused.

An application for new trial for newly-discovered evidence must show that injustice has been done the accused. *Templeton v. State*, 5 Tex. Cr. App. 398.

6. Objections to Indictment or Information.

No Notice of Findings.—Where defendant was arrested November 8, 1901, and made no effort to secure process for witnesses or employ counsel or prepare for trial, which occurred December 4, 1901, he was not entitled to a new trial on the ground that he had no notice of the finding of the indictment, and no opportunity to summon witnesses in his behalf. *Webb v. State* (Cr. App.), 68 S. W. 276.

Not Served with Trial Copy.—It is too late, on motion for new trial, to complain that accused had not been

served with a true copy of the indictment. *Coleman v. State* (Cr. App.), 74 S. W. 769; *Ford v. State* (Cr. App.), 54 S. W. 761; *Burrows v. State* (Cr. App.), 72 S. W. 848.

Charge of Duplicity.—Where accused contended that an information charging him with having received stolen property was bad for duplicity, but the matters alleged in such information were not repugnant, and accused failed to take advantage of the alleged defect by motion to quash, he can not urge such objection after verdict, on a motion for a new trial. *Rumage v. State* (Cr. App.), 55 S. W. 64.

Irregularities in Record Entry of Indictment.—Where a criminal cause is transferred from one county to another for trial, irregularities in the record entry of the presentment of the indictment is not cause for setting aside the indictment, or in arrest of judgment, since such matters should have been urged in the court wherein the indictment was presented, and are not available in the forum to which the venue has been changed. *Barr v. State*, 16 Tex. Cr. App. 333.

Not Read to Jury.—Uncontroverted affidavits, in support of a motion for a new trial, show that upon the trial of the case the indictment was not read to the jury, that the defense did not plead in the cause, and that no plea was entered for him. The judgment recites that the defendant pleaded "not guilty," but it is not stated that the indictment was read to the jury, nor that the defendant pleaded not guilty to any particular charge. Held, that under such circumstances it must be considered a fact, shown by the record, that the indictment was not read to the jury. *Wilkins v. State*, 15 Tex. Cr. App. 420.

Variance.—One convicted of burglary, though he learns for the first time, when the indictment is read to the jury, of a variance between such indictment, charging burglary in the nighttime, and that served on him,

which charged burglary in the daytime, can not object to such variance for the first time on motion for new trial. *Brooks v. State* (Cr. App.), 98 S. W. 244.

Where one count in an indictment for theft alleged ownership in W., and the second in some person unknown, and the proof showed the property in W., and defendant alleged purchase from a stranger, a claim that the want of consent in W. was not shown can not be first raised on motion for new trial. *McLaughlin v. State* (Cr. App.), 34 S. W. 280.

7. Rulings Relative to Witnesses.

See post, "Absence of Witnesses," I, C, 8, b. See, generally, the title WITNESSES.

Absence—Diligence.—A new trial should be granted where defendant was forced to trial and convicted in the absence of material testimony which he had used due diligence to procure. *Smith v. State*, 20 Tex. Cr. App. 134; *Cooper v. State*, 16 Tex. Cr. App. 341; *Taylor v. State* (Cr. App.), 39 S. W. 372.

An application for a new trial for an absent witness must set forth the facts showing diligence and if process of attachment had been issued but not executed, the time at which the process was returned should be alleged. *Barrett v. State*, 18 Tex. Cr. App. 64.

Degree of Diligence Required.—Merely causing a witness to be subpoenaed in due time is not all the diligence required of defendant in a criminal case, but if the witness fails to attend an attachment should be obtained as soon as his absence is discovered, or would be discovered by proper diligence. *Hyde v. State*, 16 Tex. 445.

In a prosecution for incest, defendant's motion for a new trial stated that his testimony that he had two former wives living, and that he had been convicted and served time for bigamy, was true, and that he could prove it by other witnesses on a new trial; that

the reason he did not have the witnesses was because of his poverty; that he was ignorant of the law of the case, and did not know, until informed by counsel, that proof of his former marriage was necessary to establish his defense. Held, insufficient to warrant the granting of a new trial, especially since the evidence was not newly-discovered. *Rivers v. State*, 40 Tex. Cr. App. 14, 48 S. W. 172.

Defendant failed to subpoena a certain witness, stating that he supposed witness was in the Indian Territory, but that he had since learned he was in Arkansas, and would attend a new trial. Held, that no ground for new trial was shown. *McFadden v. State*, 71 S. W. 972, 44 Tex. Cr. App. 420.

The failure of a witness to attend the trial pursuant to a promise does not constitute a ground for a new trial, where the witness was not subpoenaed, nor a continuance asked because of his absence. *Clay v. State* (Cr. App.), 22 S. W. 973.

On a trial for murder, one of defendant's witnesses was taken sick, and did not testify. On motion for new trial, it was claimed that his testimony would have been important in contradiction of certain statements made by deceased after being shot. Held not ground for new trial, since, if the testimony of the witness was important, defendant should have applied for a postponement of the trial or withdrawal of the jury and continuance as soon as he learned of the sickness of the witness, and after verdict it is too late to raise the question. *Munoz v. State* (Cr. App.), 60 S. W. 759.

Where, on trial for bigamy, no application for a continuance was made on the ground of the absence of witnesses who would testify that accused at the time of his second marriage had reason to believe that his first wife had procured a divorce from him, but announced ready for trial, with no suggestion of the importance of the miss-

ing testimony, and without becoming a witness in his own behalf and giving an excuse why he believed the second marriage to be legal, the denial of a motion for a new trial on the ground of the absence of the witnesses was not erroneous. *Nickelson v. State*, 53 Tex. Cr. App. 631, 111 S. W. 414.

Where a witness disobeys the process of the court, and fails to attend the trial, the party injured thereby should make application for a continuance. Such nonattendance is urged too late in a motion for a new trial. *Jackson v. State* (Cr. App.), 25 S. W. 632.

Where defendant discovers the absence of one of his witnesses before the conclusion of the testimony, and ascertains that he can not be present, but fails to move for a continuance or postponement because of the absence of such witness, such absence is not ground for a new trial. *Reagan v. State*, 28 Tex. Cr. App. 227, 12 S. W. 601, 19 Am. St. Rep. 833.

Defendant's testimony was impeached by a witness who testified to an involuntary confession. The latter's name was not indorsed on the indictment and defendant had been ignorant of his intended testimony, and, after it was introduced, he used all diligence during the trial to secure the presence of a person whom the witness testified was present when the alleged confession was made, but was unable to procure him. Held, that the court should have granted a new trial. *Phillips v. State*, 35 Tex. Cr. App. 480, 34 S. W. 272.

Death of Witness Pending Motion.—A motion for a new trial in a criminal case on the ground of absence of a witness was properly denied, where pending the motion the witness died. *Coffman v. State*, 56 Tex. Cr. App. 75, 119 S. W. 1148.

Facts to Be Proved Probably Untrue, Immaterial, or Inadmissible.—A motion for a new trial on the ground of the absence of witnesses is properly

overruled where the facts expected to be proved by them are not probably true, and where they probably would not have so testified. *Washington v. State*, 35 Tex. Cr. App. 154, 32 S. W. 693.

A motion for a new trial on the ground of the absence of witnesses is properly overruled where it is not probable that they would testify as alleged in the application. *Lindsey v. State*, 35 Tex. Cr. App. 164, 32 S. W. 768.

The unavoidable failure to procure the testimony of a witness who could only testify to an inadmissible self-serving declaration by accused is not ground for the new trial of a criminal prosecution. *Brown v. State* (Cr. App.), 70 S. W. 21.

Where an application for a new trial on account of the absence of witnesses showed that they were merely witnesses to previous difficulties between defendant and decedent, and such difficulties were admitted by a witness for the state, the court properly refused a new trial. *Francis v. State*, 44 Tex. Cr. App. 246, 70 S. W. 751.

Absent Witness Jointly Indicted with Accused and Already Convicted.—A new trial, in a criminal case, will not be granted because of an absent witness, where the witness was jointly indicted with defendant, and had already been convicted, and no reason is shown why his evidence was not available at the trial. *Crew v. State* (Cr. App.), 22 S. W. 973.

Witness Kept Away by Friends of Deceased.—Where it was suggested before the court in a murder trial that an absent witness had been kept away by deceased's friends, and a witness was sent for to prove this, but he was not brought into court until after overruling motion for continuance, the matter should have been thoroughly sifted by the court. *Logan v. State*, 47 S. W. 645, 39 Tex. Cr. App. 573.

Impeaching Witness.—A new trial

will not be granted to obtain the testimony of a witness if it appears that the desired evidence is destined to impeach a witness on the former trial; nor yet, unless it reasonably appears that the evidence, if admitted, would probably change the result. *Brown v. State*, 6 Tex. Cr. App. 286.

Introduction of New Witness by State after Accused Has Closed.—In the absence of a motion to postpone, and of exceptions to a refusal thereof, introducing a new witness by the state after accused has closed is not ground for new trial. *Margraves v. State* (Cr. App.), 50 S. W. 1016.

Possibility of Change in Testimony.—The fact that a witness in a case may subsequently change his testimony in the trial of a codefendant is not ground for new trial. *Shackelford v. State* (Cr. App.), 53 S. W. 884.

Failure to Hear and Understand Part of Evidence.—It is not ground for a new trial that a juror did not hear or understand part of the evidence, and, if he had so heard or understood, his verdict would have been different. *Keith v. State* (Cr. App.), 56 S. W. 628.

Difference in Testimony on Trial and On Preliminary Examination.—A showing that the prosecuting witness testified differently on the trial than he did on the preliminary examination is not sufficient to authorize a new trial. *Dillingham v. State* (Cr. App.), 62 S. W. 919.

Incompetency.—A new trial should not be granted for the reason that an infant witness was so terrified that she could not testify, no postponement or continuance having been asked for. *Jackson v. State*, 18 Tex. Cr. App. 586.

A verdict will not be set aside on the ground that a witness was incompetent, where it appears from the record that he had sufficient capacity to understand the nature and obligation of an oath, and his evidence shows

him to be intelligent. *Wolfforth v. State*, 31 Tex. Cr. App. 387, 20 S. W. 741.

Matters Relative to Credibility.—The fact that it was shown on a prosecution for statutory rape that the prosecutrix and her two brothers, who testified for the state, were liars and thieves, and had ill will against defendant, does not require a new trial, as the credibility of witnesses is for the jury. *Rodgers v. State*, 82 S. W. 1041, 47 Tex. Cr. App. 195.

A new trial will not be granted to enable the accused to show that a witness who testified for the prosecution entertained ill feelings towards the deceased and had an interest in convicting the accused. *Walker v. State*, 6 Tex. Cr. App. 576.

An allegation that a witness, "being mad at defendant," did not tell the truth, is not ground for a new trial. *Pursley v. State* (Cr. App.), 28 S. W. 683.

Witness Convicted of Perjury Subsequent to Trial.—Where, after the first trial of a prosecution for homicide, one of defendant's witnesses was indicted for perjury arising from his testimony in the trial, for the purpose of affecting his credibility in a subsequent trial, but defendant did not object, when such witness was placed on the stand in the second trial, to the state's proving that he was under such indictment for perjury, defendant, after conviction, and after acquittal of the witness, was not entitled to a new trial in order that he might have the benefit of the evidence of the witness, unaffected by such indictment. *Bennett v. State*, 81 S. W. 30, 47 Tex. Cr. App. 52.

Witness Not under Oath.—Where a witness for the state testified as to the condition of deceased's body two hours after the homicide, and to finding a knife in his pocket, and his evidence was uncontradicted, though several persons were present at the time re-

ferred to by the witness, the fact that he was not sworn did not entitle defendant to a new trial. *Coleman v. State*, 63 S. W. 322, 43 Tex. Cr. App. 15.

Testimony Conflicting with Private Statements.—The fact that a prosecuting witness testified differently from a statement made by him to the accused before the trial, relying whereon the accused had gone to trial, instead of continuing his case for designated absent witnesses, who would prove certain facts material to his defense, held to be no ground for a new trial. *Fagan v. State*, 3 Tex. Cr. App. 400.

Affidavit of Absent Witness Before Court.—New trial for want of testimony of a person by whom defendant states that he can prove that his confession was induced by a promise to use influence for immunity is properly denied, affidavits of such person and another denying this being produced. *Williamson v. State*, 36 Tex. Cr. App. 225, 36 S. W. 444.

8. Refusal of Continuance.

a. In General.

See, generally, the titles CONTINUANCES, vol. 2, p. 65; CRIMINAL LAW, vol. 2, p. 168.

Though the court, in a criminal case, in its discretion, may refuse to grant a continuance on defendant's application, yet if, on the trial, it appears that injustice was done, a new trial should be granted. *Casinova v. State*, 12 Tex. Cr. App. 554; *Laubach v. State*, 12 Tex. Cr. App. 583; *Dill v. State*, 6 Tex. Cr. App. 113; *Clampitt v. State*, 9 Tex. Cr. App. 27; *Williams v. State*, 10 Tex. Cr. App. 114; *Aiken v. State*, 10 Tex. Cr. App. 610; *Word v. State*, 12 Tex. Cr. App. 174; *Lawson v. State*, 13 Tex. Cr. App. 264; *Walker v. State*, 17 Tex. Cr. App. 16; *Martin v. State*, 17 Tex. Cr. App. 244; *Miller v. State*, 18 Tex. Cr. App. 232; *Adams v. State*, 19 Tex. Cr. App. 1; *S. C.*, 19 Tex. Cr. App. 250; *McAdams v. State*, 24 Tex. Cr. App. 86, 5 S. W. 826; *Rumbo v. State*, 28 Tex. Cr. App. 30, 11 S. W. 680.

It is proper for the court, in considering a motion for new trial based on alleged error in overruling an application for continuance, to consider the facts established on the trial, both with a view of determining the materiality of the facts which it was stated the absent witness would prove, and the truth of the affidavit. *Holland v. State*, 38 Tex. 474; *Lawson v. State*, 13 Tex. Cr. App. 264; *Yantis v. State*, 49 Tex. Cr. App. 400, 94 S. W. 1019; *Bronson v. State*, 59 Tex. Cr. App. 17, 127 S. W. 175.

Diligence Required.—The refusal of the trial court to grant a new trial upon the ground of error in refusing the accused a continuance is not cause for new trial, when it appears that the continuance was properly refused because of the failure of the accused to exercise due diligence in securing the attendance of an absent witness. *Greenwood v. State*, 9 Tex. Cr. App. 638; *May v. State*, 6 Tex. Cr. App. 191; *Reynolds v. State*, 7 Tex. Cr. App. 516; *Walker v. State*, 13 Tex. Cr. App. 618, 650.

b. Absence of Witnesses.

See ante, "Rulings Relative to Witnesses," I, C, 7.

In General.—Under Code Crim. Proc., art. 560, clause 6, the accused is not entitled to a continuance on account of the absence of a witness as a matter of right, but if it appears from the evidence adduced on the trial that the testimony of the absent witness is material and probably true, then a new trial should be granted. *Williams v. State*, 11 Tex. Cr. App. 63; *Cotton v. State*, 4 Tex. 260; *Cooper v. State*, 19 Tex. 449; *Jenkins v. State*, 30 Tex. 444; *Reed v. State*, 43 Tex. 319; *Baines v. State*, 42 Tex. Cr. App. 510, 61 S. W. 119; *Cox v. State*, 5 Tex. Cr. App. 118; *Williams v. State*, 10 Tex. Cr. App. 528; *Garrold v. State*, 11 Tex. Cr. App. 219; *Eldridge v. State*, 12 Tex. Cr. App. 208; *Tyler v. State*, 13 Tex. Cr. App. 205; *Beatey v. State*, 16 Tex. Cr. App.

421; *Parker v. State*, 18 Tex. Cr. App. 72; *Roach v. State*, 21 Tex. Cr. App. 249, 17 S. W. 464; *Doss v. State*, 21 Tex. Cr. App. 505, 2 S. W. 814; *Sims v. State*, 21 Tex. Cr. App. 649, 1 S. W. 465; *Price v. State*, 22 Tex. Cr. App. 110, 2 S. W. 622; *Covey v. State*, 23 Tex. Cr. App. 388, 5 S. W. 283; *McAdams v. State*, 24 Tex. Cr. App. 86, 5 S. W. 826; *Collins v. State*, 24 Tex. Cr. App. 141, 5 S. W. 848; *McCline v. State*, 25 Tex. Cr. App. 247, 7 S. W. 667; *Cordway v. State*, 25 Tex. Cr. App. 405, 8 S. W. 670; *Richardson v. State*, 28 Tex. Cr. App. 216, 12 S. W. 870; *Seli v. State*, 28 Tex. Cr. App. 398, 13 S. W. 602; *Hammond v. State*, 28 Tex. Cr. App. 413, 13 S. W. 605; *Hooper v. State*, 29 Tex. Cr. App. 614, 16 S. W. 655; *Withers v. State*, 30 Tex. Cr. App. 383, 17 S. W. 936; *Bluman v. State*, 33 Tex. Cr. App. 43, 21 S. W. 1027, 26 S. W. 75; *Land v. State*, 34 Tex. Cr. App. 330, 30 S. W. 788; *Logan v. State*, 39 Tex. Cr. App. 573, 47 S. W. 645; *Smith v. State*, 40 Tex. Cr. App. 391, 50 S. W. 938; *McKinney v. State*, 41 Tex. Cr. App. 413, 55 S. W. 337; *Lawhorn v. State*, 46 Tex. Cr. App. 555, 81 S. W. 714; *Perez v. State*, 48 Tex. Cr. App. 225, 87 S. W. 350; *Long v. State*, 48 Tex. Cr. App. 434, 88 S. W. 809; *Leach v. State*, 49 Tex. Cr. App. 264, 91 S. W. 1088; *Riden v. State* (Cr. App.), 5 S. W. 829; *Akin v. State* (Cr. App.), 12 S. W. 1101; *Damron v. State* (Cr. App.), 27 S. W. 7; *Lamar v. State* (Cr. App.), 39 S. W. 677; *Curtis v. State* (Cr. App.), 40 S. W. 265; *McIntyre v. State* (Cr. App.), 43 S. W. 104; *Maloney v. State* (Cr. App.), 43 S. W. 980; *Cline v. State* (Cr. App.), 71 S. W. 23; *McCoy v. State* (Cr. App.), 73 S. W. 1057; *Knowles v. State* (Cr. App.), 74 S. W. 767; *Porter v. State* (Cr. App.), 86 S. W. 1014; *Leonard v. State*, 53 Tex. Cr. App. 187, 109 S. W. 149; *Steel v. State*, 55 Tex. Cr. App. 551, 117 S. W. 850; *Wheeler v. State*, 61 Tex. Cr. App. 527, 136 S. W. 68; *Day v. State*, 62 Tex. Cr. App. 448, 138 S. W. 130.

"In *Pruitt v. State*, 30 Tex. Cr. App.

156, 16 S. W. 773, the court said: 'It is not in every case, however, even where the absent testimony is material, and probably true, that this court will revise the trial judge in refusing a new trial considered with reference to the application for continuance. It is only in a case where, from the evidence adduced upon the trial, we would be impressed with the conviction, not merely that defendant might probably have been prejudiced in his rights by such ruling, but that it was reasonably probable that, if the absent testimony had been before the jury, a verdict more favorable to defendant would have resulted.' Citing *Browning v. State*, 26 Tex. Cr. App. 432, 443, 9 S. W. 770; *Covey v. State*, 23 Tex. Cr. App. 388, 5 S. W. 283; *Massie v. State*, 30 Tex. Cr. App. 64, 16 S. W. 770." *Ray v. State* (Cr. App.), 75 S. W. 798, 800.

Application Made after Beginning of Trial.—Although an application for a continuance because of the absence of material witnesses is not made until after the trial has begun, and, therefore, is refused, its grounds may be considered on application for a new trial. *Stanley v. State*, 16 Tex. Cr. App. 392.

Fictitious Witness or Absence Procured by Defendant.—On motion for new trial because of refusal of continuance for absent witnesses, it is proper for the state to show that they were either fictitious persons, or absent by the procurement and consent of defendant. *Sargent v. State*, 35 Tex. Cr. App. 325, 33 S. W. 364.

Immaterial or False Testimony.—A new trial for refusing a continuance because of the absence of a witness, will not be granted where it appears that the witness, if present would not testify to the facts stated or that if he did testify, the matter testified, would not be true. *Carr v. State*, 36 Tex. Cr. App. 390, 37 S. W. 426.

Death of Witness before Motion Acted upon.—The refusal of a motion

for a continuance on account of the absence of a witness is no ground for a new trial where the witness dies before the motion for a new trial is acted upon. *Scoville v. State* (Cr. App.), 81 S. W. 717.

9. Improper Remarks or Conduct of Counsel.

See, generally, the title ARGUMENT AND CONDUCT OF COUNSEL, vol. 1, p. 397.

Remarks of Prosecutor.—A new trial will be granted, in a criminal case, where the district attorney, during the trial, made improper remarks calculated to prejudice defendant's case with the jury. *Laubach v. State*, 12 Tex. Cr. App. 583.

Code Cr. Proc., art. 783, provides that "the effect of a new trial is to place the cause in the same position in which it was before any trial had taken place. The former conviction shall be regarded as no presumption of guilt, nor shall it be alluded to in the argument." Held, that remarks made by the prosecuting attorney commenting on the former conviction of accused, and the new trial secured by him "on a technicality," warranted a setting aside of the conviction. *Moore v. State*, 21 Tex. Cr. App. 666, 2 S. W. 887.

The prosecuting attorney, in his closing argument, said that defendant knew that he was guilty, and challenged defendant to get up and deny his statement. On defendant's counsel whispering to defendant, the prosecuting attorney said: "That's right. Tell him to get up, and tell me that I have lied." Held, that a new trial should be granted. *Hardy v. State* (Cr. App.), 13 S. W. 1008.

The prosecuting attorney, in arguing a rape case, alluded to similar crimes, lately committed in the neighborhood, in a manner calculated to inflame the passions of the jury against the defendant. Held good ground for a new trial. *Bryson v. State*, 20 Tex. Cr. App. 566.

The argument of the prosecuting attorney, on a trial for violating the local option law, that if the jury did not convict on the facts they could as well wipe out the local option statute, tear down the courthouse, and turn bootleggers loose in the county, and that the jury should give accused the severest penalty, and teach him that bootleggers like him could not go around the county peddling out liquor, was improper, necessitating a new trial; the argument affecting the result. *Burrell v. State*, 62 Tex. Cr. App. 635, 138 S. W. 707.

On objection by defendant to a question asked a state's witness, the district attorney stated, in the presence and hearing of the jury, that he expected to show that the brother of defendant had induced the witness to leave the county so as not to testify. There was no attempt to connect defendant with such effort to suppress testimony, and the jury were not instructed to disregard the statement. Held, that defendant was entitled to a new trial. *Nalley v. State*, 28 Tex. Cr. App. 387, 13 S. W. 670.

Must Be Material.—A conviction will not be set aside because of improper remarks of counsel unless they were so material as to injuriously affect defendant's rights. *Miller v. State* (Cr. App.), 25 S. W. 634.

A new trial will not be granted because of certain remarks of the county attorney, where such remarks were made pertinent by defendant's testimony, and where the court instructed the jury to disregard them. *Graham v. State* (Cr. App.), 24 S. W. 645.

Necessity for Exception.—See, generally, the titles ARGUMENT AND CONDUCT OF COUNSEL, vol. 1, p. 397; EXCEPTIONS AND OBJECTIONS, vol. 2, p. 743.

A new trial is properly refused on account of remarks of the prosecuting attorney, where no exception was reserved to the remarks, and nothing ap-

pears in the record to sustain the statement in the motion for a new trial that such remarks were made. *Epson v. State* (Cr. App.), 36 S. W. 584; *Steinhauser v. State* (Cr. App.), 48 S. W. 506; *Anderson v. State* (Cr. App.), 100 S. W. 153; *Boyce v. State*, 62 Tex. Cr. App. 374, 137 S. W. 116.

Improper Conduct of Prosecutor.—

Artifice, trickery and fraud of prosecuting officers, whereby defendant has been induced to go to trial to his injury, have been held good grounds of reversal and cause for new trial. *Eldridge v. State*, 12 Tex. Cr. App. 208.

Where the prosecuting attorney, by artifice, led defendant to go to trial under the impression that important witnesses for the state were absent, when in fact they were present and concealed by the prosecuting attorney, a new trial was granted defendant. *March v. State*, 44 Tex. 64.

An affidavit for a new trial averred that affiant, after verdict, saw the prosecuting witness take a state's witness aside, and secretly give her five dollars in money, and this was denied by neither witness. Held, that ground was shown for a new trial. *Bostick v. State*, 10 Tex. Cr. App. 705.

A new trial will not be granted upon the ex parte statement of defendant that material witnesses were kept away by fraud or threats, unsupported by affidavits, especially when such absence was known to the accused, but no continuance was asked for. *Hartless v. State*, 32 Tex. 88.

10. Misconduct of Prosecuting Witness.

Evidence that the prosecuting witness bet a suit of clothes that defendant would be convicted is no ground for a new trial. *Reed v. State* (Cr. App.), 44 S. W. 833.

Where accused was convicted of robbery, affidavits that prosecutor stated to affiant after trial that he did not believe defendant ever intended to rob him, and that if he had paid

prosecutor what he paid the lawyers he would not have been convicted, was not ground for new trial. *Walling v. State*, 55 Tex. Cr. App. 319, 116 S. W. 813.

11. Mistake, Surprise, etc.

In General.—A new trial ought not to be granted on the ground of surprise, on the unsupported affidavit of defendant. *Jordan v. State*, 10 Tex. 479.

On a motion for a new trial on such ground, it appearing from the affidavits filed by defendant that he had a good defense, and they not being controverted by the state, the motion should have been granted. *Jackson v. State*, 88 S. W. 239, 48 Tex. Cr. App. 373.

Absence of Counsel.—Where, on the calling of a criminal case for trial, accused was informed by the court that the attorney who had previously represented him had informed the court that he would not represent accused, and accused had supposed that the attorney would represent him, and had given him the names of his witnesses, and the witnesses were absent, the court should have afforded accused an opportunity of employing other counsel, or, at any rate, have given him an opportunity to have his witnesses present. *Jackson v. State*, 88 S. W. 239, 48 Tex. Cr. App. 373.

Surprise as to Testimony of One's Own Witness.—By Code of Proc., art. 777, new trials in felony cases are positively interdicted for any cause other than those specified therein and surprise occasioned by the testimony of a witness is not cause for a new trial. *Childs v. State*, 10 Tex. Cr. App. 183.

That a defendant was surprised by the evidence of his own witness is not ground for a new trial. *Simnacher v. State* (Cr. App.), 43 S. W. 512.

Surprise caused by a witness' testifying that he witnessed the homicide, whereas he had previously told defendant otherwise, is not ground for

new trial. *Head v. State*, 50 S. W. 352, 40 Tex. Cr. App. 265.

A motion for new trial on the ground that certain witnesses had testified at the examining trial differently from what they testified to on the trial of the indictment, supported by an affidavit of defendant's attorney that, just before testifying, said witnesses made to him the same statement they had made on the preliminary trial, and that he had a subpoena served on the magistrate, and told him to bring all of his books and papers, including his docket, but he failed to bring his docket, was properly denied, where one of the witnesses admitted, on cross-examination, that he had testified at the examining trial as claimed by defendant, and the other was impeached by the magistrate, who also showed that he had the examining trial evidence with him. *McNeal v. State* (Cr. App.), 43 S. W. 792.

The fact that accused's counsel, at the time of trial, did not know that a certain witness was an enemy of accused, nor that accused's wife would testify a certain way, is not ground of new trial because of surprise, the witness having testified similarly on the habeas corpus and examining trials, and the wife being present at these trials. *Leslie v. State* (Cr. App.), 49 S. W. 73.

The fact that witnesses testified contrary to what they had stated to accused's counsel, and had testified in another trial, is not ground for new trial because of surprise; a postponement not having been asked to secure other witnesses, and the names of the witnesses not being stated in the motion, or the names of those by whom it was expected to contradict them. *Stewart v. State* (Cr. App.), 49 S. W. 95.

A new trial will not be granted on the ground of surprise in a witness not swearing as he was expected to do, when it is not shown that, on a second trial, proof can be made, by other wit-

nesses, of the facts expected to have been proved by the witness occasioning the surprise. *Mayfield v. State*, 44 Tex. 59.

Defendant is not entitled to a new trial because one of his witnesses surprised him by testifying contrary to his declarations prior to going on the stand, where no postponement was asked and no effort made to supply the evidence expected from the witness. *Webb v. State*, 9 Tex. Cr. App. 490; *Burton v. State*, 9 Tex. Cr. App. 605.

Defendant is not entitled to a new trial on allegations that he was under twenty-one years old at the time of the commission of the offense, and that he was surprised at the failure of his witnesses to testify positively as to his age. *Brown v. State* (Cr. App.), 56 S. W. 56.

Where a motion for a new trial is on the ground of surprise at a witness' testimony, which can be successfully contradicted, the evidence of proposed witnesses must be produced, or good cause shown for the failure to do so. *Welsh v. State*, 11 Tex. 368.

A new trial will not be granted on the ground of surprise by testimony, where it appears that the one seeking continuance made no effort to ascertain what the testimony would be. *Evans v. State*, 13 Tex. Cr. App. 225.

Surprise as to Testimony of State's Witness.—The mere fact that a state's witness testified contrary to what defendant expected is not matter of surprise, so as to warrant a new trial. *White v. State*, 51 S. W. 705, 40 Tex. Cr. App. 366.

A motion for a new trial was rightly overruled where the only pretense was that defendant was not apprised that the evidence would be of any avail to him. Not having been misled by the prosecution, he must abide by the course he saw proper to adopt. *Robinson v. State*, 15 Tex. 311.

Time to Raise Question.—Where, in a criminal case, defendant is surprised

by the testimony of a witness, he must move to take the case from the jury, setting up what he expects to prove by any absent witness. He can not wait until after conviction. *Zollicoffer v. State* (Cr. App.), 38 S. W. 775.

Necessity to Request Postponement or Continuance.—A new trial will not be granted because defendant was misled by a statement of a witness for the prosecution, made before the trial, where defendant, on discovering the misstatement, did not move for a postponement of the trial. *Robbins v. State*, 33 Tex. Cr. App. 573, 28 S. W. 473.

Where defendant was surprised by the testimony in consequence of having been misled by his own witness, but fails to apply for a continuance as provided by Code Proc., art. 568, the surprise is not ground for a new trial. *Webb v. State*, 9 Tex. Cr. App. 490; *Burton v. State*, 9 Tex. Cr. App. 605; *Higginbotham v. State*, 3 Tex. Cr. App. 447; *Childs v. State*, 10 Tex. Cr. App. 183; *Cunningham v. State*, 20 Tex. Cr. App. 162; *Bryant v. State*, 35 Tex. Cr. App. 394, 33 S. W. 978, 36 S. W. 79; *Turner v. State* (Cr. App.), 55 S. W. 53.

Where defendant did not ask for a continuance, a new trial should not be granted to enable him to obtain evidence to prove his good character. *Robinson v. State*, 35 Tex. Cr. App. 181, 32 S. W. 900.

The fact that, on a trial for murder, the state produced material testimony of a new witness who had not been called at two previous judicial investigations of the case, and refused to grant defendant a postponement until a contradicting witness, twelve miles away, could arrive, is ground for a new trial under Code, art. 568, as to some unexpected circumstance, etc. *Hodde v. State*, 8 Tex. Cr. App. 382.

That the testimony of a witness was not what it was represented to defendant by a third person that it would be

is no ground for a new trial, though it was the only evidence on which he relied for his defense, defendant not having sought to examine the witness till he was put on the stand, and not having moved for a continuance at the trial. *Yanez v. State*, 20 Tex. 656.

12. Rulings on Evidence.

See, generally, the title EVIDENCE, vol. 2, p. 324.

a. Admissibility.

Not Probable to Change Result.—The exclusion of evidence wholly insufficient to have changed the result will not warrant the grant of a new trial. *Higginbotham v. State*, 3 Tex. Cr. App. 447.

Exclusion of material testimony was not ground for a new trial, where the trial was before the judge without a jury, and he had refused a postponement or continuance for want of the testimony; the action of the court showing that such testimony, if admitted, would not probably have changed the result. *Turner v. State* (Cr. App.), 108 S. W. 661.

Materiality of Excluded Testimony Will Be Considered.—The materiality of excluded evidence so as to justify the granting of a new trial will be considered in connection with the evidence admitted. *Higginbotham v. State*, 3 Tex. Cr. App. 447.

Guilt Proved by Competent Testimony through Incompetent Evidence Omitted.—Where incompetent evidence was admitted, but the competent evidence left no doubt as to the guilt of the accused, the conviction will not be reversed. *Jinks v. State*, 35 Tex. Cr. App. 365, 33 S. W. 868.

Evidence Excluded Which Would Prove Remote Fact.—If evidence was excluded which might properly have been admitted, and which, if admitted, would have proved a fact so remotely connected with the case as to be entitled to no appreciable weight in favor of accused, its exclusion furnishes no

ground for a new trial. *Boothe v. State*, 4 Tex. Cr. App. 202.

When evidence is excluded which might have been properly admitted without prejudice to either side, but which, if admitted, would prove a fact so remotely connected with the case as to be entitled to no appreciable weight in favor of defendant, its exclusion furnishes no ground for a new trial. *Boon v. State*, 42 Tex. 237.

When Defendant's Counsel Proves Confession.—Where defendant's counsel, in cross-examining one of the state's witnesses, brings out the fact that defendant confessed after arrest, he must abide the consequences, and is not entitled to a new trial on the ground that such evidence was improperly allowed to go to the jury. *Moore v. State*, 6 Tex. Cr. App. 563.

Testimony of One Jointly Charged but Separately Acquitted.—A refusal to admit material testimony of one jointly charged with defendant, but on a separate trial acquitted, is ground for a new trial. *Williams v. State*, 4 Tex. Cr. App. 5.

Evidence by State to Show Reputation of Prosecutor Which Has Not Been Attacked.—Though it is error to permit the state to show that the reputation of the prosecuting witness for truth and veracity was good when his credibility has not been attacked, a new trial will not be granted on this ground alone. *Green v. State* (Cr. App.), 12 S. W. 872.

Proof of Exception to Provisos Regulating Practice of Medicine.—In a prosecution under the "Act to regulate the practice of medicine" (Gen. Laws 1876, p. 231), the accused may prove his exception under the provisos, and it was error to refuse an application for a new trial based upon the exclusion of such evidence. *Smith v. State*, 5 Tex. Cr. App. 318.

Showing Express Malice on Second Trial upon Conviction of Second Degree Murder on First Trial.—One

upon trial was acquitted of murder in the first degree, and convicted of murder in the second degree. Upon a second trial, he objected to evidence tending to show express malice. Held, that his objection was properly overruled. *McLaughlin v. State*, 10 Tex. Cr. App. 340.

Admission of Hearsay on Irrelevant Testimony Resulting in Conviction of Manslaughter.—A conviction of manslaughter should be set aside for the admission of irrelevant and hearsay testimony likely to prejudice defendant. *Stephens v. State*, 20 Tex. Cr. App. 255.

Admissibility of Ex Parte Affidavit When Impeaching Testimony Ruled Out.—On motion for a new trial on the ground that impeaching evidence was ruled out, an ex parte affidavit of the proposed witness contradicting the allegations which it was proposed to prove by him is not admissible. *Wyatt v. State*, 42 S. W. 598, 38 Tex. Cr. App. 256.

Self Crimination.—Testimony by the jailer that he had made a physical examination of the person of one of the defendants after his arrest, and had found bruises on his back, thereby corroborating the testimony of one of the three assaulted persons, that he had struck defendant on the back with a heavy whip handle, will not justify the granting of a new trial, on the ground that defendant was compelled to testify against himself, where the bill of exceptions fails to show either that defendant was compelled to expose his body to the jailor, or that any injury resulted to him from the admission of the testimony. *Leeper v. State*, 29 Tex. Cr. App. 63, 14 S. W. 398.

Necessity for Exceptions.—See, generally, the title EXCEPTIONS AND OBJECTIONS, vol. 2, p. 743.

The admission of evidence not clearly and necessarily improper, and not objected to during the trial, is no

ground for a new trial. *Hinton v. State*, 24 Tex. 454; *Berry v. State*, 4 Tex. Cr. App. 492; *Reeves v. State*, 47 Tex. Cr. App. 340, 83 S. W. 803; *Battle v. State*, 57 Tex. Cr. App. 125, 122 S. W. 561.

b. Sufficiency.

If the exculpatory testimony, relied on by defendant, to rebut a prima facie case of guilt, established by the state, from its intrinsic weight, consistency, or probability, be such as to make it incredible; if it conflict with facts clearly established, implicating the defendant in the crime charged; and other circumstances, subject it properly to suspicion; and the jury, in determining upon the credibility of the witnesses, disregard it, and find the defendant guilty, it is not error to refuse a new trial. *Monroe v. State*, 23 Tex. 210.

The evidence inculcating the accused, on his trial for theft, was that of two witnesses, one of whom was not only contradicted in material respects, but stultified himself as a willful perjurer, and the other of whom may himself have been criminally implicated in the theft. After conviction the accused moved for a new trial, alleging surprise at the testimony of the said witnesses, and showing by affidavits that he had good reason to rely on their evidence to exonerate him. Held, under all the circumstances of the case, that a new trial should have been granted. *Hasselmeyer v. State*, 1 Tex. Cr. App. 690.

The judge of the court below, having the witnesses before him, and observing their manner of testifying, is, as a general rule, more favorably circumstanced than an appellate court can be to determine whether a new trial should be granted on account of the evidence. *Chapman v. State*, 3 Tex. Cr. App. 67.

Where defendant moves for a new trial, after conviction for burglary, upon the ground that none of the

stolen property was found in his possession, but his own confession showed that he was with the other two parties who were shown to have committed the burglary in the nighttime, and he is also shown to have been drinking that night, there is no error in overruling his motion for a new trial on the ground of insufficiency of evidence. *Kelly v. State*, 61 Tex. Cr. App. 663, 136 S. W. 58.

On trial for the larceny of a cow, which defendant was detected in slaughtering, an affidavit by a person who was engaged in the slaughtering, and had been tried and acquitted, satisfactorily explaining the suspicious character of the possession, is sufficient ground for a new trial. *Voight v. State*, 13 Tex. Cr. App. 21.

An order denying a new trial, sought on the ground of the alleged insufficiency of the evidence, can not be reviewed where the statement of facts is not incorporated in the record. *Merritt v. State* (Cr. App.), 37 S. W. 722.

13. Rulings Relative to Jurors.

a. Misconduct of or Affecting Jurors.

(1) In General.

See, generally, the title JURY, ante, p. 110.

Must Affect Fairness of Trial.—"It is well settled in this state that misconduct of the jury will not be ground for a new trial, unless it is shown to be such as has affected the fairness and impartiality of the trial. (*Jack v. State*, 26 Tex. 1; *Johnson v. State*, 27 Tex. 758; *Austin v. State*, 42 Tex. 355; *Anschilds v. State*, 6 Tex. Cr. App. 524; *Allen v. State*, 17 Tex. Cr. App. 637.)" *Jack v. State*, 20 Tex. Cr. App. 656, 660; *Walker v. State*, 17 Tex. Cr. App. 16; *Kelly v. State*, 28 Tex. Cr. App. 120, 12 S. W. 505.

Presumption as to Ruling of Court.—In the absence of showing in the record to the contrary, it will be presumed that the trial court, in denying a new trial on the ground of a juror's misconduct charged in ex parte affi-

davits, properly found against the charge. *Speer v. State*, 57 Tex. Cr. App. 297, 123 S. W. 415.

Action in denying a new trial asked for misconduct of a juror will not, generally, be overruled, and will not where there is a conflict of evidence as to the fact of such misconduct. *Gilleland v. State*, 44 Tex. 356.

Motion Should Be Sworn to.—A motion for a new trial for misconduct of a juror should be sworn to by accused. *Richardson v. State*, 94 S. W. 1016, 49 Tex. Cr. App. 391.

Facts Must Be Definitely Set Forth.—Misconduct affecting the jury can not be considered as a ground for new trial, where the facts presenting such misconduct are not definitely presented in the motion for new trial and they are not supported by any testimony. *Wright v. State* (Cr. App.), 97 S. W. 699; *Scott v. State*, 43 Tex. Cr. App. 591, 68 S. W. 177; *Hodges v. State*, 6 Tex. Cr. App. 615; *Weatherford v. State*, 31 Tex. Cr. App. 530, 21 S. W. 251; *Pilot v. State*, 38 Tex. Cr. App. 515, 43 S. W. 112, 1024; *Darter v. State*, 44 Tex. Cr. App. 189, 69 S. W. 509; *Reagan v. State*, 57 Tex. Cr. App. 642, 124 S. W. 685.

Effect Where Testimony on Misconduct Closed before Argument on Motion Began.—Where the testimony on the misconduct of the jury was closed before the argument on the motion for a new trial began, defendant can not complain that he should have been permitted to introduce additional testimony. *Mitchell v. State*, 36 Tex. Cr. App. 278, 33 S. W. 367.

Proof of Misconduct.—On an investigation by the trial court into the alleged misconduct of a jury, two jurors made affidavit showing misconduct, but nine made counter affidavits, and the jury commissioners who were being impeached about that time were lectured by the court in the presence of the jurors in question; the judge stating that the jury commissioners

should not select men who would make affidavits impeaching their verdict. Held that, the affidavits of the majority of the jury having been made prior to such incident, it could not be regarded as having intimidated the majority. *Goodman v. State*, 91 S. W. 795, 49 Tex. Cr. App. 185.

Where the affidavit of defendant in a criminal case, suggesting misconduct on part of one of the jurors, was unsupported by other affidavits or testimony, and there was no showing that the court refused to enforce the attendance of witnesses to substantiate such affidavit, it was not sufficient to warrant the reversal of a judgment of guilty. *McAvoy v. State* (Cr. App.), 58 S. W. 1010.

A conviction will not be reversed on the ground of misconduct of the jury where the affidavits of jurors presented by defendant do not make out the misconduct alleged, and where the affidavits of other jurors, presented by the state satisfactorily explain the alleged misconduct. *Ikard v. State*, 46 Tex. Cr. App. 605, 79 S. W. 32.

Right of Judge to Hear Testimony of Jurors on Questions Raised by Motion.—Code Cr. Proc., art. 817, subd. 8, requires new trial in felony cases where, from misconduct of the jury, the court was of opinion that defendant had not received a fair and impartial trial, and made the voluntary affidavit of a juror competent to prove such misconduct. Article 821 authorizes taking issue on the truth of causes set forth in a motion for new trial, and provides that the judge shall hear evidence, by affidavit or otherwise, and determine the issue. Held, that the trial judge was authorized to hear testimony of the jurors adduced on controverted questions raised by the motion for new trial, and it was not necessary that the affidavits of such jurors be obtained. *Keith v. State* (Cr. App.), 56 S. W. 628.

(2) Consideration of Former Conviction.

"The statute is imperative, and must be followed, which says that the jury shall not discuss or use the fact of previous conviction as a predicate or probable predicate for their verdict." *Hughes v. State*, 44 Tex. Cr. App. 296, 70 S. W. 746, 748.

A bare statement by a juror to his fellow jurors that a former jury had tried the case and rendered a verdict against defendant would not ordinarily be ground for a reversal. *Morrison v. State*, 39 Tex. Cr. App. 519, 47 S. W. 369.

(3) Reception of Evidence after Retirement.

"Article 817, Cr. Proc., appears to be mandatory, and where the jury have received other material evidence—whether from one of their number or others—after they have retired to consider their verdict, the judgment will be reversed. *Hargrove v. State*, 33 Tex. Cr. App. 431, 26 S. W. 993; *Ellis v. State*, 33 Tex. Cr. App. 508, 27 S. W. 135; *Mitchell v. State*, 36 Tex. Cr. App. 278, 33 S. W. 367, 36 S. W. 456." *Blocker v. State* (Cr. App.), 61 S. W. 391, 392.

"In art. 777, Code Crim. Proc., the seventh subdivision is 'where the jury, after having retired to deliberate upon a case, have received other testimony,' etc. This statute in this particular has always been construed to mean that the testimony or other matter received by the jury after their retirement, in order to demand the granting of a new trial, must be such as would probably influence the verdict. *Willson*, Crim. St., § 2545; *McKissick v. State*, 26 Tex. Cr. App. 673, 9 S. W. 269; *Lucas v. State*, 27 Tex. Cr. App. 322, 11 S. W. 443." *Hendricks v. State*, 28 Tex. Cr. App. 416, 13 S. W. 672; *Bell v. State*, 32 Tex. Cr. App. 436, 24 S. W. 418; *Spencer v. State*, 34 Tex. Cr. App. 238, 30 S. W. 46; *Terry v. State* (Cr. App.),

38 S. W. 986, 987; *Mitchell v. State*, 36 Tex. Cr. App. 278, 36 S. W. 456.

"It matters not how important it is; and, the more important the case, the more important it becomes for the jury to try the appellant according to the law and the testimony adduced upon the trial. As indicated above, we repeatedly held that such conduct on the part of the jury is cause for reversal. And see, also, *Darter v. State*, 39 Tex. Cr. App. 40, 47, 44 S. W. 850; *Tate v. State*, 38 Tex. Cr. App. 261, 42 S. W. 595; *Ysaguirre v. State*, 42 Tex. Cr. App. 233, 58 S. W. 1005." *Blocker v. State* (Cr. App.), 61 S. W. 391, 392.

(4) Separation.

General Doctrine Considered.—Separation of a jury before verdict after it has been sworn and empanelled to try a felony case, is positively prohibited by the Code of Procedure, unless by permission of the court, with the consent of the state's counsel and the defendant, and then the jury must be in charge of an officer. It is the officer's duty to supply their necessary food and lodging. *Warren v. State*, 9 Tex. Cr. App. 619.

The separation of two or three jurors from the main body during the progress of a trial for murder is not ground for new trial, in the absence of a showing that they did not separate from the others with the permission of the court and in charge of an officer. *Gabler v. State*, 95 S. W. 521, 49 Tex. Cr. App. 623.

The consequence of the separation of the jury not permitted by law is not prescribed by the Code. The authorities are not harmonious, but from them we gather this rule: "That when there is a strong probability that injustice could have been done, the court will set aside the verdict." In testing whether wrong would have been done the defendant we look to all the circumstances attending the separation. *Robinson v. State*, 30 Tex. Cr. App.

459, 17 S. W. 1082; *Warren v. State*, 9 Tex. Cr. App. 619, 630; *Wilson v. State*, 18 Tex. Cr. App. 576; *Wright v. State*, 17 Tex. Cr. App. 152; *Defriend v. State*, 22 Tex. Cr. App. 570, 2 S. W. 641; *Grissom v. State*, 4 Tex. Cr. App. 374, 389; *Early v. State*, 1 Tex. Cr. App. 248. See, also, *Cannon v. State*, 3 Tex. 31; *Nelson v. State*, 32 Tex. 71; *Walker v. State*, 37 Tex. 366; *Wakefield v. State*, 41 Tex. 556; *Soria v. State*, 2 Tex. Cr. App. 297; *Goode v. State*, 2 Tex. Cr. App. 520; *Davis v. State*, 3 Tex. Cr. App. 91; *Cox v. State*, 7 Tex. Cr. App. 1; *West v. State*, 7 Tex. Cr. App. 150; *Russell v. State*, 11 Tex. Cr. App. 288; *Ogle v. State*, 16 Tex. Cr. App. 361; *Boyett v. State*, 26 Tex. Cr. App. 689, 690, 9 S. W. 275; *Bailey v. State*, 26 Tex. Cr. App. 706, 9 S. W. 270; *Kelly v. State*, 28 Tex. Cr. App. 120, 12 S. W. 505; *Taylor v. State*, 38 Tex. Cr. App. 552, 570, 43 S. W. 1019; *Powell v. State*, 49 Tex. Cr. App. 473, 93 S. W. 544; *Lamar v. State* (Cr. App.), 39 S. W. 677; *Griffey v. State* (Cr. App.), 56 S. W. 335.

The Texas supreme court in the case of *Jones v. State*, 13 Tex. 168, says: "When the jury, or any number of them, have separated without the consent of the court, we believe the following rules, laid down by Judge Green in *Hines v. The State*, 8 Humph. 597, are correct, and should be observed: 'First, that, the fact of separation having been established by the prisoner, the possibility that the jury had been tampered with, and received other impressions than those derived from the testimony in court, exists, and prima facie the verdict is vicious; but, second, the separation may be explained by the prosecution showing that the juror had no communication with other persons, or that such communication was upon subjects foreign to the trial, and that in fact no impressions, other than those drawn from the testimony, were made upon his mind; but, third, in the absence of

such explanation, the mere fact of separation is sufficient ground for a new trial.'" *Davis v. State*, 3 Tex. Cr. App. 91, 101.

"In all the cases decided in this state, where the separation has been of one or more jurors, and the verdict has been upheld, we think it will, upon inspection, manifestly appear that the facts stated sufficiently, of themselves, show the improbability that any injustice or wrong could have been done. On the other hand, when there is a strong probability that injustice and wrong could have been done, this court has never hesitated to set aside the verdict upon the ground that the law in such case would presume injury and prejudice to the accused. *Wright v. State*, 17 Tex. Cr. App. 152; *Warren v. State*, 9 Tex. Cr. App. 619, 630; *Wilson v. State*, 18 Tex. Cr. App. 576, 577." *Kelly v. State*, 28 Tex. Cr. App. 120, 12 S. W. 505.

"In *McCampbell v. State*, 37 Tex. Cr. App. 607, 40 S. W. 496, we discussed the authorities very fully on this subject, and there laid down the rule that a member or members separating from the body of jury, and not attended by an officer, would afford ground for new trial, regardless of the question of injury; that is, when an actual separation of the jury has been shown, and the juror separated from the main body of the jury was unattended by an officer, the court would not go into an examination of the question of possible prejudice or injury." *Griffey v. State* (Cr. App.), 56 S. W. 335, 336.

The cases in which a separation of a jury has been held not to entitle the accused to a new trial were not cases of the dispersion of the entire jury for a considerable time, as in the present case, but where only one or more individual members of the jury separated from the panel, under circumstances which, independent of their own evidence, repelled the supposition that they could have been tampered with.

Early v. State, 1 Tex. Cr. App. 548.

While the separation of the jury, or of one member from the rest, except with the permission of the court and consent of the parties, is prohibited by the Code, and ordinarily constitutes ground for a new trial, the mere fact that a juror left his fellows a short distance to attend a call of nature but spoke with no one, and was in view of the bailiff was not a cause for a new trial. Soria v. State, 2 Tex. Cr. App. 297.

By Permission of Court over Exception of Defendant.—"The rule upon this subject is that where there is a separation by permission of the court, to which the defendant excepts, the judgment will be reversed, without reference to injury or noninjury to the defendant; but in cases like the one in hand, and where the jury separated without permission of the court, to reverse, it must appear that the juror conversed with others about the case, or was guilty of misconduct to the prejudice of the accused." Burris v. State, 37 Tex. Cr. App. 587, 40 S. W. 284; Boyett v. State, 26 Tex. Cr. App. 689, 9 S. W. 275.

Separation of the jury by permission of court over defendant's objection will not necessitate reversal of a conviction, without reference to whether accused was injured thereby. Bailey v. State, 26 Tex. Cr. App. 706, 9 S. W. 270.

Special Care Necessary in Capital Cases.—In trials involving life or liberty, especial care should be exercised by jurors and by the officers of court to prevent any violation of the rule of the Code prohibiting the separation of the jury. Cox v. State, 7 Tex. Cr. App. 1.

Rule Less Stringent in Misdemeanor Cases.—Separation of the jury in a misdemeanor case is not cause for a new trial unless injury resulted to accused therefrom. Pasc. Dig., art., 3070,

prohibiting such separation without permission and consent applying to felonies only. Goode v. State, 2 Tex. Cr. App. 520.

Proof of Separation Should Be Adduced.—When separation or dispersion of the jury is relied on a cause for a new trial, proof thereof should be adduced in support of the motion, and, on appeal, be brought up in the record. Goode v. State, 2 Tex. Cr. App. 520.

(5) **Considering Matters Not in Evidence.**

(a) **Statements Made by Juror before Trial.**

An affidavit in support of a motion for a new trial, alleging that on the morning of the trial one of the jurors said that accused "was going to the penitentiary anyhow, or words to that effect," held not sufficient, especially where the affidavits in support of the motion were apparently procured by sharp practice. Nash v. State, 2 Tex. Cr. App. 362.

Where an affidavit in support of a motion for a new trial alleged, that on the morning of the trial one of the jurors said that accused "was going to the penitentiary anyhow, or words to that effect," the prosecuting attorney should bring the impugned juror before the court, and examine him touching the matter alleged in the affidavit. Nash v. State, 2 Tex. Cr. App. 362.

(b) **Statements Made by Juror During Trial.**

Where, after a verdict had been reached, one of the jurors stated to the others that, after he had been in the jury box for a time, defendant's face looked familiar, and that he did not think it was defendant's first offense, it was not ground for a new trial. Hernandez v. State, 60 Tex. Cr. App. 30, 129 S. W. 1109.

Ten of the jurors in a criminal case went into the jail among the prisoners, one of whom was defendant; and one

juror there discussed defendant's case, and inquired as to defendant's codefendant. They were in the jail about half an hour, during which time the outside door was locked, and the other two jurors were in the jail office. Held such misconduct as to entitle defendant to a new trial. *Burris v. State*, 40 S. W. 284, 37 Tex. Cr. App. 587.

(c) Statements Made by Juror During Deliberation.

Statements Made in Fun or Immaterial.—Where misconduct of the jury in discussing a matter affecting their judgment was relied on for a new trial, and it appeared that the discussion was in fun and of a jocular character, and was not considered in their deliberation on the case, and had no effect on them, and they paid no attention thereto, the motion was properly overruled. *Favro v. State* (Cr. App.), 59 S. W. 885.

The conviction of a porter for larceny should not be set aside merely because a juror told his fellow jurors that he had once been robbed by a porter, and that, because defendant was a porter he should be punished with especial severity. *Jack v. State*, 20 Tex. Cr. App. 656.

Former Conviction.—The act of a juror in a criminal case in stating, during the retirement of the jurors, but after the verdict was written, that he had read in the paper that defendant had been previously convicted for the same offense, was not such misconduct as to require the trial court to grant a new trial. *Tally v. State*, 90 S. W. 1113, 49 Tex. Cr. App. 91.

Under Code Cr. Proc., art. 817, subd. 7, providing that a defendant is entitled to a new trial where the jury, after retiring, receive other testimony, evidence that, while the jury were deliberating, one juror told another, who was holding out for acquittal, that the defendant had served a term in the penitentiary, entitled defendant to a new trial, as such evidence,

though not legal, was on a material issue, and calculated to influence the verdict. *Ysaguirre v. State*, 58 S. W. 1005, 42 Tex. Cr. App. 253.

On the third trial of a defendant whose conviction of manslaughter had been twice reversed, while the jury were evenly divided and deliberating, the fact that he had twice before been convicted, and that the people of the county of the first two trials would expect a severe sentence, was brought out by those jurors in favor of such penalty. The matter was reverted to several times, but the jurors testified that it was agreed that such fact should not influence their verdict, and that, as a matter of fact, it had not influenced the verdict of manslaughter, with a sentence of three and one-half years, returned by them. Held, that under the statute forbidding the discussing of the fact of previous conviction as a predicate, or probable predicate, for a verdict, the defendant was entitled to a new trial. *Hughes v. State*, 70 S. W. 746, 44 Tex. Cr. App. 296; *Lankster v. State*, 43 Tex. Cr. App. 298, 65 S. W. 373; *Mitchell v. State*, 36 Tex. Cr. App. 278, 36 S. W. 456; *S. C.*, 33 S. W. 367; *Terry v. State* (Cr. App.), 38 S. W. 986; *Darter v. State*, 39 Tex. Cr. App. 40, 44 S. W. 850; *Blocker v. State* (Cr. App.), 61 S. W. 391.

On motion for a new trial, it was proved that, while the jury was deliberating, one of the jurors stated that the defendant had served one term in the penitentiary, and that another stated that five or six other indictments were then pending against defendant, and that, if convicted, in this case, of a misdemeanor, he would be unable to give a convict bond for fine and costs, and would have to discharge his fine by serving it out in jail at the expense of the taxpayers. One juror was shown to have been influenced by these statements to convict of felony instead of a misdemeanor. Held, that a new trial should be

granted. *Burleson v. State* (Cr. App.), 15 S. W. 175.

Where, before a verdict had been reached, and while the jury were deliberating on the term of punishment, one of the jurors stated that accused was an ex-convict, and thereafter the jury agreed to a term of imprisonment greater than the minimum authorized, such statement is ground for a new trial, though two of the jurors made affidavits that they were not influenced by it. *Hardiman v. State* (Cr. App.), 53 S. W. 121.

Disparaging Defendant's Testimony or Witnesses for Defense.—On a prosecution for perjury, where the sole defense was that defendant was extremely drunk on Sunday preceding the Tuesday when he gave false testimony as to matters occurring on Sunday, by reason of which drunkenness he did not remember what occurred on Sunday, it is ground for new trial that, after the jury had retired, one of the jurors said to the others that he saw defendant on Monday morning prior to the time his wife and others had testified to his drunkenness, and that his mind was entirely free from any character of intoxicants. *Hambright v. State*, 84 S. W. 597, 47 Tex. Cr. App. 518.

After trial of an indictment for rape, an affidavit was filed by the foreman of the jury to the effect that he was influenced in his finding by the statement of one of the jurors that he had lived in the county where a female witness for defendant had resided, and knew that she was at that time kept by him, and was unworthy of belief. Held, that the verdict should have been set aside, and a new trial granted. *Anschicks v. State*, 6 Tex. Cr. App. 524.

While a case was being considered, two of the jurors told the others that they were acquainted with a witness in the case, and that they did not regard him as worthy of credit, he having often lied to them. It appeared prob-

able that one of the jurors was influenced in his verdict by such statements. Held, that a new trial should be granted. *Lucas v. State*, 27 Tex. Cr. App. 322, 11 S. W. 443.

On a motion for a new trial, defendant appended the affidavits of four jurors to the effect that one of the jurors, while the jury were considering of their verdict, said that the case would have been tried last term if W., a witness, had not feigned sickness, and remained away from court; and that said W. remained away at the instance of defendant, in order to prevent a conviction at the last term. Held, that the communication did not impair the rights of defendant. *Gallihar v. State* (Cr. App.), 37 S. W. 329.

Where, on prosecution for violation of the local option law, it appeared that after the jury retired a juror stated that he had known the state's witness all his life, and that he was a truthful man, while another juror stated that a certain witness for defendant was under indictment for horse theft, none of which evidence was before the jury during trial, defendant was entitled to a new trial. *Blalock v. State* (Cr. App.), 62 S. W. 571.

Under Code Cr. Proc., art. 777, making it a ground for new trial that the jury, after retiring, received other testimony, a verdict will be set aside, where it appears from the contradicted affidavit of a juror that another juror stated, in consultation, that he knew the character of one of defendant's most important witnesses to be bad, and that he was unworthy of credit, and that affiant's verdict was naturally affected thereby. *McKissick v. State*, 26 Tex. Cr. App. 673, 9 S. W. 269; *Wharton v. State*, 45 Tex. 2; *Anschicks v. State*, 6 Tex. Cr. App. 524.

On prosecution for homicide, misconduct of jury was shown by evidence that one of them stated that he knew a certain witness who gave ma-

terial testimony for defendant, and stated, in reply to a question by another juror, that he would swear that he would not believe such witness on oath, and that other jurors stated that there had been too many killings in the city and too many men turned loose from charges of murder, and that an example had to be made of somebody. *Riley v. State* (Cr. App.), 81 S. W. 711.

Statements Made to Juror by Defendant.—While the jury were considering the question of punishment for one on trial for rape, various statements were made by some of them as to certain alleged licentious conversations and actions by the defendant, which were not properly before them. Held, that defendant was entitled to a new trial. *Sims v. State* (Cr. App.), 70 S. W. 90.

Racial Prejudice.—The action of the jury in a criminal case in commenting during their deliberations on the fact that defendant was a negro, in discussing his character and that of his family, in arguing that a penitentiary sentence might be beneficial to him, and in telling of improper relations existing between negroes in the community generally and certain foreigners residing in the vicinity, and in coercing a dissenting juror during their retirement was such misconduct as to overthrow a conviction, and require a new trial. *Gilford v. State*, 92 S. W. 424, 49 Tex. Cr. App. 275.

Disparaging Defendant—Reference to Character, Reputation or Guilt.—A new trial of a prosecution for theft will be granted where two of the jurors, after the jury had retired, but before they had agreed on a verdict, stated to the others that defendant was the biggest rogue they ever knew, and that she should be hung, and they would be willing to hang her if the law would permit; and one of such jurors informed the others of several instances of thefts by defendant; and such two

jurors held out longer than the others for the extreme penalty. *Holmes v. State*, 42 S. W. 996, 38 Tex. Cr. App. 370.

In a prosecution for rape, a juror deposed: That at first the jury stood ten to two for acquittal; that, after discussing defendant's character, they were six to six; that then, with their approval, deponent told them what he knew of defendant's character, viz, that, three years before, a neighbor had found defendant with his wife, in her bed-room, that deponent heard said neighbor warn defendant to leave the country, and that defendant did leave the neighborhood; and that the next ballot was unanimous for conviction. Held ground for a new trial, for that the jury had "received other testimony" after retiring. Code Cr. Proc., art. 777, subd. 7. *Ellis v. State*, 33 Tex. Cr. App. 508, 27 S. W. 135.

In support of a motion for a new trial, after a conviction for murder, an affidavit of three jurors was filed, stating that, while the jury was considering the case, it was stated by jurors that the reputation of defendant and his father and brother as peaceable citizens was bad; that defendant had murdered several men, and was a hardened criminal—which statements were not denied in the counter affidavits. Held, that a new trial should be granted; Code Cr. Proc., art. 777, subd. 7, providing that a new trial shall be granted when the jury have received other testimony after having retired to consider the case. *Hargrove v. State*, 33 Tex. Cr. App. 431, 26 S. W. 993.

A statement made by one juror to another, after they had retired to consider their verdict, in regard to the character of the accused, is not such misconduct as is contemplated by statute to authorize a new trial. *Austin v. State*, 42 Tex. 355.

On a murder trial, where the issue of self-defense was strongly supported

in the testimony, while the jury was deliberating and had been unable to agree for many hours, standing eight for acquittal and four for conviction, one of the jurors announced to the others that he had just recognized accused as a man who had been tried a short time before for carrying a pistol and acquitted, though guilty, by his present counsel, who was the judge, and that he was a bad fellow and needed taking down, and it would not do to acquit him, as he would go down town and kill somebody else. Afterwards a compromise verdict of guilty was returned. Held, that the conviction should be set aside and a new trial granted. *Helvenston v. State*, 53 Tex. Cr. App. 636, 111 S. W. 959.

Where, on a prosecution for unlawfully carrying a pistol, defendant pleaded guilty, and no testimony was introduced enabling the jury to graduate the punishment, and they assessed a penalty greater than the minimum, and it was shown that the jury, after retiring, discussed defendant's character, and that it was stated by jurors that he was a man of bad character, he should have been granted a new trial. *Hargrove v. State*, 51 Tex. Cr. App. 47, 99 S. W. 1121.

In a prosecution for homicide, defendant, though claiming he shot deceased in self-defense, also testified that he sought deceased, who was the stepfather of defendant's wife, to remonstrate with him for his criminal intimacy with defendant's wife and to obtain a promise from him to cease such attention. Held, that statements made by jurors while considering their verdict that it seemed that defendant's wife was as anxious "to do it or to cohabit" as decedent was, and "I do not think a man ought to be shot down about a damned whore like that woman is," were not objectionable as receiving additional testimony after submission of the case, but were justifiable expressions of the jurors' conclusions on the

proposition submitted to them. *Reagan v. State*, 57 Tex. Cr. App. 642, 124 S. W. 685.

On a motion for a new trial, where an affidavit of a juror's expression of an opinion that defendant "ought to be hung" is rebutted by the juror's affidavit that he made no such statement, where the affiants are known to the trial court, his ruling as to their credibility and the weight to be attached to the statements will not be reviewed. *Belcher v. State* (Cr. App.), 37 S. W. 428.

On a motion for a new trial of one charged as an accomplice to a burglary, which resulted in the stealing of certain liquor, the affidavits of two of the jurors stated that the jury, after retiring, discussed the probability that the accused was engaged in the illegal sale of liquor, and his general reputation as a violator of the local option law, and the fact that his wife failed to testify in his behalf during the trial; also that one of the jurors stated that when he first knew accused he was engaged as a bartender at a certain saloon. Held, that the showing warranted a new trial. *Hall v. State*, 52 Tex. Cr. App. 250, 106 S. W. 379.

It was shown by affidavits that a juror had stated that defendant "ought to be hung" and "ought to be burned." This was controverted by the state, and the juror, in his affidavit, denounced the imputed statement as maliciously false. Held, that a new trial on such ground was properly refused. *Shaw v. State*, 32 Tex. Cr. App. 155, 22 S. W. 588; *Washburn v. State*, 31 Tex. Cr. App. 352, 20 S. W. 715.

"A mere statement made by one juror to another, or his fellows, in reference to the character of the defendant, is not *per se* ground for new trial (*Austin v. State*, 42 Tex. 355), and, unless the verdict was probably influenced by the statement of a juror to his fellows as to the character for credibility of a witness for defendant, a

new trial will not be granted on that ground. *Anschicks v. State*, 6 Tex. Cr. App. 524; *McKissick v. State*, 26 Tex. Cr. App. 673, 9 S. W. 269; *Lucas v. State*, 27 Tex. Cr. App. 322, 11 S. W. 443." *Cox v. State*, 28 Tex. Cr. App. 92, 12 S. W. 493, 495.

On motion for new trial on the ground that a juror had stated in the jury room that accused was guilty, and the jury would know so if they knew him as well as the speaker, affidavits held to sustain a finding that the juror did not make the alleged improper statements. *Potts v. State*, 56 Tex. Cr. App. 39, 118 S. W. 535.

Misconduct of the jury in hearing, after retirement, a juror's statements, not in evidence, that defendant, charged with stealing a calf, was in the habit of stealing calves, is ground for new trial. *Terry v. State* (Cr. App.), 38 S. W. 986.

Where, in a prosecution for sodomy, but a single juror was produced who heard another juror remark that it was proper to convict defendant anyway, because he had it in his mind to do something of the kind, and if some white woman had passed he would have raped her, and the juror who heard the remark did not know who uttered it, and stated that it had no effect on him, and he paid no attention to it, it was insufficient to warrant the granting of a new trial. *Richardson v. State*, 94 S. W. 1016, 49 Tex. Cr. App. 391.

Character of Prosecutrix.—A statement by one of the jurors to the others that prosecutrix was of good character, made after they had unanimously determined defendant's guilt, was not prejudicial. *Gonzales v. State*, 32 Tex. Cr. App. 611, 25 S. W. 781.

Conviction of Codefendant.—While a jury was considering a verdict, a juror stated, in the presence of the others, that a codefendant had been convicted of the same offense for which defendant was on trial, and had been

sentenced to ten years in the penitentiary, and that the jury should not give defendant any less. The jury arrived at a verdict of ten years. Held, that the misconduct of the jury required a reversal, under White's Ann. Code Cr. Proc., art. 817, subd. 7, and 1150, providing for the granting of a new trial when the jury while deliberating have received other testimony. *Tutt v. State*, 91 S. W. 584, 49 Tex. Cr. App. 202; *McWilliams v. State*, 32 Tex. Cr. App. 269, 22 S. W. 970; *Mitchell v. State*, 36 Tex. Cr. App. 278, 33 S. W. 367, 36 S. W. 456.

Connecting Defendant with Other Offense.—In homicide, it appeared that, when the jury retired to consider their verdict, they stood eight for acquittal; that two of the jurors stated to the jury that defendant had killed a certain man, and had made other statements tending to show that defendant and other members of his family were of bad character. Held, that this was misconduct sufficient to justify a new trial, under Code Cr. Proc. 1895, art. 817, § 7, granting new trial where the jury, after having retired to deliberate, have received other testimony. *Mitchell v. State*, 36 Tex. Cr. App. 278, 36 S. W. 456, reversing 33 S. W. 367.

The mere discussion by jurors of other crimes attributed to defendant, where it is shown that such discussion influenced the jury or any member thereof in reaching a verdict of guilty, is not ground for a new trial. *Mitchell v. State*, 36 Tex. Cr. App. 278, 33 S. W. 367.

A new trial will not be granted because the jury, while consulting, discussed other murders imputed to defendant, where the reference was but incidental, and the jury agreed not to be influenced thereby, and understood that they were concerned with nothing but the charge on trial, and four of the jurors testify that they were not influenced by the other charges. Tes-

tard *v.* State, 26 Tex. Cr. App. 260, 9 S. W. 888.

On a prosecution for rape, the affidavits of some of the jurors on the motion for new trial showed that the matter of a cotton theft, of which there was evidence before the jury, but for which defendant was not convicted, was mentioned in the jury room. One of the jurors stated to the others that since the matter came up he remembered it. Held sufficient to show misconduct of the jury in the jury room. *Robbins v. State*, 83 S. W. 690, 47 Tex. Cr. App. 312.

Testimony that the jury arrived at their verdict, after discussing the manner in which defendant had been reared, in the belief that the best thing to do would be to place him in a reformatory, does not show such misconduct as will authorize a new trial. *Grayson v. State*, 51 S. W. 246, 40 Tex. Cr. App. 573.

Code Cr. Proc., art. 817, authorizes the granting of a new trial when the jury receives material evidence after they have retired to consider their verdict. After a jury had agreed on defendant's guilt, but before they had fixed the punishment, one of the jurors stated that deceased was not the first man defendant had killed; and it was also stated that, if certain evidence as to the dying declarations of deceased had not been excluded on defendant's objection, they would have known more about the reason defendant went to the penitentiary at a former time. Held sufficient misconduct to warrant a reversal of a judgment of conviction. *Blocher v. State* (Cr. App.), 61 S. W. 391.

Failure of Accused to Testify.—Affidavit of accused's attorney, appended to a motion for new trial, that one of the jurors informed him the jury commented on accused's failure to testify, not being supported by the affidavit of his informer or stating the facts, can not be considered on appeal. *Black*

v. State, 41 Tex. Cr. App. 185, 53 S. W. 116.

The fact that a conviction of one charged with the larceny of a cow was brought about by the argument of a minority of the jury that accused, if innocent, could have shown where he got the cow, amounted to an improper reference to the failure of accused to testify, requiring the setting aside of the verdict. *Richards v. State*, 59 Tex. Cr. App. 203, 127 S. W. 823.

In a prosecution for violation of the local option law, where a motion for new trial averred that there was misconduct of the jury in speaking about the failure of defendant to take the stand, but was not verified by defendant's affidavit, or other proof offered to support it, it was properly overruled, where the affidavit of all the jurors distinctly negated this ground for the motion. *Ray v. State*, 60 Tex. Cr. App. 138, 131 S. W. 542.

A new trial will not be granted accused for the mere incidental mention by the jury of his failure to testify, but it must appear in order to justify a new trial on that ground that the jury's misconduct was such as would or might likely have prejudiced defendant's cause. *Johnson v. State*, 53 Tex. Cr. App. 339, 109 S. W. 936.

Under the statute providing that the failure of the accused to testify in his own behalf shall not be used against him, a new trial should have been granted on a showing that some of the jurors were under the impression that evidence of certain statements in defendant's favor which had been admitted should not be considered by them because defendant had not testified in his own behalf and asserted the truth of such statements. *Adams v. State* (Cr. App.), 64 S. W. 1055.

Discussion by jury, before determining degree of defendant's offense and the punishment, as to his failure to testify, is ground for new trial, at least where it is not apparent that it did not

influence some of the jurors. *Wilson v. State*, 46 S. W. 251, 39 Tex. Cr. App. 365.

In support of defendant's contention of misconduct of the jury in a criminal trial, one juror testified that the fact that defendant did not testify in the case was mentioned by the jury during their deliberations on their verdict, but two other jurors testified that if the fact of defendant not testifying was mentioned, they did not remember it. It did not appear whether the mentioning of such fact was before or after the verdict. Held not sufficient to show misconduct. *Stepp v. State*, 53 Tex. Cr. App. 158, 109 S. W. 1093.

A new trial should be granted where it is shown that at least one juror was prejudiced against defendant; that the jurors discussed defendant's failure to testify in his own behalf; that some of the jurors asserted that defendant had recently abandoned his young wife, of which there was no evidence in the case; and that some of the jurors asserted that, if any injustice should be done defendant by the verdict, he could appeal. *Tuller v. State*, 58 Tex. Cr. App. 571, 126 S. W. 1158.

In homicide it was disclosed on motion for new trial that after the jury had agreed upon a verdict, and were waiting to be taken into the courtroom, some of the jury remarked on defendant's failure to testify. It was further shown that a juror had said that he knew that defendant went farther back than a witness stated, but the witnesses differed as to the distance, and the jury only discussed the testimony of the witnesses. It was also shown that another juror had stated after the agreement that he saw the place where the blood was. Held, that the jury did not receive other evidence than that introduced upon the trial, of such character as to require a reversal of an order denying a new trial. *Johnson v. State*, 84 S. W. 824, 47 Tex. Cr. App. 523.

Comments by jurors in a prosecution for seduction on the failure of the defendant to take the stand as a witness in his own behalf are ground for new trial. *Woolley v. State*, 96 S. W. 27, 50 Tex. Cr. App. 214.

Statements Regarding Intent of Defendant.—Where statements by jurors regarding a fact material as to defendant's intent, as disclosed by his own testimony, were considered in their deliberations, and influenced his conviction, no such evidence occurring before them during the trial, the judgment will be reversed, though they stated, on the motion for a new trial, that the matter referred to was treated more as a joke than otherwise. *Favro v. State* (Cr. App.), 59 S. W. 885.

Conversations Related by Juror.—Code Cr. Proc., art. 777, subd. 7, provides that "a new trial shall be granted when the jury, after being retired to deliberate on the case, have received other testimony." Held, that where a juror, while considering a verdict, related conversations about the case which were not in evidence, and stated that he knew enough to satisfy him "that defendant ought to be hung," a new trial should be granted, whether the verdict was influenced by such juror or not. *McWilliams v. State*, 32 Tex. Cr. App. 269, 22 S. W. 970.

Statement That Defendant Would Be Hung before Morning if Not Given Death Penalty.—A juror, in a prosecution for homicide, stated after the trial that on the retirement of the jury the foreman stated that they must give defendant the death penalty, or he would be hung before morning. He refused, however, to make an affidavit of this fact. The district judge was absent on the day of this statement, but early next day defendant's attorney made application for a subpoena for such juror, and process was issued, and given to the deputy sheriff; the court announcing that the hearing of the motion for new trial would be taken

up at 10 o'clock. It was not, however, taken up until 2 o'clock in the afternoon. The juror summoned lived not more than 10 miles from the seat of the court, and, though repeatedly requested, both before and after 10 o'clock, the deputy sheriff refused to make service because of lack of time. Held that, if the foreman of the jury made the statement attributed to him, it was ground for a new trial, and the court should have forced the attendance of the juror, and, if necessary, of all the jurors, and inquired into the matter, and, it having failed to do so, the conviction would be reversed. *Lax v. State*, 79 S. W. 578, 46 Tex. Cr. App. 628.

Discussing Statements Made by Deceased.—It is no ground for a new trial that after the retirement of the jury some of the jurors expressed the belief that certain opprobrious language used by deceased did not refer to defendant's relatives, as defendant claimed that it did. *Balls v. State* (Cr. App.), 40 S. W. 801.

Opinion as to Guilt of Defendant.—On motion for a new trial after conviction of homicide, affidavits of defendant's counsel that a juror had stated that, on a vote as to defendant's guilt, six jurors rose, and that certain jurors had stated that they had a doubt as to defendant's guilt, and did not know why defendant had been convicted, showed no ground for a new trial. *Cruise v. State* (Cr. App.), 77 S. W. 818.

Attempted Suicide by Defendant after Arrest.—The state offered to prove that defendant, after arrest, attempted to commit suicide. The court excluded the evidence, and instructed the jury to disregard the matter. In the jury room the matter was referred to, but all the jury agreed not to consider it. Held, that this was not ground for a new trial. *Williams v. State*, 33 Tex. Cr. App. 128, 25 S. W. 629, 47 Am. St. Rep. 21.

Statements Tending to Increase Penalty.—Denial of an application for

a new trial for misconduct of a juror in saying that there had been much criticism of juries lately and that defendant ought to get a stiff penalty held not so clearly erroneous on the evidence of the jurors as to require a reversal. *Douglas v. State*, 58 Tex. Cr. App. 122, 124 S. W. 933.

Opinions Regarding Sanity of Defendant.—It would be against public policy on motion for a new trial in a criminal case where the defense was insanity to admit testimony of the jurors that they, in fact, believed accused to be insane, but convicted him because of their belief that, if acquitted, he would probably hurt some one else. *Turner v. State*, 61 Tex. Cr. App. 97, 133 S. W. 1052.

(d) Inspection of Clothing.

Code Cr. Proc., art. 777, subd. 7, which provides for a new trial in case "the jury, after having retired to deliberate on a case, have received other testimony," does not authorize the granting of a new trial, in a murder case, because the jury inspected the clothing worn by deceased at the time of the homicide, after they had retired, where the clothing was inadvertently left in the jury room, and other undisputed evidence, besides the clothing, showed that deceased was shot in the back, and all the jurors testify that its inspection did not influence their verdict. *Hendricks v. State*, 28 Tex. Cr. App. 416, 13 S. W. 672.

(e) Evidence Received after Verdict Reached.

Where a jury have agreed on a verdict of guilty, and awarded the minimum punishment, the fact that incriminating evidence was afterwards received from a fellow juror in the jury room is without prejudice. *Angley v. State*, 35 Tex. Cr. App. 427, 34 S. W. 116.

(6) Discussing Case after Retirement.

The fact that jurors discuss among themselves features of the case not di-

rectly testified about is not ground for reversal. *Borer v. State* (Cr. App.), 28 S. W. 951.

Where a juror, after retiring to consider the verdict, stated that he knew something about the case, and that he thought they had the right man, it is not ground for reversal, without evidence that such knowledge created in his mind such a prejudice against defendant that he could not give him a fair trial. *Ray v. State*, 35 Tex. Cr. App. 354, 33 S. W. 869.

One ground of the motion for a new trial was that the jury carried with them in their retirement, and consulted in their settlement of differences about the evidence, a certain statement of the testimony taken by attorneys on the trial. Counter affidavit showed that the statement so taken and consulted was one made out by the attorneys for the defense. Held that, in the absence of proof to the contrary, the court of appeals could not presume that the accused was prejudiced by this action of the jury, and the court below did not err in overruling the motion on that ground. *Holt v. State*, 9 Tex. Cr. App. 571.

An affidavit of a juror in a criminal case that there was some discussion among the jurors as to the evidence of a witness, and that he agreed to a verdict because he understood such witness to testify to a certain effect, does not show misconduct of the jury. *Blackwell v. State* (Cr. App.), 73 S. W. 960.

(7) Agreements and Balloting Affecting Verdict.

If Agreement to Be Bound by Average of Ballot.—A new trial must be granted because the verdict was determined by lot (Code Cr. Proc. 1895, art. 817, subd. 3), where the jury agreed to divide by twelve the sum of the number of years of imprisonment suggested by each juror, and adopt the quotient as their verdict. *White*

v. State, 40 S. W. 789, 37 Tex. Cr. App. 651.

Where a jury agrees to determine the number of years' imprisonment by lot, by a "quotient" verdict, and to abide by the result—such a verdict being made a ground for new trial by Code Cr. Proc., art. 817—the burden rests upon the state to show that such agreement was subsequently abandoned; and where it was shown that, after the number of years was thus determined, two of the jurors refused to abide by the result, but that after several hours' deliberation the same verdict was returned, within a fraction of a year, and it was not shown that the other ten jurors had abandoned such agreement, a new trial should have been granted. *Driver v. State*, 38 S. W. 1020, 37 Tex. Cr. App. 160.

If No Agreement to Be Bound by Average Ballot.—A new trial will not be granted because the jury agreed to divide by twelve the sum of the fine and imprisonment suggested by each juror, where there was no agreement in advance to abide by the result, and where further ballots were taken before the verdict was agreed upon. *Hill v. State*, 67 S. W. 506, 43 Tex. Cr. App. 583; *Leverett v. State*, 3 Tex. Cr. App. 213; *McDade v. State*, 27 Tex. Cr. App. 641, 11 S. W. 672; *Ulrich v. State*, 30 Tex. Cr. App. 61, 16 S. W. 769; *Pruitt v. State*, 30 Tex. Cr. App. 156, 16 S. W. 773; *Barton v. State*, 34 Tex. Cr. App. 613, 31 S. W. 671; *Holt v. State*, 51 Tex. Cr. App. 15, 100 S. W. 156; *Gaines v. State* (Cr. App.), 37 S. W. 331; *Reyes v. State*, 55 Tex. Cr. App. 422, 117 S. W. 152.

(8) Access to or Reading Law Books.

It is the general rule when a juror reads a reported case in the jury room, in order to avail himself of error, the appellant must show that some injury resulted. See *Anschicks v. State*, 6 Tex. Cr. App. 524, 525; *Spencer v. State*, 34 Tex. Cr. App. 238, 30 S. W. 46; *Munos v. State*, 34 Tex. Cr. App. 472, 31 S. W. 380.

The fact that a juror, in a prosecution for burglary, read a decision in one of the reports after the jury had retired, but before he had come to any conclusion as to the guilt of the defendant, and made affidavit that he was influenced thereby, is not ground for reversal, where it does not appear how he was influenced by reading the case, or that defendant was prejudiced thereby. *Munos v. State*, 34 Tex. Cr. App. 472, 31 S. W. 380.

(9) Remarks to or Conversations with Juror.

"Remarks to or conversations with jurors do not necessarily constitute ground for granting a new trial. In order to entitle a party to a new trial under such circumstances it must be made to appear that, by reason of such conversation, injustice was probably done him. It must be such as was calculated to produce a more unfavorable impression upon the mind of the juror than that made by the evidence adduced on the trial, or it must be of such a nature as was calculated to result in probable harm to the accused, in order to constitute ground for a new trial, or, in case of its refusal, to authorize a reversal on appeal. *Nance v. State*, 21 Tex. Cr. App. 457, 1 S. W. 448; *Bailey v. State*, 26 Tex. Cr. App. 706, 9 S. W. 270; *March v. State*, 44 Tex. 64." *Shaw v. State*, 32 Tex. Cr. App. 155, 22 S. W. 588.

Where, pending the trial, and during a recess, while an officer was taking the jury from the court house to supper, a person, in passing, shook hands with several of the jurors, and said to the officer, "Take care of the children," but nothing further was done or said, and no remark made by any one concerning the case, defendant could not have been injured or the verdict influenced by the occurrence, and it will not vitiate the judgment. *Pickens v. State*, 31 Tex. Cr. App. 554, 21 S. W. 362.

A new trial will be granted where

outsiders were permitted to come into the jury room to transact business with one of the jury, and where an outsider was permitted to sleep in the jury room with one of the jurors. *Wright v. State*, 17 Tex. Cr. App. 152.

On a motion for a new trial, defendant made affidavit that two witnesses in the case talked to the jury impaneled in the cause, and said, in their presence, that "defendant did not want good men to try his cause, but wanted to get away where he could get rascals to try his case," and that a juror not named said that "defendant would not escape." The sheriff and deputies swore that no such conversation took place, and that it could not have done so, and eleven of the panel, the twelfth being absent from the state, swore to the same effect. The two witnesses were shown to be absent from the state. Held, that it was proper to refuse a new trial. *Kutch v. State*, 32 Tex. Cr. App. 184, 22 S. W. 594.

A statement by a juror to a person that he can not converse with him about the case, is not a conversation within the meaning of 672d, Code of Criminal Procedure. *Johnson v. State*, 27 Tex. 758, 770.

That jurors informed their families by telephone that they were serving on the jury was not ground for a new trial, where the state showed that accused was not injured thereby. *Bryan v. State* (Cr. App.), 139 S. W. 981.

(10) Use of Intoxicants.

Where it was not shown that any of the jurors became intoxicated by whisky drunk during their deliberations, or that whisky was drunk to excess by them or while they were deliberating on their verdict, the fact that they drank whisky, while reprehensible, was not ground for a new trial. *Brown v. State*, 75 S. W. 33, 45 Tex. Cr. App. 139; *Jack v. State*, 26 Tex. 1; *Tuttle v. State*, 6 Tex. Cr. App. 556; *Allen v. State*, 17 Tex. Cr. App.

637; *Rider v. State*, 26 Tex. Cr. App. 334, 9 S. W. 688.

But in *Jones v. State*, 13 Tex. 168, it was held that the drinking of ardent spirits (whiskey) of their own procurement by the jury in a criminal case after they have retired to consider their verdict vitiates their verdict and is good cause for a new trial.

The use of four or five bottles of whiskey by jurors in the jury room vitiated their verdict. *March v. State*, 44 Tex. 64.

(11) Influences Inducing Agreement to Verdict.

An affidavit of a juror that, after the jury had been out from Thursday evening till Saturday afternoon, the jury were informed that the presiding judge was going home, and would not return till the following Tuesday, and would leave instructions that the jury should not be discharged till his return, unless they arrived at a verdict, whereupon the affiant gave his consent to the verdict, was not sufficient to authorize a new trial. *Bacon v. State*, 61 Tex. Cr. App. 206, 134 S. W. 690.

The fact that a conviction was brought about by the argument of jurors that accused after conviction would have an opportunity to seek a new trial, both before the trial court and on appeal, was not misconduct requiring a new trial, where the reference to the possibility of a new trial by the jurors was only of the most general nature. *Richards v. State*, 59 Tex. Cr. App. 203, 127 S. W. 823.

The fact that two jurors agreed to a conviction on the agreement that the jury would petition the governor for a pardon is not such misconduct as would authorize a new trial. *Montgomery v. State*, 13 Tex. Cr. App. 74.

Two of the jurors, in a trial of defendant for burglary, stated, on oath, that, before they reached a verdict of guilty, it was agreed to recommend defendant for pardon, and that such agreement influenced them in making

their verdict. Affidavits of six other jurors stated that the agreement in reference to the matter of pardon occurred subsequent to their agreement on the verdict. Held not to authorize a new trial. *Hendrickson v. State* (Cr. App.), 23 S. W. 690.

An affidavit of a juror that he would likely have voted to acquit the defendant, had not the foreman and other jurors told him that the defendant could try for a new trial, and then have the right of appeal, which he thought would eventually amount to an acquittal, is no ground for a new trial. *Vaughn v. State*, 62 Tex. Cr. App. 24, 136 S. W. 476.

(12) Influencing Jury in Behalf of Defendant.

A new trial can not be granted defendant because of efforts to influence the jury in his behalf. *Murphy v. State* (Cr. App.), 40 S. W. 978.

(13) Difference of Opinion as to Proper Punishment.

It is no ground for a new trial that after the retirement of the jury the jurors differed for a time as to the amount of punishment which should be awarded, and the degree of the homicide. *Balls v. State* (Cr. App.), 40 S. W. 801.

(14) Visiting or Viewing Place of Crime.

Where, pending a murder trial, the jury, in going to their meals, took some measurements at the place where the killing occurred, but they were not of a character to influence their finding, it is no ground for reversal. *Hardin v. State*, 49 S. W. 607, 40 Tex. Cr. App. 208.

A jury received "other testimony," within Code Cr. Proc., art. 817, subd. 7, which entitled defendant to a new trial, where they viewed the locus in quo of the homicide while deliberating on their verdict, and concluded therefrom that one of defendant's witnesses was mistaken, and where they learned

by a statement of one of their number that defendant was an ex-convict. *Darter v. State*, 44 S. W. 850, 39 Tex. Cr. App. 40.

A verdict of murder in the second degree will not be set aside because the jury examined the room in which the homicide was committed, it having been committed in the court house, and because they read from the Penal Code; it not appearing that they were influenced thereby. *McDonald v. State*, 15 Tex. Cr. App. 493.

(15) Access to or Reading Newspaper.

It appeared that, while the jury were deliberating on their verdict, a newspaper was found in the jury room, containing a reference to defendant, and the robbery for which he was on trial, and stated that one of the men who participated in the robbery was convicted and sentenced, and that defendant was under indictment in another part of the state. Held that, in the absence of a showing of prejudice by the presence of the paper in the jury room, the verdict would not be disturbed. *Moore v. State*, 36 Tex. Cr. App. 88, 35 S. W. 668.

The fact that, on a trial for murder, after the evidence had gone to the jury, two jurors read a newspaper which contained an accurate synopsis of the evidence, and also correctly stated that "defendant was not placed on the stand," is not ground for a new trial. *Williams v. State*, 33 Tex. Cr. App. 128, 25 S. W. 629, 47 Am. St. Rep. 21.

Allowing the jury access to newspapers containing imperfect or incorrect reports of the trial vitiates their verdict. *Walker v. State*, 37 Tex. 366.

(16) Misconduct of Prosecutor.

See, generally, the titles ARGUMENT AND CONDUCT OF COUNSEL, vol. 1, p. 397; JURY, ante, p. 110.

Conduct of prosecutor in accompanying a juror home and taking dinner

with him, and not returning until after the court had convened, was ground for a new trial. *Mann v. State*, 83 S. W. 195, 47 Tex. Cr. App. 250.

(17) Misconduct of Officer.

A sheriff, present during the deliberations of a jury, heard nothing except a suggestion of a juror to report a disagreement, whereupon the sheriff remarked that the jury had been out so short a time that the judge would send them back, and they continued their deliberations. Held, that there was nothing to justify a setting aside of the verdict, although the action of the sheriff was reprehensible. *McGuire v. State*, 10 Tex. Cr. App. 125.

The fact that a sheriff entered the jury room and spoke to the jurors in regard to the case upon which they were deliberating is, under Code Cr. Proc., art. 690, which provides that no person shall converse with a juror after he has been impaneled, and under art. 777, subd. 7, which provides for a new trial in case a juror converses with any person in regard to the case, sufficient ground for a new trial. *Hogan v. State* (Cr. App.), 28 S. W. 949.

In a prosecution for homicide, exception to the action of the sheriff in bringing accused into the court room, in the presence of the jury at the opening of the trial, with his hands manacled can not be taken for the first time on the motion for a new trial. *Canon v. State*, 59 Tex. Cr. App. 398, 128 S. W. 141.

The presence of a bailiff with a petit jury while they are deliberating on their verdict, though forbidden by law, is not cause for new trial when it does not appear that the fairness of the trial was affected thereby. *Martin v. State*, 9 Tex. Cr. App. 293.

On the trial of an indictment for an aggravated assault, it appeared that the bailiff who had charge of the jury came to the jury room while they were considering their verdict, and said that the jury should send de-

fendant to the penitentiary, and used argument that he should be punished severely. Held to entitle defendant to a new trial. *Dansby v. State*, 34 Tex. 392.

That the bailiff remained in the room with the jury while they were deliberating, though expressly forbidden to do so, is not, per se, a cause for a new trial under the Code, because not enumerated among the causes for which new trials can be granted. *Slaughter v. State*, 24 Tex. 410.

The fact that the bailiff of the petit jury was related to deceased, for whose murder defendant is on trial, is not ground for a new trial; proper inquiry not having been made on the voir dire. *Baker v. State*, 4 Tex. Cr. App. 223.

That the person who acted as bailiff of the petit jury was not a sworn officer, and was a relation of the deceased for whose murder the defendant was on trial, is not ground for a new trial when no exception was taken to him at the proper time, and when it does not appear that any right of the defendant was prejudiced. *Baker v. State*, 4 Tex. Cr. App. 223.

(18) Misconduct of Bystanders.

A new trial will be granted where the bystanders continuously applauded one of the parties to the trial; it appearing that the applause may have influenced the verdict. *Owens v. State*, 64 Tex. 500.

Where the argument of a prosecuting attorney to the jury was applauded by persons in the audience, it is the duty of the court to grant the defendant a new trial, if it appears probable that the jury were influenced against him by such action. *Hamilton v. State*, 37 S. W. 431, 36 Tex. Cr. App. 372.

The mere fact that, on a trial for the murder of a teacher, the school adjourned and attended a portion of the trial, does not require a reversal of the conviction on the ground that the teachers and children attended by

concert of action with a view of influencing the jury. *Long v. State* (Cr. App.), 127 S. W. 551.

That a stranger passing near the jury, while they were out with the sheriff, said "Don't give him more than ten years," is not ground for a new trial, it not being shown that their verdict was affected thereby. *Murphy v. State* (Cr. App.), 40 S. W. 978.

The grant or refusal for a new trial for disqualification of a juror is within the discretion of the trial court. *Shaw v. State*, 27 Tex. 750.

b. Disqualification of Jurors.

(1) In General.

Discretion of Court—Diligence Necessary.—Disqualification of a juror by whom the case was tried is not ground for a new trial where it is not shown that such disqualification was not known, or could not have been known by proper inquiry, when the jury was accepted. *Roseborough v. State*, 43 Tex. 570; *O'Mealy v. State*, 1 Tex. Cr. App. 180; *Trueblood v. State*, 1 Tex. Cr. App. 650; *Matkins v. State*, 33 Tex. Cr. App. 605, 28 S. W. 536.

Disqualification Must Be Shown Prejudicial.—Article 777 of the Code of Criminal Procedure enumerates the specific causes for which new trials shall be awarded, and none of the causes so enumerated embrace as a ground the disqualification of a trial juror. To authorize a new trial because of the disqualification of a juror, who served on the trial, it must be further made to appear that probable injury resulted to the defendant by reason of the service of such juror upon the trial. The cases of *Lester v. State*, 2 Tex. Cr. App. 432; *Armendaris v. State*, 10 Tex. Cr. App. 44; *Boren v. State*, 23 Tex. Cr. App. 28, 4 S. W. 463, and *Brackenridge v. State*, 27 Tex. Cr. App. 513, 11 S. W. 630, in so far as they announce

the contrary doctrine, are overruled. *Leeper v. State*, 29 Tex. Cr. App. 63, 14 S. W. 398.

To make the disqualification of a juror ground for a new trial, defendant must show that it was calculated to, and probably did, prejudice him. *Mays v. State*, 37 S. W. 721, 36 Tex. Cr. App. 437.

In a criminal prosecution, the mere disqualification of a juror, who served on the trial, is not ground for a new trial in the absence of a showing that such disqualification prejudiced the rights of the defendant. *Lane v. State*, 29 Tex. Cr. App. 310, 15 S. W. 827.

The fact that the record does not show that a juror was interrogated on his voir dire as to bias or prejudice does not preclude an investigation on a charge of prejudice upon motion for a new trial. *Nash v. State*, 2 Tex. Cr. App. 362.

An application for new trial, on the ground that one of the petit jurors was not a citizen of the state, will not be granted where the application does not show that accused was prejudiced by that fact. *O'Mealy v. State*, 1 Tex. Cr. App. 180.

A new trial will not be granted because a juror qualified by falsely stating on his voir dire that he was a householder in the county, and a freeholder in the state; it not being shown that defendant was not at the time aware of the contrary, and further shown that probable injury resulted to defendant by reason of the service of such juror. *Williamson v. State*, 36 Tex. Cr. App. 225, 36 S. W. 444.

Time Disqualification May Be Raised.—Lack of the qualifications required, by the Jury Act of 1876, for jurors, is an obligatory reason for excluding a juror, but must be urged when the jury is being impaneled, or, if raised by motion for a new trial, must be accompanied with excuse for the laches. *Lester v. State*, 2 Tex. Cr. App. 432.

The question of the disqualification of a trial juror can not be raised for the first time on a motion for a new trial. *McDaniel v. State* (Cr. App.), 74 S. W. 768.

An objection that a juror whose name had been scratched from the list by accused's counsel remained on the jury and tried the case comes too late when urged for the first time on motion for a new trial. *West v. State*, 54 Tex. Cr. App. 597, 114 S. W. 142.

"If defendant and his counsel sit by and see the juror placed upon the jury, and accept him as a juror, without inquiring as to the fact that he was a qualified voter or householder or freeholder, it can not be taken advantage of on the motion for new trial. See *Roseborough v. State*, 43 Tex. 570; *O'Mealy v. State*, 1 Tex. Cr. App. 180; *Leeper v. State*, 29 Tex. Cr. App. 63, 14 S. W. 398." *Randell v. State* (Cr. App.), 64 S. W. 255, 256.

Objectionable Juror Forced on Defendant after Exhaustion of Peremptory Challenges.—Where an objectionable juror is forced on accused after he has exhausted his peremptory challenges, the ruling is ground for reversal of a conviction. *Holt v. State*, 9 Tex. Cr. App. 571.

Effect if Disqualified Juror Sit on Jury and Render Verdict.—The fact that a juror whose name had been scratched from the list by accused's counsel sat on the jury and rendered a verdict was not ground for a new trial, where he was not shown to be disqualified or unfair. *West v. State*, 54 Tex. Cr. App. 597, 114 S. W. 142.

Presumptions and Burden of Proof—Sufficiency of Proofs.—New trial may not be had on the ground that a juror in the case was disqualified because of insufficient residence in the county; there being nothing to show what statement the juror made, or what effort to discover the matter of his residence was made, no direct statement that his disqualification was

unknown, nor any direct proof that his residence had not been sufficient, but merely an averment that the fact of his disqualification was unknown to defendant when the jury was impaneled, that his answers to questions propounded by the court were supposed by defendant to be true, and therefore he did not feel that diligence required him to interrogate the juror on questions to which he had already made answers to the court, and that subsequent to the trial, on a voir dire examination of the juror, it developed he had not lived six months in the county, and the court held him disqualified as a juror. *Haley v. State*, 59 Tex. Cr. App. 338, 128 S. W. 1133.

Where a juror was thoroughly tested on his voir dire, and denied having formed or expressed an opinion as to defendant's guilt, and denied that he made a statement attributed to him in a motion for new trial, the fact that a witness testified that the juror made a statement in conversation derogatory to defendant was not ground for reversal. *Ramsey v. State* (Cr. App.), 63 S. W. 876.

Where a motion for a new trial was supported by affidavits showing that a juror was biased, and qualified himself as a competent juror in order to convict defendant, but the affidavits were contradicted by the juror, it was not an abuse of discretion to refuse a new trial. *Louder v. State*, 79 S. W. 552, 46 Tex. Cr. App. 121.

It was shown by affidavits that a juror had stated that defendant "ought to be hung" and "ought to be burned." This was controverted by the state, and the juror, in his affidavit, denounced the imputed statement as maliciously false. Held, that a new trial on such ground was properly refused. *Shaw v. State*, 32 Tex. Cr. App. 153, 22 S. W. 588, distinguishing *Washburn v. State*, 31 Tex. Cr. App. 352, 20 S. W. 715.

On a motion for a new trial because

of prejudice of a juror, defendant testified that, before the trial he had a quarrel with the juror, but did not know the latter had any ill feeling against him before the trial. Two witnesses testified that, several months before the trial, the juror stated to them that defendant had a case in court, and that he hoped, "when the son of a bitch was tried," he could get on the jury; that he would send him to the penitentiary. Held, that a new trial should have been granted. *Long v. State*, 32 Tex. Cr. App. 140, 22 S. W. 409.

On motion for a new trial, defendant's affidavits showed that one juror was not a householder in the county, nor a freeholder in the state; that he was not a resident of the county; that, before being impaneled, he was questioned, and answered under oath that he resided in the county, and was a qualified voter there; that the juror was a stranger to defendant, and that neither he nor his counsel knew that he was not qualified; also, that the juror, before being impaneled, had made statements showing prejudice against defendant, and that defendant and his counsel were ignorant of these statements at the time. There was no evidence controverting these facts. Code Cr. Proc., art. 631, requires that a juror be asked if he possess these qualifications, and provides that, if he states under oath that he does possess them, he shall be held to be qualified until the contrary appear by further examination or other proof. Held, that a new trial should have been granted. *Brackenridge v. State*, 27 Tex. Cr. App. 513, 11 S. W. 630, 4 L. R. A. 360.

The affidavits of defendant and his counsel, on information and belief, that a disqualified juror was in favor of convicting defendant of murder in the first degree, while the others were in favor of finding a lower degree of homicide, or of acquittal, are not suffi-

cient to warrant the granting of a new trial on the ground that defendant was prejudiced by allowing the disqualified juror to serve. *Lane v. State*, 29 Tex. Cr. App. 310, 15 S. W. 827.

On motion for new trial on conviction of murder, an affiant deposed that he heard a certain juror, twenty minutes before the jury was impaneled, say that accused ought to be hanged; but the juror denied it, and another, alleged to have overheard the same remark, also denied hearing it. The juror had qualified himself to sit in the case, and was accepted. Held, that the motion was properly denied. *Harris v. State*, 48 S. W. 502, 40 Tex. Cr. App. 8.

A refusal of a new trial in a criminal case on the ground of the partiality of a juror, as shown by an affidavit, will be sustained, where the juror's testimony controverts the facts alleged in the affidavit. *Rogers v. State*, 50 S. W. 338, 40 Tex. Cr. App. 355.

A motion for a new trial, based on an allegation, supported by affidavit, that a certain juror had expressed an opinion as to the guilt of the defendant, is properly denied, when the affiant makes a subsequent affidavit stating that the juror did not express any such opinion, and the juror himself denies the expression of such opinion, and states that he had not formed any, and knew nothing of the facts before the trial. *Cockerell v. State*, 32 Tex. Cr. App. 585, 25 S. W. 421.

Where defendant applied for a new trial for disqualification of one of the jurors, and the matter was submitted to the court by counter affidavits, the juror having controverted defendant's claim as to his disqualification, and denied in toto the statements implied to him, the denial of the motion was not error. *Fonseca v. State*, 85 S. W. 1069, 48 Tex. Cr. App. 28.

A statement in an affidavit that a juror stated to affiant before the trial that, if selected, he would "give de-

fendant what belonged to him," and that affiant understood that the juror meant that he would convict defendant, is not sufficient ground for a new trial, where the juror makes an affidavit that he was without bias, and that what he said was that he would try defendant according to law, and give him what belonged to him. *Driver v. State*, 38 S. W. 1020, 37 Tex. Cr. App. 160.

A motion for new trial on the ground that one of the jurors had formed a conclusion as to defendant's guilt before the trial, was properly denied upon an affidavit by the juror that he had formed no conclusion before the trial, and that he had at first voted for acquittal, corroborated by the affidavits of two other jurymen. *Duke v. State* (Cr. App.), 38 S. W. 43.

(2) Grounds.

Prejudice or Previous Opinion or Declarations—In General.—Where, in a criminal prosecution, a juror was shown to have been prejudiced against the defendant when he was impaneled upon the jury, a new trial should be granted defendant despite the counter affidavit of the impugned juror. *Se-well v. State*, 15 Tex. Cr. App. 56.

Where it appears that one of the jurors had a fixed opinion that accused was guilty, if accused swears that he was not informed of this opinion when he accepted him as one of his jurors, the verdict should be set aside. *Mc-Williams v. State*, 32 Tex. Cr. App. 269, 22 S. W. 970.

Where a new trial is sought on the ground that a juror had previously formed or expressed an opinion, he is a competent witness to deny or explain the charge. *Gilleland v. State*, 44 Tex. 356.

Necessity for Challenge.—Where defendant, knowing a juror's partiality before the trial, does not challenge him, the objection can not be made ground for a new trial. *Givens v. State*, 6 Tex. 343.

Injury Must Result.—A motion for a new trial on the ground of prejudice of a juror, shown by his statements before he was placed on the panel, is properly denied where the juror's counter affidavit affirms that he did not recollect making the statements; that, if he made them, it was in jest; and that he tried the case without prejudice, and solely on the evidence and instructions. *Hawkins v. State*, 27 Tex. Cr. App. 273, 11 S. W. 409.

On a criminal prosecution a certain juror remained silent when the jurors were asked collectively if they knew defendant, and on a motion for a new trial there was produced an affidavit that at such time one of the jurors knew defendant well. Held, that there was no ground for a new trial, as the affidavit, even if true, did not show any injury to accused. *Dodd v. State*, 72 S. W. 1015, 44 Tex. Cr. App. 480.

Diligence Necessary.—Upon application for a new trial on the ground that one of the jurors had expressed an opinion relative to the accusation against defendant, counsel's affidavit must show proper diligence in questioning such juror before he was sworn. *Armstrong v. State*, 34 Tex. Cr. App. 248, 30 S. W. 235.

Where defendant was not apprised of the prejudice of a juror until after the trial, a new trial will be granted, though defendant failed to examine the juror on his voir dire; no gross negligence on defendant's part being shown. *Hanks v. State*, 21 Tex. 526.

A juror on his voir dire stated that he had formed an opinion, and that he might have expressed an opinion as to the guilt or innocence of defendants, but that he would not be influenced by it. Defendants did not ask him at the time anything further as to the matter, and did not challenge him. Held, that defendants were not entitled to a new trial. *Aud v. State*, 36 Tex. Cr. App. 76, 35 S. W. 671.

A new trial, asked on the ground that

a juror was disqualified through having stated that accused was guilty and ought to be punished, was properly refused where the juror denied making such statement, and the motion was taken up on the last day of the term, and through accused's want of diligence the evidence of the persons to whom the juror was claimed to have made the statements showing his prejudice was not obtained. *Roe v. State*, 55 Tex. Cr. App. 128, 115 S. W. 593.

On motion for a new trial a witness testified that one of the jurors had stated before the trial, "If all I have heard is true, defendant is guilty of murder." The juror testified that he had no recollection of making such statement. On his examination as a juror he stated that he had an opinion on the case from newspaper reports and general rumor, but that it was not so fixed that it would influence him in finding a verdict. Defendant's counsel did not question him as to the opinion, or how he had formed it. Held no ground for a new trial. *Herrington v. State* (Cr. App.), 63 S. W. 562.

On motion for a new trial, an affidavit in behalf of defendant was presented, to the effect that a juror had stated that he expected to have been asked some questions before he went into the jury box; that, if he had been, he would have told them that he had heard too much about the case, but, as they asked no questions, he decided to go into the jury box and serve as a juror, and say nothing about the case until he heard what the balance of the jury had to say. The district attorney presented an affidavit of another juror swearing that there was no discussion of the case among the jurors, except as to the evidence introduced; that the juror in question was one who contended for the lowest punishment, and one of the last to agree to find defendant guilty. It did not appear that such juror was ex-

amined on his voir dire concerning the matters alleged to have been stated by him, or that he answered falsely concerning any of such matters. Held not error to overrule the motion. *Lazenby v. State* (Cr. App.), 73 S. W. 1051.

It is no ground for a new trial that before the trial the juror had expressed the belief that his opinion as to defendant's guilt disqualified him, where there is no showing that he was examined on his voir dire touching the matter. *Speer v. State*, 57 Tex. Cr. App. 297, 123 S. W. 415.

Specific Illustrations of Rule.—

Where defendant, convicted of complicity in a murder, moves for a new trial on the ground that the foreman of the jury advised the sheriff as to who would be a good witness for the state, thereby exhibiting bias against defendant, it is not error to overrule such motion. *Wilkerson v. State* (Cr. App.), 57 S. W. 956.

Where, on a trial for homicide, neither manslaughter nor self-defense was in the case, and the jury returned a verdict of murder in the second degree, and assessed the lowest punishment (five years), a new trial will not be granted because of the prejudice of a juror, as shown by an affidavit averring that the juror had told the affiant that defendant ought to have twenty-five years for killing decedent. *Tyler v. State*, 90 S. W. 33, 48 Tex. Cr. App. 611.

That the foreman of the jury was prejudiced against accused, being related to accused's enemy, should have been brought out before the juror was accepted, and was not ground for a new trial. *Woodland v. State*, 57 Tex. Cr. App. 352, 123 S. W. 141.

A new trial should not be granted because a juror, before qualifying, stated that from rumors he thought defendant was being persecuted rather than prosecuted. *Murphy v. State* (Cr. App.), 40 S. W. 978.

An affiant, who was also a juror,

averred that another juror had expressed an opinion as to defendant's guilt to him, before becoming a juror, in an alleged conversation. The juror made affidavit that he was not prejudiced against defendant, and affiant in his voir dire stated that he was fair and impartial. Held insufficient to show that such juror had expressed an opinion, for if affiant's affidavit were true he had himself sworn falsely as to his qualification, and hence was not to be believed. *McGrew v. State* (Cr. App.), 49 S. W. 226.

On a motion for a new trial of a prosecution for murder, defendant filed affidavits to the effect that affiants had heard a certain juror prior to the trial state that any man who had conducted himself as defendant had done ought to have his neck broken or be hung. The juror filed an affidavit to the effect that he had no recollection of such language in form or import, but that, if he did use it, it was an idle and unmeaning remark, as he knew nothing of the facts and formed no opinion prior to the trial. It appeared by affidavits of other jurors that the juror in question was the only one favorable to defendant when the jury retired, and that he held out in his favor for some time. It appeared that, when the juror was being examined on his voir dire, he was not interrogated as to whether he had formed any conclusion. Held, that there was no error in overruling a motion for a new trial. *McCorquodale v. State*, 54 Tex. Cr. App. 344, 98 S. W. 879.

A juror on his voir dire disclaimed prejudice or bias. After trial and conviction, defendant learned that the juror had said to other jurors, as shown by their affidavits, that "he was a poor juror for defendant." The juror, by counter affidavit, disclaimed prejudice or bias, but offered no explanation of his remark. Held, that defendant was entitled to a new trial. *Long v. State*, 10 Tex. Cr. App. 186.

That a juror said, when leaving for the courthouse, that he would be back soon, and that he knew too much about this thing to be taken on the jury, did not indicate prejudice one way or another, and there was no error in refusing a new trial therefor. *Joseph v. State*, 59 Tex. Cr. App. 82, 127 S. W. 171.

Where it appeared by affidavit, which was not explained by the juror, that he had, before the trial, in speaking of the affair, said the accused "had killed a poor, innocent soldier, and ought to have his neck broke," and that this was not known to the accused when the jury was impaneled, and that on his examination the juror swore that he had no prejudice, a new trial should be granted. *Henrie v. State*, 41 Tex. 573.

Where a juror had, prior to the trial of one indicted for assault, told the assaulted party that he was well acquainted with his case, and would do all he could for him, prejudice is sufficiently shown to entitle defendant to a new trial, where he did not learn of such disqualification until after the trial. *Hanks v. State*, 21 Tex. 526.

One convicted of murder moved for a new trial, on the ground that a juror, before being impaneled, said that, if put on the jury, he would hang defendant. By a counter showing it appeared that the juror's remark was a mere device to avoid service on the jury, and that he had no bias. Held not error to overrule the motion. *Simms v. State*, 8 Tex. Cr. App. 230.

A new trial will be granted, on the ground of bias and prejudice on the part of a juror, where defendant and his attorneys swear that such bias was unknown to them before the trial, and affidavits that such juror had said before the trial "that defendant was guilty of the crime charged, and ought to be punished," and that it was a "bad case against the defendant," are not controverted. *Graham v.*

State, 28 Tex. Cr. App. 582, 13 S. W. 1010.

Alienage—In General.—Code Cr. Proc., art. 777, provides that new trials in felony cases shall be granted for the following causes, "and for no other;" one of the causes mentioned being where the court has committed any "material error calculated to injure the rights of the defendant," but none embracing the disqualification of a trial juror. Held, that the fact that a juror disqualified in fact because not a freeholder, as required by Code Cr. Proc., art. 636, qualifies himself on his voir dire, and serves during the trial, is no ground for a new trial, though such disqualification did not come to defendant's notice until after the verdict, and though he was not guilty of laches in not ascertaining the fact, unless he can show that probable injury resulted to him by reason of the service of the disqualified juror. *Leeper v. State*, 29 Tex. Cr. App. 63, 14 S. W. 398, overruling *Brackenridge v. State*, 27 Tex. Cr. App. 513, 11 S. W. 630, and other cases.

Same—Rule Illustrated.—Where the objection that a juror was not qualified, in that he was neither a freeholder in the state nor a householder in the county, was raised for the first time after a verdict on motion for a new trial, it does not afford the basis of a new trial, in the absence of further showing that probable injury resulted to defendant by reason of the service of such juror on the trial. *Martinez v. State* (Cr. App.), 57 S. W. 838; *Leeper v. State*, 29 Tex. Cr. App. 63, 14 S. W. 398; *Williamson v. State*, 36 Tex. Cr. App. 225, 226, 36 S. W. 444; *Mays v. State*, 36 Tex. Cr. App. 437, 37 S. W. 721.

A new trial will not be granted because one of the jurors was an alien, the prisoner having had the right to challenge him if he had chosen. *Yanez v. State*, 6 Tex. Cr. App. 429, 32 Am. Rep. 591.

A juror who tried the case qualified himself on his voir dire by declaring himself a freeholder in the state. It transpired after the trial that he was neither a freeholder in the state nor a householder in the county. Applying for a new trial, the appellant and his counsel made affidavit that they did not know of the disqualification of the juror until after the return of the verdict. Held, that the new trial should have been awarded, notwithstanding appellant and his counsel had intimately known the juror for years. *Boren v. State*, 23 Tex. Cr. App. 28, 4 S. W. 463.

After conviction of theft, defendant first learned that four of the jurors were citizens of Mexico, and not legal voters of the county in which the trial was had, as they had sworn on their voir dire. Held, that a new trial should have been granted. *Armendaris v. State*, 10 Tex. Cr. App. 44.

An affidavit on a motion for a new trial charging that certain jurors were not householders or freeholders, though they answered on their voir dire that they were, did not properly raise the issue, where affiant did not show her means of information nor offer any testimony to prove the facts asserted. *Reum v. State*, 90 S. W. 1109, 49 Tex. Cr. App. 125.

In this case a juror qualified himself on his voir dire, but, after verdict, it was discovered that he was neither a freeholder in the state, nor a householder in the county, and this disqualification was set up as a ground for new trial. Held that in refusing the new trial, the trial court erred. *Boren v. State*, 23 Tex. Cr. App. 28, 4 S. W. 463.

Where the evidence of a witness at the examining trial is introduced, over defendant's objection, on the ground of a prima facie showing that a year before the trial the witness resided outside the state, and on defendant's motion for a new trial it is made to appear that at the time of the trial the

witness was, and had been for some months previous thereto, a resident of Texas, and that this fact might have been ascertained by the district attorney by the use of reasonable diligence, a new trial should be granted. *Tippett v. State* (Cr. App.), 37 S. W. 860.

On a motion for new trial it was made to appear that juror was incompetent to serve in that capacity, because he was neither a freeholder in the state nor a householder in the county of the trial; that said juror, before being impaneled, answered on his voir dire that he was a freeholder in the state, or a householder in the county, he believing at the time that he was a householder in the county, when in fact and in law he was not such householder; that neither defendant nor his counsel knew the fact of said juror's incompetency until after the return of the verdict. The facts above recited, and which are contradicted, entitled defendant to a new trial, and the court erred in refusing to grant his motion therefor. *Armendaris v. State*, 10 Tex. Cr. App. 44; *Boren v. State*, 23 Tex. Cr. App. 28, 4 S. W. 463; *Brackenridge v. State*, 27 Tex. Cr. App. 513, 11 S. W. 630; *Read v. State* (Cr. App.), 12 S. W. 413, 414.

In the motion for a new trial, when one of the jurors who tried the case was not a qualified juror by reason of the fact that he had not resided in the state twelve months prior to said trial, and where the defendant was not aware of such disqualification, until subsequent to the trial, defendant is not entitled to a new trial. *Leeper v. State*, 29 Tex. Cr. App. 63, 14 S. W. 398; *O'Mealy v. State*, 1 Tex. Cr. App. 180; *Sutton v. State*, 31 Tex. Cr. App. 297, 20 S. W. 564.

Relationship.—The fact that a juror was related to the deceased, for whose murder defendant was on trial, is not ground for a new trial when proper in-

quiry was not made on the voir dire. *Baker v. State*, 4 Tex. Cr. App. 223.

Upon a trial for theft when one of the jurors was related to the owner of the property, and a cause of challenge to him existed on that ground, and no neglect was attributable to defendant in not discovering it till after the trial, a new trial should be granted. *Page v. State*, 22 Tex. Cr. App. 551, 3 S. W. 745.

A new trial, on the ground that the relationship of a juror to the prosecuting witness was not known to the accused or his attorneys until after the verdict, was properly refused, where it appeared that the juror was accepted without being examined in reference to the matter. *Templeton v. State* (Cr. App.), 57 S. W. 831; *Page v. State*, 22 Tex. Cr. App. 551, 557, 3 S. W. 745; *Wright v. State*, 27 Tex. Cr. App. 447, 11 S. W. 458; *Aud v. State*, 36 Tex. Cr. App. 76, 83, 35 S. W. 671; *Self v. State*, 39 Tex. Cr. App. 455, 47 S. W. 26.

Where, on a motion for a new trial in a prosecution for murder, it appeared that one of the jurors (who had said on his voir dire that he was not related to deceased) and deceased had married first cousins, and that deceased's wife was dead, but had left two sons surviving, who were private prosecutors in the case; such juror was disqualified, since he was related to deceased and the prosecutors by affinity within the prohibited degree. *Stringfellow v. State*, 42 Tex. Cr. App. 588, 61 S. W. 719.

Physical Disability.—The fact that a juror was of defective hearing, of which accused did not know until after the trial, is not ground for a new trial, where the juror, before being placed in the jury, was subjected to the usual examination. *Drake v. State*, 5 Tex. Cr. App. 649.

Member of Grand Jury.—That a member of the petit jury which tried a criminal case had been a member of the grand jury which found the indict-

ment, while good as a ground of challenge to the juror, can not avail on a motion for new trial. *Franklin v. State*, 2 Tex. Cr. App. 8.

Service of Previous Trial.—After verdict of conviction the accused moved for a new trial because one of the petit jurors had served on a previous trial; but accused filed no affidavit that he was ignorant of this fact when he accepted the juror, or that he had been prejudiced by it, and the juror swore that he had forgotten his prior service on the case, and was not influenced by it at the present trial. Held, that the previous service of the juror did not vitiate the verdict, there being no reason to question the impartiality of the juror; wherefore it was not error to overrule the motion. *Brill v. State*, 1 Tex. Cr. App. 572.

Educational Deficiency.—Denial of a motion for a new trial on the ground that a juror could not read or write English, not supported by proof, is not erroneous. *Gentry v. State*, 61 Tex. Cr. App. 619, 136 S. W. 50.

The fact that a juror was of deficient understanding of the English language, of which accused did not know until after the trial, is not ground for new trial, where the juror, before being placed on the jury, was subjected to the usual examination. *Drake v. State*, 5 Tex. Cr. App. 649.

Personal Knowledge of Case.—Where one of the jurors in a trial for murder, if not a witness of the act, was on the scene immediately thereafter, located the wound in the body, and was acquainted with the main features of the case at the time he was taken as a refusal to grant a new trial was error. *Nelson v. State* (Cr. App.), 58 S. W. 107.

A juror was shown, after convicting for murder, to have stated that he had seen too much of the difficulty at the time it occurred, and knew too much of the case, to render any other verdict; that he should have been a witness, in-

stead of a juror; and that a certain defense offered at the trial was, as he knew of his own personal knowledge, without merit. A counter affidavit was to the effect that he had no prejudice against defendant, that he had tried the case on the law and the evidence, and that he had not been controlled by anything he had heard or seen prior to the trial. His first statements, however, were admitted, or, at least, not denied. Held, that a new trial should be granted. *Washburn v. State*, 31 Tex. Cr. App. 352, 20 S. W. 715.

c. Summoning, Impaneling and Oath.

In General.—A new trial can be awarded only for some one of the grounds enumerated in the code, and, illegal organization of the trial jury not being one of the grounds so enumerated, it is not ground for such new trial. *McMahon v. State*, 17 Tex. Cr. App. 321.

That the trial court erroneously overruled a good challenge for cause to an unqualified juror, and required the defense to exhaust a peremptory challenge on him, is not ground for a new trial, when it does not appear that any objectionable juror was forced upon the defendant. *Balding v. State*, 23 Tex. Cr. App. 172, 4 S. W. 579.

The defendant was convicted of gaming, and moved for a new trial on the ground that two of the jurors were not sworn, offering, in support of the motion, affidavits of two of the jurors and two other persons. Held, that it was not error for the court to refuse to hear the affidavits. *Brewer v. State*, 12 Tex. 248.

Statute Directory.—Code Cr. Proc., arts. 618-621, laying down certain forms of procedure for the calling, examination, and impaneling of jurors summoned on a writ of special venire, are directory, and not mandatory, and the pursuance of other methods by the trial court is not fatal error, unless it appears from the record that the accused was prejudiced thereby. *Murray*

v. State, 21 Tex. Cr. App. 466, 1 S. W. 522.

Time to Object.—Objection that a jury has not been properly summoned and impaneled, in a criminal case, can not be made for the first time on motion for a new trial. *Buie v. State*, 1 Tex. Cr. App. 452; *Hasselmeyer v. State*, 1 Tex. Cr. App. 690; *McMahon v. State*, 17 Tex. Cr. App. 321.

Formal objections to the selection and organization of a jury are made too late when first made on a motion for a new trial, and will not be entertained, even where defendant has been convicted of murder in the first degree, if it is apparent that he has had a fair trial. *Caldwell v. State*, 12 Tex. Cr. App. 302.

Defendant moved for a new trial on the ground that the list from which the jury was selected contained the names of only fourteen persons. Held, that the objection came too late. *Brill v. State*, 1 Tex. Cr. App. 572.

Objection to the manner of summoning the venire can not be first raised on motion for new trial, especially where no prejudice is shown. *Margraves v. State* (Cr. App.), 50 S. W. 1016.

Challenges to the array or to particular jurors should be made when the jury is being impaneled, and are not available, except in certain exceptional cases going to qualifications of a particular juror, on motion for a new trial. *Ray v. State*, 4 Tex. Cr. App. 450, 453.

Diligence Necessary.—The fact that the jury were summoned by a state's witness, in a trial for theft, is not cause for a new trial, unless it was neither known nor discoverable by proper diligence when the jury was impaneled, and the accused was prejudiced thereby. *Allen v. State*, 4 Tex. Cr. App. 581.

Wrong Oath Administered.—Where the record of a trial for felony shows that the oath prescribed by the statute

was not administered to the jury, and that a different oath was substituted therefor, the effect is the same as if no oath had been administered, and a judgment of conviction must be set aside. Such a case is to be distinguished from those in which the record merely states that the jury were sworn, without purporting to recite the oath, in which it must be presumed that the oath administered was that prescribed by law. *Smith v. State*, 1 Tex. Cr. App. 408; *S. C.*, 1 Tex. Cr. App. 516.

14. Rulings Relative to Instructions.

See, generally, the title INSTRUCTIONS, vol. 4, p. 385.

Objection Must Be Specific.—In General.—When error is assigned upon the charge either by the bill of exceptions or the motion for a new trial, the specific error relied upon must be pointed out, and it is not sufficient to copy the charge complained of into the bill or motion. *Beauchamp v. State* (Cr. App.), 140 S. W. 104.

Objection Sufficiently Definite.—A ground of motion for new trial because the court erred in failing to charge on the phase of insanity presented by accused, relying on insanity, and failed to charge the peculiar phase of monomania which rendered accused irresponsible, the court's attention having been called by special exception at the time, challenges the charge of the court and furnishes a basis for review of the contention by the court on appeal. *Tubb v. State*, 55 Tex. Cr. App. 606, 117 S. W. 858.

Objections Too General.—That the Court Should Not Have Charged on Manslaughter.—An exception in the motion for new trial saying: "The court erred in charging the law of manslaughter." This objection is too general to be considered by us. *Hudson v. State*, 44 Tex. Cr. App. 251, 70 S. W. 764; *Quintano v. State*, 29 Tex. Cr. App. 401, 403, 16 S. W. 258; *Maxwell v. State*, 31 Tex. Cr. App. 119, 19 S. W. 914; *Williams v. State*, 22 Tex.

Cr. App. 497, 4 S. W. 64; *Thompson v. State*, 32 Tex. Cr. App. 265, 22 S. W. 979.

Same.—That Court Should Have Charged on Manslaughter.—A ground for motion for new trial that "the court should have charged on manslaughter" is too general to present any error as to failure to so charge. *Mansfield v. State*, 62 Tex. Cr. App. 631, 138 S. W. 591.

Same.—That Court Should Have Instructed as to Right of Deceased to Prevent Taking of His Money.—Objection, in a motion for new trial, that the court erred in not instructing upon accused's rights to prevent decedent from taking accused's money, is insufficient to present any question of accused's right to act in defense of the property. *Mansfield v. State*, 62 Tex. Cr. App. 631, 138 S. W. 591.

Same.—Objection to Charge Generally.—A motion for a new trial on a conviction of obtaining property fraudulently, on the ground that the charge as a whole was prejudicial to defendant, only charging the law in the abstract, and that the court should have charged that the testimony showed conclusively that the prosecuting witness knew that the title to the lot in exchange for which defendant obtained the prosecuting witness' property was in another, and that the jury should acquit, is insufficient to present for review an objection that the charge failed to instruct that, though defendant did not have the right to dispose of the lot, he should be acquitted if he believed he had such right, and an objection that the charge failed to instruct that, though the prosecuting witness believed defendant's statement as to his title, if by exercising due diligence he could have ascertained that defendant did not have title, the defendant should be acquitted. *White v. State*, 52 Tex. Cr. App. 193, 106 S. W. 1167.

A motion for new trial on the ground

that the court erred in its charge, which fails to point out in what particular the charge was erroneous, is too general; and such ground can not be considered. *Kubacak v. State*, 59 Tex. Cr. App. 165, 127 S. W. 836.

An objection, in a motion for a new trial, that the charge as a whole is upon the weight of the evidence, is too general to be considered. *Mansfield v. State*, 62 Tex. Cr. App. 631, 138 S. W. 591.

Where, in a motion for a new trial in a criminal prosecution, an objection was made that "the court erred in its charge to the jury," the charge could not be reviewed, since the exception did not specifically point out wherein there was error. *Hearne v. State*, 66 S. W. 773, 43 Tex. Cr. App. 435.

A statement of ground for new trial in a criminal case that the court misdirected the jury, without pointing out any particular portion of the charge or designating the particular error, was too general to constitute ground for a new trial. *Mercer v. State*, 52 Tex. Cr. App. 321, 106 S. W. 365.

Complaint in a motion for new trial after conviction for an assault with intent to commit rape that the court erred in its charge because it was confusing and misleading is not sufficiently explicit to require consideration. *Conger v. State* (Cr. App.), 140 S. W. 1112.

That the court erred in the general charges to the jury on the question of murder in the second degree, on the question of manslaughter, and on the question of self-defense to the prejudice of defendant, and that the charge is vague, indefinite, and uncertain and contradictory, are too indefinite to be considered as grounds for a new trial. *Harris v. State* (Cr. App.), 93 S. W. 726.

A ground for a new trial, alleging that the charge was confusing and failed to charge the law of the case in part, and where it attempted to charge the

law it did not do so fully and with the clearness and precision required, was fatally defective for indefiniteness. *Glasgow v. State*, 50 Tex. Cr. App. 635, 100 S. W. 933.

Statement that the trial court erred in its charge on a certain degree of the offense, "as the charge given was not the law; was unintelligible and confusing"—is insufficient as a ground of motion for new trial. *Jordan v. State*, 62 Tex. Cr. App. 380, 137 S. W. 133.

That the charge is erroneous is not a sufficient assignment of error on a motion for a new trial. *Darnell v. State*, 15 Tex. Cr. App. 70.

A motion for a new trial on the ground that "the judge erred in his charge to the jury" is too indefinite. *Brown v. State* (Cr. App.), 28 S. W. 471.

The grounds of motion for new trial, "because the court did not give all the law of the case to the jury" and "because the court erred in each and every paragraph of its charge," are too general. *Duncan v. State*, 55 Tex. Cr. App. 168, 115 S. W. 837.

Same—Error Charged Generally in Specific Paragraphs.—A statement that "the court erred in the four of the charge" is insufficient as a ground for new trial. *Holmes v. State*, 55 Tex. Cr. App. 331, 116 S. W. 571.

Specifications of error in the motion for new trial to the giving of certain numbered paragraphs of the charge are too general to be considered on appeal. *Lemons v. State*, 59 Tex. Cr. App. 299, 128 S. W. 416.

A ground of a motion for new trial, that "the court erred in the following portions of its charge to the jury, to wit: Paragraphs Nos. 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27"—without stating wherein the error lies, is too general to be considered. *Phillips v. State*, 59 Tex. Cr. App. 534, 128 S. W. 1100.

Necessity for Filing Instructions.—The fact that in a trial for felony the

charge of the court was delivered to the jury without being filed is not cause for a new trial. *Nettles v. State*, 4 Tex. Cr. App. 337.

Failure to Give Proper Instructions.

—An erroneous instruction prejudicial to defendant, though not excepted to, is ground for a motion for a new trial. *Ayres v. State*, 21 Tex. Cr. App. 399, 17 S. W. 253.

During the preliminary examination of a witness called to impeach the character of another witness for truth and veracity, he testified that the character of such witness was bad, but failed to show himself competent to testify on the point. Held, that a refusal to instruct the jury to disregard his statement was error, for which a new trial should be granted. *Trammell v. State*, 10 Tex. Cr. App. 467.

In a prosecution for assault with intent to murder, where the evidence showed that the person assaulted advanced in a threatening manner on defendant, a charge that if "defendant did commit an assault on said S., yet, if you further believe * * * that, at the time, said S. was making the assault on defendant, * * * then you should acquit," omitting to charge as to threatening gestures, can not be taken advantage of as erroneous, when the objection is raised first on motion for new trial. *Crist v. State*, 21 Tex. Cr. App. 361, 17 S. W. 260.

A motion for a new trial was presented on the ground that the court failed to give an instruction defining manslaughter, and applying the rules of law with reference thereto to the facts, and telling the jury that defendant would be guilty of aggravated assault if, had she killed said prosecutor under those circumstances, she would only be guilty of manslaughter, in that the testimony in the case clearly raised the issue of manslaughter and aggravated assault. Held, that such statement was a sufficient criticism of the instruction to call the court's attention

to his failure to submit the issue of aggravated assault. *Furgerson v. State*, 58 Tex. Cr. App. 431, 126 S. W. 594.

Verbal Charge.—Failure of the court, in a felony case, to deliver to the jury a written charge, as required by Pasch. Dig., art. 3059, is a ground for a new trial. *West v. State*, 2 Tex. Cr. App. 209.

An exception to the giving of an oral charge in a criminal case must be taken at the time the charge is given, the objection being too late if made for the first time on a motion for a new trial. *Garrison v. State*, 57 Tex. Cr. App. 600, 114 S. W. 128.

Exceptions to oral instructions, in misdemeanor cases, do not constitute ground for new trial when taken for the first time in support of such motion. *Franklin v. State*, 2 Tex. Cr. App. 8.

An objection to a verbal charge, in a case of misdemeanor, should be taken at the time. It can not be made for the first time on motion for a new trial. *Vanwey v. State*, 41 Tex. 639.

If a charge is not excepted to, a new trial will not be granted. *Cunningham v. State*, 20 Tex. Cr. App. 162.

It is too late, on motion for a new trial, to object to a charge as verbal. *Goode v. State*, 2 Tex. Cr. App. 520, 523.

Erroneous Charge.—"To entitle a party to a new trial for supposed error in the charge, it must be made to appear that the court 'has misdirected the jury as to the law, or has committed any other material error calculated to injure the rights of the defendant.' Code Crim. Proc., art. 777, subd. 2; *Bishop v. State*, 43 Tex. 390; *Leache v. State*, 22 Tex. Cr. App. 279, 280, 3 S. W. 539; *Jackson v. State*, 22 Tex. Cr. App. 442, 3 S. W. 111; *Williams v. State*, 24 Tex. Cr. App. 17, 5 S. W. 655." *Washington v. State*, 25 Tex. Cr. App. 387, 8 S. W. 642.

If no exception was reserved to the

error when it was committed, the next place when it can be availed of is on the motion for new trial, wherein it is provided by statute (Code Crim. Proc., art. 777), as a sufficient ground for new trial, that "the court has misdirected the jury as to the law, or has committed any other material error calculated to injure the rights of the defendant." *Jackson v. State*, 22 Tex. Cr. App. 442, 3 S. W. 111.

Where a charge was erroneous, being contrary to law and on evidence, and calculated to injure defendant's rights, it may be considered on an application for a new trial, although not excepted to at the time when delivered. *Maddox v. State*, 12 Tex. Cr. App. 429.

New trial should be awarded when it appears that the court has charged upon an inculpatory theory insufficiently supported by the evidence. *Odle v. State*, 13 Tex. Cr. App. 612.

Effect of Misunderstanding of Charge by Jury.—Affidavits of jurors that they did not understand the charge of the court will not be considered on a motion for a new trial. *Mitchell v. State*, 36 Tex. Cr. App. 278, 33 S. W. 367, 36 S. W. 456.

A charge not being susceptible of misconstruction, a new trial should not be granted on the affidavit of jurors that they misunderstood it. *McCulloch v. State*, 35 Tex. Cr. App. 268, 33 S. W. 230.

Failure of Court to Sign.—Under the express provisions of Code Cr. Proc. 1895, art. 723, an exception to the court's failure to sign the charge can be taken in the motion for a new trial. *Jones v. State*, 48 Tex. Cr. App. 32, 85 S. W. 1075.

15. Rulings Relative to Verdict, Judgment or Sentence.

See, generally, the title SENTENCE, JUDGMENT, COMMITMENT AND PUNISHMENT.

Verdict Unsupported by, or Contrary to, Evidence.—In the absence of

evidence to support a verdict of conviction, a new trial should be awarded. *Hardin v. State*, 13 Tex. Cr. App. 192; *Hightower v. State*, 22 Tex. 605; *Owens v. State*, 35 Tex. 361; *Underwood v. State*, 25 Tex. Supp. 389; *Spears v. State*, 2 Tex. Cr. App. 244; *Brite v. State*, 10 Tex. Cr. App. 368; *Ellis v. State*, 10 Tex. Cr. App. 540; *Walker v. State*, 14 Tex. Cr. App. 609; *Saltillo v. State*, 16 Tex. Cr. App. 249; *Zollicoffer v. State*, 16 Tex. Cr. App. 312; *Gazley v. State*, 17 Tex. Cr. App. 267.

Where defendant is convicted of selling liquor to a minor, and the evidence of the apparent age of the boy is conflicting, and found adversely to the defendant by a jury, a new trial for insufficiency of evidence will be denied. *Schirmacher v. State* (Cr. App.), 45 S. W. 802.

The evidence connecting defendant with a larceny was circumstantial, and capable of explanation in a manner consistent with defendant's innocence. Held, that he was entitled to a new trial. *Green v. State*, 12 Tex. Cr. App. 51.

Where the evidence might have warranted a verdict of guilty of a violent assault, a verdict finding defendant guilty of assault with intent to murder will be set aside. *Montalvo v. State*, 31 Tex. 63.

On trial of an indictment for theft, where the only evidence of guilt is the bare possession of the stolen property, if the explanation given by defendant of such possession is such as to warrant a well-founded doubt of guilt, he is entitled to a new trial. *Galloway v. State*, 41 Tex. 289.

Where the verdict is contrary to the weight of evidence, it will be set aside on appeal. *Walker v. State*, 14 Tex. Cr. App. 609.

Only in cases where the verdict appears to be wrong, oppressive, and unjust will the court of appeals disturb it on account of the evidence. *Leverett v. State*, 3 Tex. Cr. App. 213.

Discretion of Court.—Where the trial court considers a verdict of doubtful propriety, it has the discretion, and ought to grant a new trial when properly applied for. *Cox v. State*, 32 Tex. 610.

Verdict Received in Absence of Defendant.—Receiving verdict in absence of defendant is ground for new trial. *Richardson v. State*, 7 Tex. Cr. App. 486.

Objections Too General.—The grounds in a motion for new trial: "The verdict is against the law." "The verdict is against the weight of the evidence." "Because justice has not been done"—are too general to be considered. *Brogdon v. State* (Cr. App.), 140 S. W. 352.

Where there was no attempt to show where the verdict was contrary to law or the evidence, the ground for the motion for new trial that the verdict was contrary to both was too general. *Beauchamp v. State* (Cr. App.), 140 S. W. 104.

A motion for new trial on the ground that the verdict is contrary to the law and the evidence in this, "that the evidence and all the evidence was as follows," followed by a copy of all the testimony, is too general, and need not be considered on appeal. *Sanders v. State* (Cr. App.), 140 S. W. 103.

Effect of Juror Being Coerced in Agreement to Verdict.—That a juror was coerced into agreeing to a conviction by the charge of another juror that he had been placed on the jury for the purpose of hanging is no ground for a new trial. *Montgomery v. State*, 13 Tex. Cr. App. 74.

Verdict Contrary to Law.—Misconstruction of the charge of the court by the jury is not recognized by the code as a ground for a new trial. *Johnson v. State*, 27 Tex. 758.

Denying or Explaining Assent to Verdict.—A verdict will not be set aside on account of an affidavit of a juror that he was induced to sign the verdict by a promise that the jury in

its verdict, would recommend defendant to executive clemency. *Henry v. State* (Cr. App.), 43 S. W. 340.

Jurors can not impeach their verdict by affidavits that they materially misunderstood a plainly written charge, which was correctly read by the judge, and then delivered to them. *Tolston v. State* (Cr. App.), 42 S. W. 988.

The court properly refused to set aside a verdict of guilty because one of the jurors made an affidavit that he did not believe the defendant guilty, but assented to the verdict, because eleven of said jurors stated that they believed defendant was guilty, and their conduct was such "that I believed, unless I assented to the verdict which was returned, I would be grossly insulted by them, and that I only assented thereto by reason of the influence of this fear." *Pilot v. State*, 43 S. W. 112, 1024, 38 Tex. Cr. App. 515.

When eight of the jury make affidavit that their verdict was unjust to defendant, and given without due reflection; that they had voted many times for acquittal, and, being tired, had agreed on a compromise verdict; that they do not now believe that defendant is guilty; that as jurors they believed him guilty, as citizens not; and seven of them further swear that they did not believe him guilty when they returned the verdict—the court, having permitted the filing of these affidavits, should set aside the verdict, and fine the affiants for contempt. *McCane v. State*, 33 Tex. Cr. App. 476, 26 S. W. 1087.

In a prosecution for burglary, affidavits of jurors, appended to a motion for new trial, that they did not believe defendant entered the burglarized house, but that under the charge, as they understood it, they were bound to convict though they did not believe him guilty of stealing the gun taken from the house, but only guilty of receiving and concealing it,

were properly stricken out on request of the district attorney. *Ramon v. State* (Cr. App.), 87 S. W. 1043.

An affidavit of a juror that he was coerced into voting for conviction by the charge of another juror that he was put on the jury for the express purpose of hanging it will not be received on a motion for a new trial. *Montgomery v. State*, 13 Tex. Cr. App. 74.

Affidavits to Impeach Verdict—General Rule.—Affidavits of jurors are not admissible to impeach the verdict, on motion for a new trial. *Johnson v. State*, 27 Tex. 758; *Brennan v. State*, 33 Tex. 266; *Rockhold v. State*, 16 Tex. Cr. App. 577; *Cannon v. State*, 3 Tex. 31; *Davis v. State*, 43 Tex. 189; *Dancy v. State*, 41 Tex. Cr. App. 293, 53 S. W. 635, judgment reversed on rehearing 53 S. W. 886; *McCane v. State*, 33 Tex. Cr. App. 476, 26 S. W. 1087; *Scott v. State*, 43 Tex. Cr. App. 591, 68 S. W. 177.

A juror in a criminal case, who held out for acquittal for a while, but finally voted for conviction, may not impeach his verdict by stating that he still believes defendant innocent. *Booker v. State*, 54 Tex. Cr. App. 80, 111 S. W. 744.

Jurors can not attack their verdict by showing what they might or might not have done under supposable circumstances, or had certain evidence been before them. *Drennan v. State*, 53 Tex. Cr. App. 311, 109 S. W. 1090.

On an application for a new trial, the court properly refused to permit accused to prove by a juror that, while in their retirement, some of the jurors remarked that they would not convict, unless they understood the testimony of a certain witness as to the incriminating facts about which he testified; the jury having been brought into court and the testimony of such witness in its entirety read to them, after which they brought in a verdict of guilty. *Harrolson v. State*, 54 Tex. Cr. App. 452, 113 S. W. 544.

Same—Exception.—Jurors can not impeach their verdict, except perhaps in extreme cases and under an imperative necessity for the accomplishment of justice. *Brennan v. State*, 33 Tex. 266.

Under Code Crim. Proc. 1895, art. 817, authorizing a new trial for misconduct of the jury, and declaring it competent to prove such misconduct by the voluntary affidavit of a juror, and that the verdict may in like manner be sustained by such affidavit, and art. 821, providing that, when the state has taken issue on the truth of a cause set forth in a motion for new trial, the court shall hear evidence by affidavit or otherwise, an issue is made, so as to authorize the court to compel the jurors to testify, by defendant's affidavit in his motion for new trial showing that his counsel had endeavored to talk with the jurors in regard to their verdict, but that they had refused to do so, stating that they had agreed they would not, and the affidavit of a person that a juror had told him that he was not originally in favor of the death penalty, which the jury imposed, but that they thought the wholesale killing in the county should be stopped, and that the death penalty should be inflicted in order to do so, though such juror made affidavit denying this. *Kannmacher v. State*, 51 Tex. Cr. App. 118, 101 S. W. 238.

The voluntary affidavit of jurors may be used to show that their verdict was reached in an unlawful manner. *Hunter v. State*, 8 Tex. Cr. App. 75.

The provision of the code, admitting affidavits of jurors to prove any misconduct, was not intended to open up for discussion the respective opinions of the jurors. *Hodges v. State*, 6 Tex. Cr. App. 615.

Testimony of jurors, showing misconduct vitiating the verdict, can not be excluded, on motion for new trial, merely because the court would discipline the jury for such misconduct.

Dixon v. State, 79 S. W. 310, 46 Tex. Cr. App. 154.

An affidavit by a juror that a member of the jury who was holding out for acquittal told affiant that another member had stated that defendant had been convicted in a former case, and had served a term in the penitentiary, was sufficient evidence that the jury had received testimony, after retiring, entitling defendant to a new trial, and it was not necessary for defendant to produce affiant as a witness. Ysaguirre v. State, 58 S. W. 1005, 42 Tex. Cr. App. 253.

Where the affidavits of two jurors that the jury discussed the failure of defendant to testify before any verdict was rendered were not controverted, defendant was entitled to a new trial on this ground. Brogden v. State, 80 S. W. 378, 47 Tex. Cr. App. 121.

On examination of jurors, on application for new trial because of their discussion of defendant's failure to testify, the court should not mention its duty to punish them if it found they had been guilty of misconduct. Wilson v. State, 46 S. W. 251, 39 Tex. Cr. App. 365.

Code Cr. Proc., art. 817, naming as a ground for new trial in felony cases the misconduct of the jury, such that the court is of opinion that defendant has not received a fair trial, and providing that it shall be competent to prove such misconduct by the voluntary affidavit of a juror, does not authorize the filing or consideration of an affidavit of a juror that his consent to the verdict was procured by representation that the jury would be confined an unreasonable length of time in case of further disagreement. Bacon v. State, 61 Tex. Cr. App. 206, 134 S. W. 690.

Same—Have No Probative Force.—Affidavits of jurors as to unlawful conduct of the jury in arriving at a verdict have no probative force. Bearden v. State, 83 S. W. 808, 47 Tex. Cr. App. 271.

Same—Necessity for Signature and Oath.—An affidavit to impeach a verdict can not be considered when it does not appear to have been signed or sworn to. Johnson v. State (Cr. App.), 24 S. W. 94.

Same—Must State Facts.—An affidavit of a juror offered as evidence in support of a motion for a new trial in a criminal prosecution, which affidavit seeks to impeach the verdict on account of misconduct of the jurors, must state the facts relating to such misconduct. Morrison v. State, 39 Tex. Cr. App. 519, 47 S. W. 369.

Affidavit to Support Verdict.—Where misconduct is imputed to a juror to impeach the verdict, his affidavit is admissible to refute the aspersion and support the verdict. Bowen v. State, 3 Tex. Cr. App. 617; Cannon v. State, 3 Tex. 31.

But, where opportunity to have tampered with or influenced a juror or jurors separating from the others is clearly shown, the fact that he or they were not influenced can not be established by the affidavit of the juror or jurors separating. Robinson v. State, 30 Tex. Cr. App. 459, 17 S. W. 1082.

Judgment.—Four days after an order overruling a motion for a new trial by defendant, and after notice of appeal entered, defendant's attorney excepted to the judgment for the reason that such order had been made in the absence of defendant, whereupon the court, over the objection of said attorney, set aside such order, and set a future day for rehearing of the motion, at which time defendant refused to renew the motion, and the court sentenced him. Held not error. Gonzales v. State, 41 S. W. 605, 38 Tex. Cr. App. 62.

Imposition of Improper Sentence.—It is no ground for a new trial that the place of punishment of a person under sixteen years of age, convicted of felony, was fixed as the penitentiary, instead of the reformatory, where no proof of his age was introduced on the

trial. *Gutierrez v. State* (Cr. App.), 47 S. W. 372.

16. Death of Judge Subsequent to Trial.

Where there was an agreed statement of facts filed in a case, the death of the presiding judge, subsequent to the trial and before the statement of facts was made up, was no ground for a new trial. *Ellis v. State*, 56 Tex. Cr. App. 22, 118 S. W. 543.

D. PROCEEDINGS AT NEW TRIAL.

Time of Trial upon Grant of New Trial.—Where a new trial is granted, defendant should not be put on trial at the same term without being allowed sufficient time to procure the attendance of witnesses. *Lott v. State*, 41 Tex. 121.

After Two Trials Effect of Failure to Enter Plea.—Where there have been two trials on defendant's plea of not guilty, failure to formally enter the plea before the third trial, which was conducted precisely as though it had been entered, is not reversible error. *Huff v. State* (Cr. App.), 25 S. W. 772, reversing 24 S. W. 903.

Arraignment on New Trial under Same Indictment.—Where defendant, after having been arraigned, pleaded guilty on a former trial, and was subsequently allowed a new trial, it was not error to again arraign defendant under the same indictment so as to enter a plea of not guilty. *Shaw v. State*, 32 Tex. Cr. App. 155, 22 S. W. 588.

Refusal of Copy of Indictment.—It was not error to deny a request for a copy of the indictment, when first demanded, when the state announced itself ready for trial after the first trial had been prosecuted to conviction and new trial granted, and defendant had been out on bond and was rearrested. *Scoville v. State* (Cr. App.), 77 S. W. 792.

When Arraignment Unnecessary on New Trial after Reversal.—Under

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Pasch. Dig., art. 2933, providing that there shall be no arraignment of a defendant except upon indictment for a capital offense, where a defendant has been convicted of murder in the second degree, an arraignment is unnecessary on the new trial after reversal, as the legal effect of the first verdict was to acquit him of murder in the first degree. *Cheek v. State*, 4 Tex. Cr. App. 444.

Attacking Affidavits.—An affidavit filed by the county attorney as a predicate for the introduction of the deposition of an absent witness whose testimony was taken at the examining trial, can not be assailed by counter affidavit on a motion for a new trial. *Ballinger v. State*, 11 Tex. Cr. App. 323.

Retrial When.—It was not error to retry a case at the same term, within two days of the former trial. *Garrett v. State*, 38 S. W. 1017, 39 S. W. 108, 37 Tex. Cr. App. 198.

II. Arrest of Judgments.

A. PURPOSE AND EFFECT.

Under the code, a motion in arrest of judgment is a suggestion by accused that judgment can not legally be rendered against him on the verdict; and it is also available to reach substantial defects in the indictment. *Berliner v. State*, 6 Tex. Cr. App. 181; *Washington v. State*, 41 Tex. 583, 586.

A motion in arrest of judgment does not raise the question whether there was any evidence, or whether the evidence was sufficient, and hence, an allegation respecting the evidence, made in such a motion, can not countervail the presumption of regularity in support of the proceedings had on the trial. *Berliner v. State*, 6 Tex. Cr. App. 181.

B. THE MOTION.

Time of Filing.—So much of an amended motion for a new trial as purported to be an arrest of judgment

must be held to have been properly struck out, where it was not filed within two days after conviction, as expressly required by Code Cr. Proc. 1895, art. 826, and no reason for delay in filing is alleged. *Reno v. State*, 56 Tex. Cr. App. 229, 120 S. W. 429; S. C., 55 Tex. Cr. App. 260, 117 S. W. 129.

Can Not Be for Both an Arrest and New Trial.—Where a party moves "to set aside and arrest a judgment, and grant him a new trial," and assigns grounds in support of both, the motion must be treated either as a motion for a new trial, or in arrest, exclusively, and can not be considered as embracing both. *State v. Mann*, 13 Tex. 61.

C. GROUNDS.

1. Must Be for Matter of Record.

"By the common law, a motion in arrest of judgment would only be for matters apparent upon the record; and this principle of the common law is enacted in the code." Code Cr. Proc., art. 675 (Pasc. Dig., art. 3140); *State v. Vahl*, 20 Tex. 779." *Beardall v. State*, 9 Tex. Cr. App. 262, 265; *Peter v. State*, 11 Tex. 762.

2. Sufficiency but Not Form of Indictment on Information.

a. Doctrine Stated.

See, generally, the title INDICTMENT AND INFORMATION, vol. 4, p. 239.

Upon motion, judgment will be arrested upon any ground which would be good upon any exception to the indictment or information for any substantial defect therein; but a mere formal objection would not be reached by motion in arrest of judgment. *West v. State*, 6 Tex. Cr. App. 485; *Cesure v. State*, 1 Tex. Cr. App. 19, 27; *Frasher v. State*, 3 Tex. Cr. App. 263, 279; *Berliner v. State*, 6 Tex. Cr. App. 181, 183; *Friedlander v. State*, 7 Tex. Cr. App. 204; *Rountree v. State*, 10 Tex. Cr. App. 110, 111; *Perez v. State*, 10 Tex. Cr. App. 327, 329; *Jones v. State*,

10 Tex. Cr. App. 552; *Williams v. State*, 19 Tex. Cr. App. 276; S. C., 20 Tex. Cr. App. 357; *McDaniel v. State*, 24 Tex. Cr. App. 552, 558, 7 S. W. 249; *Robertson v. State*, 31 Tex. 37; *Jones v. State*, 32 Tex. Cr. App. 110, 22 S. W. 149; *Terrell v. State*, 41 Tex. 463; *Gibbs v. State*, 41 Tex. 491; *Long v. State*, 43 Tex. 467, 472; *Anderson v. State*, 39 Tex. Cr. App. 83, 45 S. W. 15; *Brown v. State*, 60 Tex. Cr. App. 505, 132 S. W. 789.

Irregularities in the record entry of the presentment of an indictment do not constitute cause for setting aside the indictment, or in arrest of judgment. Such matters should be mooted by suggestion in limine to the court wherein the indictment was presented and are not available in a different forum to which the venue has been changed. *Barr v. State*, 16 Tex. Cr. App. 333.

b. Doctrine Illustrated.

(1) Substantial Defect.

Objection to indictment as being duplications may be raised by motion in arrest of judgment. *Weathersby v. State*, 1 Tex. Cr. App. 643, 646.

Alteration by Erasure.—Where indictment was altered by erasing parts, motion in arrest of judgment will be sustained. *Calvin v. State*, 25 Tex. 789, 796.

The omission of an indictment to lay a venue of the offense charged is a fatal defect, which may be taken advantage of by a motion in arrest of judgment. *Searcy v. State*, 4 Tex. 450.

Forgery the Offense—Indictments Charging Swindling.—Where the offense was forgery and the indictment charged swindling, motion in arrest should have been sustained. *Mathews v. State*, 33 Tex. 102, 108.

Failure to Lay Venue—Failure to Allege Possession on Charge of Robbery.—Failure of an indictment for robbery to properly allege possession of property taken is a matter of sub-

stance of such materiality that it can be availed of by motion in arrest of judgment as well as by motion to quash. *Evans v. State*, 34 Tex. Cr. App. 110, 112, 29 S. W. 266.

Joint Indictment for Robbery—All Charged as Principals—No Need for Charge of "Acting Together."—Appellant and two others were jointly indicted for robbery. Appellant was tried separately, and found guilty; whereupon he moved in arrest of judgment on the ground that the indictment did not charge that he and the others "acted together" in the commission of the act. Held, that the motion was properly overruled. The parties being all charged as principals, it was not necessary to allege a conspiracy among them to do the act. *Bell v. State*, 1 Tex. Cr. App. 598.

Indictment Filed by one Acting as County Attorney without Authority.—*Moore v. State*, 56 Tex. Cr. App. 300, 119 S. W. 838.

No Complaint Filed upon Which to Base Indictments.—*Johnson v. State* (Cr. App.), 49 S. W. 618.

Variance between Complaint and Indictments.—Variance between the complaint, charging the assault on "Mount," and the information, giving his name as "Mounts," is ground for arrest of judgment. *Harrison v. State*, 85 S. W. 1058, 48 Tex. Cr. App. 44.

Improper Filing of Complaint and Indictments.—Motion in arrest of judgment made on the ground that the affidavit or complaint upon which information is based was sworn to and filed on the same day the offense was alleged to have been committed, and that the affidavit does not charge the commission of offense anterior to the filing of same should be sustained, where information was filed on the same day. *Williams v. State*, 17 Tex. Cr. App. 521, 524.

Use of Word "Murder" Instead of "Killed" in Indictment for Homicide.—An indictment charged that accused

"did then and there, with malice aforethought, murder A. F., by shooting him with a gun." Held fatally defective, in that it did not charge affirmatively that accused, with his malice aforethought, "killed" A. F.; and hence a motion in arrest should prevail. *Strickland v. State*, 19 Tex. Cr. App. 518.

(2) Defects Not Substantial.

Presentation by Proper Grand Jury.

—Objection to an indictment that minutes of court do not show that it was presented by a proper grand jury, can not be first taken by motion in arrest of judgment. *Johnson v. State*, 7 Tex. Cr. App. 210, 211; *Bailey v. State*, 11 Tex. Cr. App. 140, 143.

3. Objections to Jury.

The acceptance of the jury is a waiver of any right to object to the organization of the jury on a motion in arrest. *McMahon v. State*, 17 Tex. Cr. App. 321.

The fact that the court excused jurors because of their supposed corrupt verdict in another case, and summoned others, can not be urged on a motion in arrest of judgment. *Mencheca v. State* (Cr. App.), 28 S. W. 203.

Defendant moved in arrest of judgment, on the ground that the names of the jurors were not drawn by the clerk, as required by the jury law, but were drawn by the judge. Held, that the objection should have been made by challenge to the jury when impaneled, and is not available by motion in arrest. *Hasselmeyer v. State*, 1 Tex. Cr. App. 690.

4. Objections to Grand Jury.

A motion in arrest of judgment, based on the disqualification of a grand juror, comes too late, as the matter should have been raised by challenge. *Hopkins v. State* (Cr. App.), 68 S. W. 986.

A motion in arrest of judgment on the ground that defendant, a negro,

was discriminated against by excluding negroes from the grand jury, was properly overruled, as such objection should have been made by direct attack upon the indictment prior to the trial. *Davis v. State* (Cr. App.), 69 S. W. 502.

A suggestion, on a motion in arrest, that negroes had been discriminated against in the selection of grand and petit juries, comes too late. *Kennard v. State* (Cr. App.), 61 S. W. 131.

Under the Code of Procedure, an objection that a grand jury was not legally constituted can not be raised on a motion in arrest of judgment but only by challenge. *Hudson v. State*, 40 Tex. 12.

Code Cr. Proc. 1895, art. 559, provides that a motion to set aside an indictment "shall be based on one or more of the following causes, and no other: (1) That it appears by the records of the court that the indictment was not found by at least nine grand jurors; * * * (2) that some person not authorized by law was present when the grand jury were deliberating upon the accusation against the defendant, or were voting upon the same." Held, that the failure of the jury commissioners to sign and certify the list of grand jurors is no ground upon which to base a motion in arrest of judgment in the case of one indicted by that grand jury. *Barber v. State* (Cr. App.), 46 S. W. 233.

Objections to the manner of drawing and summoning the grand jury will not be heard on a motion in arrest of judgment. *State v. Vahl*, 20 Tex. 779.

5. Questioning Validity of Order Transferring Misdemeanor Case.

The validity or existence of an order transferring a misdemeanor case to an inferior court for trial can not be questioned by motion in arrest of judgment. *Friedlander v. State*, 7 Tex. Cr. App. 204.

6. Clerk of Court Not Such De Jure.

It is no ground for a motion in ar-

rest of judgment that the clerk of court, de facto, was not such de jure. *Johnson v. State*, 14 Tex. Cr. App. 306.

7. Objections to Evidence.

Objection to evidence of the date of the commission of the offense should have been made at the time it was offered, or by a subsequent motion to strike it out, and if overruled, might have been good ground for a motion in arrest of judgment because it had not been legally rendered against the defendant. *Rountree v. State*, 10 Tex. Cr. App. 110.

Where the evidence was conflicting, and the verdict depended on the credibility of the witnesses, a motion in arrest of judgment was properly overruled. *Green v. State* (Cr. App.), 29 S. W. 1072.

8. Objections to Verdict.

In General.—Motion in arrest of judgment is properly overruled, where the verdict is responsive to issues and defendant found guilty of the offense defined by the code. *Gibbs v. State*, 1 Tex. Cr. App. 12, 17.

A verdict will not be reversed on motion in arrest of judgment on the ground that the verdict assessed no punishment, where the verdict, as contained in the record, does not assess punishment. *Long v. State*, 1 Tex. Cr. App. 709, 715.

Where an indictment charges two offenses in separate counts and the charge of the court restricted the inquiry of the jury to the first count, where the verdict is responsive to the charge given, the verdict is sufficiently certain to support a conviction, and motion in arrest of judgment is properly denied. *Dalton v. State*, 4 Tex. Cr. App. 333, 336.

That only one of several defendants indicted for affray is convicted is not ground for arresting judgment. *Sadler v. Republic*, Dallam 610, 611.

The test as to the effect of an imperfect verdict, which has been received and recorded, is, if it sufficiently

finds anything whether for or against the defendant, it will be interpreted by the court, and judgment be rendered, on the one side or the other, for what is thus found; otherwise, it will be treated as null, the judgment will be arrested, or be erroneous if rendered, and the defendant may be tried anew. Hence, where a verdict is clearly insufficient, it is a nullity, and it becomes the duty of the court to arrest the judgment thereupon; and the rule is the same, whether this is to be done upon the court's own motion or that of the defendant. *Dubose v. State*, 13 Tex. Cr. App. 418.

Trying an indictment for burglary, the jury found defendant guilty of "Burgerally & Theft," and he moved in arrest. Held, that there is no such offense, and no such word as "burgerally," nor is it idem sonans with "burglary;" and hence the verdict is unintelligible, and a refusal of the motion in arrest is error. *Haney v. State*, 2 Tex. Cr. App. 504.

A failure of a verdict to find the degree of the crime is ground for a motion in arrest of judgment. *Slaughter v. State*, 24 Tex. 410.

9. Objections to Local Option Elections.

As the statute expressly requires that all objections to local option elections must be brought under review by direct proceedings to annul and set them aside, such objections can not be made the basis of a motion in arrest of judgment in a prosecution for an unlawful liquor sale. *Reno v. State*, 53 Tex. Cr. App. 260, 117 S. W. 129.

10. Complaint Sworn Out by Person Unable to Write.

Code Cr. Proc. 1895, art. 257, provides that a complaint must be in writing, and signed by the affiant if he is able to write his name, otherwise he must place his mark at the foot of the complaint. Held, that the fact that a

complaint was signed by mark when the complaining witness was able to write, while available on motion to quash, is too late when first made in a motion in arrest. *Lewis v. State*, 30 Tex. Cr. App. 331, 97 S. W. 481.

11. Objections to Form of Oath Administered.

Under Hart. Dig., art. 1656, requiring the jury in a criminal case to be sworn "well and truly to try the issue between the state and defendant, according to the law and the evidence," a judgment will not be arrested because the entry of the judgment recites that the jury "who, being duly sworn the cause to try, and, after hearing the evidence," etc., returned a verdict, since it will be regarded as a mere recital of the clerk of what he conceived to be the nature of the oath and not as the form of the oath which was really administered. *Russell v. State*, 10 Tex. 288.

12. Death of Trial Judge Pending Motion for New Trial.

The death of the trial judge after conviction of accused and while a motion for new trial was pending is not a sufficient ground for arrest of judgment, where his successor passed upon the questions involved and signed the appeal papers, and it is not shown that the successor was not appointed during the term of court allowed by law or fixed by the commissioners' court. *Ellis v. State*, 56 Tex. Cr. App. 14, 117 S. W. 978.

13. Actions Already Barred by Limitation.

Where, on a trial for murder, committed about six years before the indictment found, defendant was convicted of assault with intent to murder, motion in arrest of judgment was improperly overruled, as the assault was barred by the statute of limitations. *Fulcher v. State*, 33 Tex. Cr. App. 22, 23, 24 S. W. 292.

14. Failure of Minutes to Show Special Venire Drawn.

Failure of minutes to show that a special venire was ordered and drawn in a murder case is not ground for motion in arrest of judgment. *Rather v. State*, 25 Tex. Cr. App. 623, 630, 9 S. W. 69.

15. Impeachment of Signature and Jurat of Justice of Peace.

A motion in arrest of a judgment based on an impeachment of the signature and jurat of a justice of the peace, supported by affidavits of third parties that the signature and jurat are forgeries, is properly denied, where the justice could have been produced. *Leftwich v. State* (Cr. App.), 55 S. W. 571.

16. No Information against Defendant.

The court should arrest judgment and discharge the accused, where there is no information filed against him. *Deon v. State*, 3 Tex. Cr. App. 435, 436.

17. Indictment Placed on Retired Dockets.

That the indictment was placed on the retired docket to be brought forward on the trial docket when defendant should be arrested held not ground for arrest of judgment. *Allen v. State*, 62 Tex. Cr. App. 557, 138 S. W. 593.

18. Appeal from Former Conviction for Same Offense.

A motion in arrest of judgment is not available on the ground of a pending appeal from a judgment of conviction rendered on a former indictment for the same offense. *Williams v. State*, 20 Tex. Cr. App. 357.

19. Information Not Based on Complaint.

An information in misdemeanor cases not based upon a complaint is insufficient to charge an offense, and upon motion or exception should be quashed, and such an exception would also be good on motion in arrest of

judgment. *Perez v. State*, 10 Tex. Cr. App. 327.

20. Failure of Count to Name Defendant.

Where an indictment in the first count charged defendant with unlawfully altering the brand on cattle, and the second count on which conviction was had charged defendant with unlawfully defacing the brand on the cattle, but did not contain the name of defendant, a motion in arrest of judgment should have been sustained. *Powell v. State*, 42 Tex. Cr. App. 12, 57 S. W. 95.

Code Cr. Proc., art. 787, provides that a motion in arrest of judgment shall be granted on any ground which is good on exception to an indictment for any substantial defects therein, and art. 528 enumerates the grounds of such substantial defects, but does not embrace the ground that the indictment was presented by a grand jury composed of more than twelve persons. Held, that a motion in arrest of judgment because the grand jury was composed of more than twelve persons is not available, since the grounds specified are the only ones which can be considered, when presented in such a motion. *Lott v. State*, 18 Tex. Cr. App. 627.

Swearing Grand Jury and Appointing Foreman.—Under Code Cr. Proc., § 787, providing that a motion in arrest shall be granted on any ground which would be good on exception to an indictment or information for substantial defect, a judgment will not be arrested because the record fails to show that the court appointed a foreman for the grand jury which found the indictment, or that the grand jury was sworn. *McDaniel v. State*, 24 Tex. Cr. App. 552, 7 S. W. 249.

Disqualification of Grand Juror.—That one of the grand jurors who found an indictment was incompetent because he had not paid his poll tax

is not ground for arresting judgment on the indictment. *Thomas v. State* (Cr. App.), 77 S. W. 801.

Signing of Foreman.—The validity of an indictment is not affected by the failure of the foreman of the grand jury to sign it. Even if it were, an exception would be one of form, and not of substance, and hence, if available at all, it would not be by motion in arrest. *Weaver v. State*, 19 Tex. Cr. App. 547, 53 Am. Rep. 389; *Jones v. State*, 10 Tex. Cr. App. 552, 556.

Presentment in Court.—The objection that the indictment was not properly presented in open court by a quorum of the grand jury can not be first raised by motion in arrest. *Jinks v. State*, 5 Tex. Cr. App. 68.

The failure of an indictment to allege that it was presented in court is a defect of form only, and is not a ground for arresting a judgment. *Jones v. State*, 32 Tex. Cr. App. 110, 22 S. W. 149.

That the minutes of the court do not show that the indictment was presented in open court to the judge by the grand jury, a quorum being present, is not cause for arrest of judgment, though good, if sustained by the record, as an exception to the indictment before plea of not guilty. *Houillion v. State*, 3 Tex. Cr. App. 537.

Where an indictment for theft showed on its face that it was presented in February, 1906, but the record entry in connection with the filing and presentation of the indictment showed that it was done in February, 1907, the file mark also showing that the same was February, 1907, the error was a clerical one, subject to correction, and a motion in arrest of judgment came too late. *Smith v. State* (Cr. App.), 102 S. W. 407.

Filing.—On a prosecution for violating the local option law, an objection made in arrest, after conviction, that the information did not state on what day it was filed, was made too late.

Hollar v. State (Cr. App.), 73 S. W. 961.

It is not a ground for arrest of judgment that the clerk of court made a mistake in the date of the filing of the indictment, where it was actually returned and filed at the proper time. *Terrell v. State*, 41 Tex. 463.

Failure to File Complaint.—An objection that no complaint is filed with the information in a criminal case must be taken, if at all, by a motion to quash the information before trial, and cannot be raised by motion in arrest of judgment after verdict. *Jessel v. State*, 57 S. W. 826, 42 Tex. Cr. App. 72.

Misjoinder of Offenses.—That an indictment charges two distinct and separate offenses in different counts is not ground for a motion in arrest of judgment, where no motion to quash, or to compel the prosecution to elect between the two counts, was made. *Collins v. State* (Cr. App.), 43 S. W. 90. Especially where the court instructed the jury to return a verdict on one count only. *Weathersby v. State*, 1 Tex. Cr. App. 643, 644.

Conviction of burglary on an indictment joining theft and burglary, held not ground for arrest of judgment. *Hobbs v. State*, 44 Tex. 353, 355.

Misnomer of Defendant.—A mistake in the name of the accused, as stated in the indictment, is not available to him by motion in arrest of judgment. The proper time to take advantage of the misnomer is before the plea of not guilty. *Foster v. State*, 1 Tex. Cr. App. 531.

Motion in arrest of judgment will be denied when based upon immaterial and unconfusing variance between the name of defendant as given in one part of the indictment and such name as given elsewhere therein. *Holt v. State*, 39 Tex. Cr. App. 282, 297, 45 S. W. 1016, 46 S. W. 829.

Misnomer of Prosecuting Attorney.—That an information states J. K.,

county attorney, presented the information, while it was signed by G. K., county attorney, is no ground for a motion in arrest of judgment. *Williams v. State*, 70 S. W. 213, 44 Tex. Cr. App. 235.

Description of Third Persons.—That an indictment under art. 386, Crim. Code Act, failed to describe the person the defendant married, by name, should be taken advantage of by motion to quash, and can not be availed of on motion in arrest of judgment, for the verdict cured the omission. *Frasher v. State*, 3 Tex. Cr. App. 263, 279.

Description of Offense.—Defendant was indicted for willfully wounding a cow, on a day after that on which the new Code went into effect. Under the new Code the indictment was good, but under the old Code bad, for failing to allege the injury to have been inflicted both wantonly and willfully. The evidence showed the offense to have been committed on a day prior to the adoption of the new Code, and the evidence was not objected to when offered. Defendant was found guilty. Held, that a motion in arrest of judgment was properly refused. *Rountree v. State*, 10 Tex. Cr. App. 110.

Certainty and Definiteness.—A motion in arrest of judgment after conviction of murder should not be granted because the indictment charging that defendant "did then and there unlawfully, and with express malice aforethought, kill and murder" deceased, did not have the word "his" between the words "with" and "express." *Worthan v. State* (Cr. App.), 65 S. W. 526.

Repugnancy and Duplicity.—Where an information for an aggravated assault and battery tendered one count and alleged three distinct aggravations, but all laid at the same date, free from repugnancy and intimately interwoven, it was held that defendant could not move in arrest of judgment for duplicity after a conviction of simple assault. *Tucker v. State*, 6 Tex. Cr. App. 251, 254.

Judgment will not be arrested because the two counts of an indictment are inconsistent, where the state elected on the trial to rely on one, and the other was not submitted to the jury. *Thomas v. State* (Cr. App.), 77 S. W. 801.

Error in Spelling.—Judgment will not be arrested because the indictment for receiving stolen twenty-dollar pieces reads "tenty" for "twenty." *Allen v. State* (Cr. App.), 28 S. W. 474.

An indictment in which the essential word "possession" is spelled "possession" is not bad for that reason on a motion in arrest of judgment, though otherwise on exceptions to the indictment. *State v. Williamson*, 43 Tex. 500.

Motion in arrest of judgment because the indictment did not conclude "against the peace and dignity of the state" was founded upon the misspelling of the word "against" which was spelled "aganist." Held not sufficient to sustain motion. *Hudson v. State*, 10 Tex. Cr. App. 215.

Variance between Affidavit and Information.—When a defendant, indicted by information for a misdemeanor, under one name, suggests his true name, which is another, and the information is changed, and proceedings had accordingly, his motion in arrest of judgment, after conviction, can not be sustained because of repugnancy between the information and its supporting affidavit. *Wilson v. State*, 6 Tex. Cr. App. 154, 158.

Variance between Complaint and Information.—The fact that the complaint alleges the commission of an offense "on or about" a given date, and the information alleges its commission on the same date, but omits the expression "on or about," is not ground for an arrest of judgment. *Dave v. State* (Cr. App.), 29 S. W. 1093.

Variance in the name of the defendant in the complaint and the information held not ground for arrest of judgment. *Luna v. State* (Cr. App.) 70 S. W. 89.

Motion in arrest of judgment is not available on the ground that the complaint and information had different file numbers, the defect being merely in form. *Williams v. State*, 19 Tex. Cr. App. 276, 280.

Defects in One of Several Counts.—Where an indictment contains more than one count, and one is defective, while the evidence supports a good count, motion in arrest of judgment comes too late. *Crook v. State*, 39 Tex. Cr. App. 252, 45 S. W. 720.

Defects in Complaint.—Motion in arrest of judgment on ground that complaint on which information was based was sworn to by the person convicted of felony is not sufficient, unless accompanied by judgment of conviction or an authenticated copy thereof. *Perez v. State*, 10 Tex. Cr. App. 327, 330.

Improper Transfer from District to County Court.—Defendant, having pleaded to the indictment without objection, can not, on motion in arrest of judgment, object that the indictment returned into the criminal district court was not properly transferred to the county court, because, while the indictment was against W. B. (defendant's name), the certificate of the clerk to the order of transfer gave the name A. B. Bonner *v. State*, 44 S. W. 172, 38 Tex. Cr. App. 599.

Cure of Defects.—Motion in arrest of judgment because of unimportant omission or mistake in immaterial part of indictment is properly overruled where material parts of the indictment are sufficient to charge the offense. *McClackey v. State*, 5 Tex. Cr. App. 320, 332.

A mistake in the date of filing the indictment is not available on motion in arrest of judgment. *Scrivener v. State*, 44 Tex. Cr. App. 232, 70 S. W. 214.

Indictment charged theft of one person's property from the possession of another, without alleging that the latter held the possession for the former.

Held, not good cause in arrest of judgment. *Alexander v. State*, 4 Tex. Cr. App. 261.

Where, in a prosecution for theft, the evidence was too unsubstantial and inconclusive to sustain a conviction, a new trial should be granted defendant upon being convicted. *Willis v. State*, 15 Tex. Cr. App. 118.

In a prosecution for the theft of cattle where the conviction rested alone upon the uncorroborated evidence of a single witness whose testimony was subject to suspicion because of his own contradictory and conflicting statements, a new trial should have been granted upon a motion showing that accused expected to prove by an absent witness that accused was a minor and lived with him at the time the animal was stolen, and was at his house on the night before he was alleged to have removed the animal, and was with the witness at his pen and about the house from daylight until 8'clock in the morning, and could not have been the person who removed the animal, and by another witness expected to prove that on the night before accused was alleged to have taken the animal witness stayed all night at the house with accused, and on the morning of which the state's witness claimed to have seen accused take the animal witness was with accused continually from daylight until two hours after sunrise, and accused could not have gone off a half mile where the animal was alleged to have been staked. *Miles v. State*, 14 Tex. Cr. App. 436.

In a prosecution for horse theft where defendant claimed that gentle colts alleged to have been stolen were running on a mustang range with wild horses and that he captured them in a mustang pen unbranded, newly discovered evidence to the effect that it was a common thing for young, untamed mustang colts without dams to take up with branded or gentle stock,

and for gentle colts without dams to take up with mustang stock, and that in mustang ranges it was the custom to take up unbranded colts without dams, and that gentle and mustang stock frequently get so mixed that it is natural to mistake the one for the other, was sufficient ground for a new trial. *Mapes v. State*, 14 Tex. Cr. App. 129.

On a trial for the theft of a hog where, in support of a motion for a new trial, accused produced affidavits of witnesses to facts, which, if true, were in connection with accused's evidence, almost, if not quite as strong, as the case made by the state to prove that the hog in question had not been stolen and killed by accused, but was alive on a farm near the prosecuting witness's home some time after accused had killed the hog for which he was tried, and up to within a very few days of the trial, a new trial should have been granted. *Crockett v. State*, 14 Tex. Cr. App. 226.

In a prosecution for theft of an animal, when the case is called for trial, defendant applied for a continuance because of the absence of two witnesses by whom he stated that he expected to prove that he purchased the alleged stolen animal in good faith, his application was overruled, and upon the trial there was some evidence tending to show that he had purchased the animal. The facts which he stated he expected to prove by the absent witnesses were material to his defense, and, in view of the other evidence in the case, they should have been regarded by the court as probably true. Held that, in view of the evidence, defendant was entitled to a new trial. *Ray v. State*, 13 Tex. Cr. App. 51.

The evidence inculcating the accused, on his trial for theft, was that of two witnesses, one of whom was not only contradicted in material re-

spects, but stultified himself as a willful perjurer, and the other of whom may himself have been criminally implicated in the theft. After conviction, the accused moved for a new trial, alleging surprise at the testimony of the said witnesses, and showing by affidavits that he had good reason to rely on their evidence to exonerate him. Held, that a new trial should have been granted. *Hasselmeyer v. State*, 1 Tex. Cr. App. 690.

Where property stolen in one county was the next day sold by the accused in another, he saying that he had bought the property, and giving reasons, not proved to be true, why he wanted to sell, there was no error in refusing a new trial. *Callahan v. State*, 30 Tex. 488.

When the grand jury can ascertain the name of the owner of the stolen property, by the use of reasonable diligence, it is their duty to do so, and, failing in this duty, a new trial should be granted. *Kimbrough v. State*, 28 Tex. Cr. App. 367, 13 S. W. 218.

Affidavits of jurors are not admissible to show upon what ground they found their verdict. *Blackwell v. State* (Cr. App.), 73 S. W. 960.

Under an indictment charging (1) assault with intent to rape by force and without the female's consent and (2) assault with intent to rape a female under the age of consent, a general verdict which fails to show on which count the conviction is based will be set aside, where a preponderance of the evidence tends to show that the female was above the age of consent. *Shell v. State* (Cr. App.), 38 S. W. 207.

In all cases where the verdict is for a minor degree of the offense charged in the indictment, the proof should meet the statutory definition of the minor degree. *Mathews v. State*, 10 Tex. Cr. App. 279.

Nolle Prosequi.

See the titles CRIMINAL LAW, vol. 2, p. 211, et seq.; DISMISSAL AND NONSUIT, vol. 2, p. 229.

Nolo Contendere.

See the title CRIMINAL LAW, vol. 2, p. 204.

Non Compos Mentis.

See the title INSANE PERSONS, vol. 4, p. 382.

Non Est Factum.

See the titles BAIL AND RECOGNIZANCE, vol. 1, p. 638; PERJURY; SCIRE FACIAS.

Nonsuit.

See the titles TRIAL; DISMISSAL AND NONSUIT, vol. 2, p. 229.

NOTARIES.

CROSS REFERENCES.

See the titles AFFIDAVITS, vol. 1, p. 48; DEPOSITIONS, vol. 2, p. 224; JUSTICES OF THE PEACE, ante, p. 189.

The governor's appointment of a notary public is inoperative without the advice and consent of the senate. (Pachal's Dig., art. 4687.) *Brown v. State*, 43 Tex. 478.

A justice of the peace is an ex-officio notary public in Texas. *Waters v. State*, 30 Tex. Cr. App. 284, 287, 17 S. W. 411.

A notary has authority to swear a chattel mortgagor to an affidavit stating that he is the owner of the property, and that it is not encumbered, etc., since. A notary public has authority to swear persons, whether to necessary affidavits required by law, or those which are voluntary. *Campbell v. State*, 43 Tex. Cr. App. 602, 68 S. W. 513.

Authority to Fine for Refusal to

Answer Interrogatories.—A notary public, executing a commission to take the deposition of a defendant at the instance of a codefendant, has no authority to fine defendant for contempt for refusing to answer interrogatories. *Ex parte Johnson*, 54 Tex. Cr. App. 113, 111 S. W. 743.

Authority to Take Depositions Out of State.—A notary public is not an officer authorized by law to take depositions in criminal cases beyond the limits of this state. *Lienpo v. State*, 28 Tex. Cr. App. 179, 12 S. W. 588.

False Personation by Notary.—On trial of one appointed by the governor as notary public, without the advice and consent of the senate, for falsely assuming or pretending to be a notary, a charge that, "if the defendant

acted as notary and was not legally entitled to do so," the jury should find him guilty, "unless he had reasonable ground to believe that he was entitled to exercise the functions of the office." was error. His guilt or innocence de-

pended on his "belief, intent, or honesty of purpose," and not on the reasonableness of such belief. *Brown v. State*, 43 Tex. 478. See the title FALSE PERSONATION, vol. 3, p. 237.

Not Guilty.

See the title CRIMINAL LAW, vol. 2, p. 210.

Notice.

See the titles BAIL AND RECOGNIZANCE, vol. 1, pp. 632, 633, et seq.; INTOXICATING LIQUORS, vol. 4, p. 633. As to notice of proceeding to substitute tort indictment, see the title INDICTMENT AND INFORMATION, vol. 4, p. 239. As to notice of substitution of information, see the title INDICTMENT AND INFORMATION, vol. 4, p. 239. As to notice of amendment of judgment, see the title SENTENCE, JUDGMENT, COMMITMENT AND PUNISHMENT. As to notice of entry nunc pro tunc, see the title SENTENCE, JUDGMENT, COMMITMENT AND PUNISHMENT. As to notice of appeal, see the title APPEAL, ERROR AND CERTIORARI, vol. 1, p. 148. As to notice to produce evidence, see the titles EVIDENCE, vol. 2, p. 537; FORGERY, vol. 3, p. 301.

NUISANCE.

CROSS REFERENCES.

As to disorderly houses being nuisances, see the title DISORDERLY HOUSES, vol. 2, p. 230. As to gambling and gambling houses being nuisances, see the title GAMING, vol. 3, p. 353. As to prohibition of by ordinances, see the title MUNICIPAL CORPORATIONS, ante, p. 456. As to the obstructions of highways being a nuisance, see the title STREETS AND HIGHWAYS. As to pollution of water being a nuisance, see the title WATERS AND WATERCOURSES.

To constitute a public nuisance there must be a substantial injury to the public at large. Ex parte Robinson, 30 Tex. Cr. App. 493, 17 S. W. 1057.

Authority to abate nuisances does not include the power to declare that to be a nuisance, which in its nature, situation, or use is not such. Ex parte Robinson, 30 Tex. Cr. App. 493, 17 S. W. 1057.

Article 2034, Paschal's Digest, providing that it shall be a misdemeanor "to do any act or thing that would be

deemed and held a nuisance at common law," is invalid as being repugnant to art. 1605, Paschal's Digest. *Johnson v. State*, 4 Tex. Cr. App. 63, 66.

That clause of art. 2034, Paschal's Digest, which purports to make it a misdemeanor "to do any act or thing that would be deemed and held a nuisance at common law," is not a valid enactment. The cases of *Allen v. State*, 34 Tex. 230, and *State v. Flynn*, 35 Tex. 354, are hereby overruled. *Johnson v. State*, 4 Tex. Cr. App. 63.

Under the clause of article 2034, the proprietors of a tallow factory, who conduct that unwholesome and offensive business in or near a town or densely settled neighborhood, or on a public thoroughfare, are subject to be prosecuted and punished for a misdemeanor. *Allen v. State*, 34 Tex. 230, overruled in *Johnson v. State*, 4 Tex. Cr. App. 63, 64.

Any citizen has the right personally to abate a public nuisance. *Jolly v. State*, 19 Tex. Cr. App. 76.

Power to abate a nuisance upon conviction of those offenses, where, by the statute, the court is empowered to abate the nuisance, can not be invoked, unless the nuisance entered into the definition of the offense and the information was framed with that view. *Brooks v. State*, 4 Tex. Cr. App. 567, 572.

Rights of Private Persons—Injunction.—Acts 30th Leg., p. 248, c. 132 (Pen. Code, art. 362b), in authorizing

suit to restrain the keeping of a disorderly house to be brought by any citizen without showing that he is personally injured by the acts complained of, is not invalid. *Ex parte Morgan*, 57 Tex. Cr. App. 551, 124 S. W. 99; *Ex parte Lane* (Cr. App.), 124 S. W. 100; *Ex parte Patterson* (Cr. App.), 124 S. W. 101.

Acts 30th Leg., p. 248, c. 132, § 1 (Pen. Code, art. 362b), authorizing suit to restrain the keeping of a disorderly house to be brought by any citizen, without showing that he is personally injured by the acts complained of, is not repealed by Rev. St. 1895, art. 2989, § 1, subd. 3, as amended by Acts 31st Leg., p. 354, c. 34, which has reference largely to the practice with reference to granting writs, hearing thereof, and appeals and orders granted therein, but does not by its terms or necessary implication repeal the former provision. *Ex parte Morgan*, 57 Tex. Cr. App. 551, 124 S. W. 99.

OATH.

CROSS REFERENCES.

See the titles AFFIDAVITS, vol. 1, p. 48; JURY, ante, p. 110; JUSTICES OF THE PEACE, ante, p. 189; NOTARIES, ante, p. 555; PERJURY; TRIAL; WITNESSES.

"The word 'obligation' is defined to be 'the constraining power or authoritative character of a duty; a moral precept; a civil law; or a promise or contract voluntarily made; that to

which one is bound; that which one is obliged or bound to do, especially by moral or legal claims; a duty.' " *Colter v. State*, 37 Tex. Cr. App. 284, 39 S. W. 576.

Objections.

See the title EXCEPTIONS AND OBJECTIONS, vol. 2, p. 743.

OBSCENITY.

CROSS REFERENCES.

See the titles BREACH OF THE PEACE, vol. 1, p. 684; CRIMINAL LAW, vol. 2, p. 168; FORNICATION, vol. 3, p. 345; INDICTMENT AND INFORMATION, vol. 4, p. 239; LEWDNESS, ante, p. 386.

The terms "obscene and indecent exhibition of the person," as used in art. 343 of Penal Code, mean exposure of those parts of person commonly considered as private, and which custom and decency requires should be covered and kept concealed from public sight. *Tucker v. State*, 28 Tex. Cr. App. 541, 13 S. W. 1004.

Medical Advertisements.—Advertisements of medicines for relief or cure of diseases recognized by the medical profession are not within the prohibition of the statute regarding indecent publications. *Abendroth v. State*, 34 Tex. Cr. App. 325, 30 S. W. 787.

Composition Not Obscene on Its Face.—A recital in an indictment for making and publishing an obscene composition that certain words were "manifestly designed to corrupt the morals of youth," does not mean that the composition of itself and upon its face must manifestly produce that effect, but refers to the intention and purpose of the defendants in making the composition. *Smith v. State*, 24 Tex. App. 1, 5 S. W. 510; *Abendroth v. State*, 34 Tex. Cr. App. 325, 30 S. W. 787.

A writing as follows: "Stay with me after school. I have secured a powder through the mail that will make you safe"—is not manifestly designed to corrupt the morals of youth, within Pen. Code 1895, art. 365, punishing the making of any indecent and obscene written composition designed to corrupt the morals of youth. *Edwards v. State*, 85 S. W. 797, 47 Tex. Cr. R. 611.

Who Is a Youth.—Under Pen. Code 1895, art. 365, making it an offense to make any indecent and obscene written composition manifestly designed to

corrupt the morals of youth, the exhibition of an alleged indecent and obscene composition to a female twenty-one years of age is not an offense, as she is not a youth, within the meaning of the statute. *Edwards v. State*, 85 S. W. 797, 47 Tex. Cr. R. 611.

Publicity Contemplated by Statute.—An indictment for making an indecent exhibition of the person (Pasch. Dig., art. 2030), which charges the act to have been done "in a public place, to wit, a public road," is bad. The publicity contemplated by the statute has reference to persons who may witness the act, rather than to locality. *Moffit v. State*, 43 Tex. 346.

Boarding House Not a Public Place.—A boarding house is not per se a "public place," nor named as such in the statute punishing the use of obscene, vulgar, and indecent language in public places, and hence an information charging the use of such language in "a public place, to wit, a boarding house," does not charge a violation of the statute, in the absence of any allegations of fact showing the house to have been a public place. *Huffman v. State*, 92 S. W. 419, 49 Tex. Cr. R. 319.

Defenses.—One charged with delivering an obscene picture to a female about fifteen years of age may not show in justification that she had previously received other lewd pictures. *Holcomb v. State*, 60 Tex. Cr. App. 408, 132 S. W. 362.

Allegation of Indictment.—In indictments of offenses of this character it is generally sufficient and proper that the language of the statute should be followed, nothing more nor less. *Moffit v. State*, 43 Tex. 346, 347; *State v. Griffin*, 43 Tex. 538.

An indictment charging that defendant "did unlawfully make and publish an indecent and obscene written composition, manifestly designed to corrupt the morals of youth," setting forth the composition in *hæc verba*, is good; it not being necessary to allege the manner, mode or circumstances attending the making and publication. *Smith v. State*, 24 Tex. Cr. App. 1, 5 S. W. 510.

When an indictment, under art. 343, Pen. Code, which makes indecent publications a criminal offense, fails to show on its face that the published matter was obscene or indecent, it will not sustain a conviction. *Abendroth v. State*, 34 Tex. Cr. R. 325, 30 S. W. 787.

An indictment for publishing an indecent and obscene newspaper designed to corrupt must set forth wherein the indecency and obscenity consists. *State v. Hanson*, 23 Tex. 232, 233; *Abendroth v. State*, 34 Tex. Cr. App. 325, 30 S. W. 787.

Variance.—An indictment charging that defendant "did unlawfully and designedly, in public, make an obscene and indecent exhibition of the persons

of others," in violation of Pen. Code, art. 343, is not sustained by proof that he placed an obscene and indecent writing upon the clothes worn by others. *Tucker v. State*, 28 Tex. Cr. App. 541, 13 S. W. 1004.

Sufficiency of Evidence.—Evidence that defendants were seen carving a bench during services, that indecent words were discovered cut thereon immediately after the services, not on the bench before the commencement thereof, is sufficient to sustain a conviction for indecent publication. *Smith v. State*, 24 Tex. Cr. App. 1, 3, 5 S. W. 510.

How Question of Obscenity Determined.—Where the defendant is indicted for making and publishing an indecent and obscene written composition, it is the province of the judge to determine whether it is indecent and obscene. *Smith v. State*, 24 Tex. Cr. App. 1, 5 S. W. 510.

Manner and Time of Publication.—How and when an indecent publication was made are matters of proof and not of pleading. *Smith v. State*, 34 Tex. Cr. App. 1, 3, 5 S. W. 510.

OBSTRUCTING JUSTICE.

BY L. R. BUSKEY.

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As to bribery of officers, see the title BRIBERY, vol. 1, p. 692. As to aiding escape of prisoners, see the title ESCAPE AND RESCUE, vol. 2, p. 315.

I. Nature and Elements of Offense.

A. RESISTING EXECUTION OF CIVIL PROCESS.

"There are various articles of the Penal Code which provide for the punishment of those who shall willfully oppose or resist an officer in executing, or attempting to execute, a warrant for the arrest of another person, in cases of felony or in cases of misdemeanor, as arts. 219 and 220; yet it is believed that arts. 216 and 221 are the

only articles known to our law which by their terms would support a criminal prosecution for interfering in order to oppose or prevent the execution of civil process, as such, emanating from an officer or court in a civil cause." *Horan v. State*, 7 Tex. Cr. App. 183, 187.

B. RESISTING ARREST.

1. Lawful Arrest.

Gist of Offense.—The resisting the attempt of the officer to execute the

warrant is the gist of the offense. It is only by resisting the officer when attempting to perform his duty that the law is violated. *Hill v. State*, 43 Tex. 329.

Duty to Submit.—When a lawful arrest is attempted by a person known to be an officer, submission to arrest becomes a duty and resistance is not justifiable. *Tiner v. State*, 44 Tex. 128, 131; *Plasters v. State*, 1 Tex. Cr. App. 673.

Defect in Warrant Not Known to Defendant.—The assault for which this prosecution and conviction was had was committed by the defendant upon an officer while resisting arrest by the said officer. The validity of the warrant upon which the arrest was attempted by the officer was assailed upon the ground that it did not state the Christian name of the defendant, but only his surname, and that his Christian name was unknown, and gave no other description of him. The proof shows, however, that the defect in the warrant was unknown to the defendant at the time of the assault, and that it in no degree, influenced his conduct in committing the assault. Held, that for the purpose of this prosecution the warrant was sufficient. *Graham v. State*, 29 Tex. Cr. App. 31, 13 S. W. 1013.

Threat Not Made by Defendant.—One is properly found guilty of resisting an officer in his attempt to execute a warrant against another, where both were armed with guns when the arrest was attempted, and, although defendant did not threaten to shoot, the other did, and both rode away together. *Pierce v. State*, 17 Tex. Cr. App. 232.

2. Unlawful Arrest.

Right to Resist.—To a just and reasonable extent, the right of resistance to an illegal official action is essential to government. *Alford v. State*, 8 Tex. Cr. App. 545, 563.

Person threatened with an unlawful
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arrest may either appeal to law for redress by some appropriate remedy or he may resort to right of resistance. *Alford v. State*, 8 Tex. Cr. App. 545, 566.

A charge that a person in the actual custody of a police officer, though restrained without authority and innocent of the charge against him, has no right to assault the officer to effect his escape, is error. *Goodman v. State*, 4 Tex. Cr. App. 349, 355.

Duration of Right.—Right of resistance to an unlawful arrest exists from the time of the arrest, throughout the whole detention, and may be resisted by the party himself or others for him, with such force as may be necessary to effect liberation. *Alford v. State*, 8 Tex. Cr. App. 545, 566.

Extent of Resistance.—In *Goodman v. State*, 4 Tex. Cr. App. 349, it is said: A person illegally restrained of his liberty may use such force, short of taking life, as is necessary to regain his liberty. And in *Toliver v. State*, 32 Tex. Cr. App. 444, 446, 24 S. W. 286, it was held that a person is not required to submit to arrest under an illegal warrant, though his resistance must not be unwarranted or illegal. But in *Ross v. State*, 10 Tex. Cr. App. 455, 464, it is said that, in resisting an unlawful arrest, the person is justified in using whatever force may be necessary.

Aiding Resistance to Unlawful Arrest.—Interference by another for the purpose of freeing one from an unlawful arrest is not unlawful. *Alford v. State*, 8 Tex. Cr. App. 545, 564.

Aid in Preventing Unauthorized Search.—It does not constitute the offense of resisting arrest for one to aid a person who has been placed under illegal arrest in preventing the officer from making an unauthorized search of his person. *Lee v. State*, 74 S. W. 28, 45 Tex. Cr. App. 94.

Illegal Warrant.—An indictment for resisting and assaulting an officer at-

tempting to execute a warrant of arrest with intent to murder him, in violation of Pen. Code, art. 222, which provides for the punishment of one against whom a legal warrant of arrest is directed if he resist its execution, and declares that if arms be used in making the resistance in such a manner as would make him liable for assault with intent to murder, etc., he should be punished accordingly, should be quashed, where the warrant was illegal, since one is not required to submit to arrest under an illegal warrant. *Toliver v. State*, 32 Tex. Cr. App. 444, 24 S. W. 286.

Under Pen. Code, art. 238, making it an offense to resist the execution of "a legal warrant of arrest," and art. 254, Code Cr. Proc., requiring that a warrant state "that the person is accused of some offense against the laws of the state, naming the offense," a person resisting a warrant for arrest for "gaming" is guilty of no offense, gaming not being made an offense by the law. *Fulkerson v. State*, 67 S. W. 502, 43 Tex. Cr. App. 587.

C. AUTHORITY OF OFFICER.

See, generally, the title OFFICERS.

Name of Officer Immaterial.—Article 488, Penal Code, was intended to punish anyone who assaults any officer of the state in the discharge of his official duties, by whatever name he may be called. *Sanner v. State*, 2 Tex. Cr. App. 458, 459.

De Facto Officers.—Pen. Code, art. 601, subd. 1, making an assault on an officer engaged in the discharge of his duty an offense, applies to assaults on de facto officers as well as officers de jure. *Brown v. State*, 60 S. W. 548, 42 Tex. Cr. App. 417, 96 Am. St. Rep. 806.

In a prosecution for an assault on an officer engaged in the discharge of his duty, it was shown that the person assaulted had entered on the dis-

charge of his duties as deputy sheriff under a valid appointment, but he had not taken the oath of office and filed his appointment for record, as required by law. Held, that the court correctly assumed he was a de facto officer; hence there was no error in refusing to submit that question to the jury. *Brown v. State*, 60 S. W. 548, 42 Tex. Cr. App. 417, 96 Am. St. Rep. 806. See the title DE FACTO OFFICERS, vol. 2, p. 221.

Policeman.—A policeman of an incorporated town or city is an "officer" within the meaning of the statute intended to punish his assaults upon officers. *Sanner v. State*, 2 Tex. Cr. App. 458, 459.

Where Officer Does Not Declare His Character.—Where a person about to be arrested knows the purpose and capacity of the officer, and the arrest is otherwise lawful, he is not justified in resisting arrest, though the officer makes no declaration of his official character or purpose. *Plasters v. State*, 1 Tex. Cr. App. 673.

II. Defenses.

Ignorance.—Ignorance is no defense to a prosecution for forcible interference with lawful authority of court. *State v. Sparks*, 27 Tex. 627, 635.

Writ Voidable and Defective.—In a criminal prosecution for resisting an officer who was attempting to seize property under a writ of sequestration, the defendant was not justified in making such resistance by the fact that the writ was voidable and defective in not stating the value and location of the property, as the writ, issuing from a court of competent jurisdiction, justified and authorized the officer to attempt to execute the same; a different rule being applied in criminal than in civil cases. *Witherspoon v. State*, 61 S. W. 396, 42 Tex. Cr. App. 532, 96 Am. St. Rep. 812.

III. Indictment.

A. RESISTING EXECUTION OF CIVIL PROCESS.

1. In General.

An indictment for resisting an officer's execution of process should allege the mode of committing the offense. *Horan v. State*, 7 Tex. Cr. App. 183.

In indictment for resisting the execution of civil process, "the process should have been so far set forth that the court could see that it was legal, and that the officer had authority to serve it." *Horan v. State*, 7 Tex. Cr. App. 183, 190.

2. Knowledge of Authority of Officer.

An indictment for resisting an officer's execution of process must allege that the accused knew in what capacity the officer was acting. *Horan v. State*, 7 Tex. Cr. App. 183.

B. RESISTING ARREST.

1. In General.

Pen. Code, art. 222, makes it an offense for one against whom a legal warrant of arrest is directed in a criminal case to resist arrest, etc. Held, that an information charging the offense must aver the warrant to have been a warrant of arrest, and to have been addressed to an officer in a criminal case. *McGrew v. State*, 17 Tex. Cr. App. 613.

An indictment for resisting an officer in an attempt to execute a warrant for the arrest of the person named, stating that a justice of the peace had issued the warrant for the arrest of such person "to answer on a charge of theft of a horse, founded on an affidavit of W. L. J.," is sufficient. *Pierce v. State*, 17 Tex. Cr. App. 232, 242.

2. Legality of Arrest.

An indictment for resisting an officer in his attempt to execute a warrant for the arrest of a party charged with a felony should, in addition to showing that the warrant sufficiently

charged the felony, show that it was legally issued. *Pierce v. State*, 17 Tex. Cr. App. 232.

An indictment under Pasch. Dig., art. 1959, for resisting an officer, which omits to charge that the officer was resisted while engaged in the effort to execute a legal warrant of arrest, is bad. *Hill v. State*, 43 Tex. 329.

Alleging Offense for Which No Warrant Is Necessary.—Where an information for resisting an officer while making an arrest states that the arrest was made, without a warrant, for a misdemeanor, it is fatally defective, unless it also shows that the misdemeanor was one for which an arrest could be made without a warrant. *McKinney v. State* (Cr. App.), 22 S. W. 146.

Under Pen. Code 1895, art. 236, declaring a penalty if one shall resist an officer in executing or attempting to execute a lawful warrant for the arrest of another in a misdemeanor case, or in arresting or attempting to arrest a person without a warrant, where the law authorizes the arrest to be made without a warrant, an information for resisting arrest is insufficient, where it does not allege whether the arrest was sought by virtue of a warrant or without one, and alleges as to the person sought to be arrested only that he was drunk in a public place, in the presence of a deputy sheriff, this not being a sufficient allegation to show authority to arrest without a warrant. *Harless v. State*, 53 Tex. Cr. App. 319, 109 S. W. 934.

An information for resisting an officer in making an arrest alleged that defendant and others were charged with a "misdemeanor of gaming," and were engaged in said game in the presence of the officer just prior to the resistance, and were commanded by him to consider themselves under arrest. Held insufficient, the inference being that the arrest was without warrant, and, if card playing was the offense

referred to by "gaming," an arrest without a warrant, which is limited to felonies and breaches of the peace, not being authorized. *Lee v. State*, 74 S. W. 28, 45 Tex. Cr. App. 94.

3. Knowledge of Authority of Officer.

An indictment for an assault on an officer while in the discharge of his duties must allege that defendant knew the assaulted to be an officer, or that the officer declared to defendant that he was such. *Bristow v. State*, 37 S. W. 326, 36 Tex. Cr. App. 379; *Patton v. State* (Cr. App.), 49 S. W. 389.

C. BRIBING WITNESSES.

1. In General.

To sustain a conviction for offering to bribe a witness, it is not necessary for the indictment to allege that an indictment had been found for the criminal charge about which it was expected the witness might testify, or that a subpoena or other process had issued for the witness. *Jackson v. State*, 43 Tex. 421.

2. To Disobey Subpoena.

An indictment charging that defendant offered "to bribe A. to disobey a subpoena," held insufficient in not charging the acts constituting the bribery, that the subpoena was lawfully issued, a suit was pending, and the parties thereto. *Brown v. State*, 13 Tex. Cr. App. 358.

If a bribe is offered to induce a witness to disobey a subpoena or other legal process, an indictment for such offense must allege issuance of the subpoena or other legal process. *Scoggins v. State*, 18 Tex. Cr. App. 298, 301.

An indictment which charges that defendant, knowing A. B. to be a witness, offered him \$5 and property to the value of \$10 to secrete himself and be absent from the district court at the April term, 1874, and not be a witness before the grand jury at that term of the court, nor a witness against the defendant at the district court at

said term, does not charge the offense of offering to bribe a witness under Pasch. Dig., art. 1934, which makes it an offense to bribe or offer to bribe a witness to disobey a subpoena or avoid service of the same. *State v. Hughes*, 43 Tex. 518.

3. To Avoid Service of Subpoena.

One may be convicted of attempting to bribe a witness to avoid the service of a subpoena, although the indictment neither alleges its existence, issuance, or service. *Scoggins v. State*, 18 Tex. Cr. App. 298.

An indictment alleging that, while defendant and M. were under indictments, defendant, to induce M. to disobey a subpoena to appear and testify in the case against defendant, agreed with M. to assist him to pay his fine, stating to him, "I would rather pay your fine than mine," does not sufficiently charge bribery. *Peacock v. State*, 37 Tex. Cr. App. 418, 35 S. W. 964.

IV. Evidence.

A. ADMISSIBILITY.

Defendant's Utterances in Resisting Arrest.—On a criminal prosecution for preventing an officer from seizing property under a voidable writ of sequestration, it was prejudicial error to admit evidence of defendant's sayings and doings in resisting arrest, as such evidence related to a separate and distinct offense, in no way connected with the fact in issue. *Witherspoon v. State*, 42 Tex. Cr. App. 532, 61 S. W. 396.

Disposition of Officer.—On a trial for assault with intent to murder, where it appears that defendant and his assistants barred the door to prevent an officer from arresting a fugitive, and resisted the officer at the window with drawn pistols, evidence that the officer was of an overbearing and vindictive disposition constitutes no defense, and is inadmissible. *Stewart v. State* (Cr. App.), 26 S. W. 203.

Secondary Evidence of Warrant of Arrest.—Since a warrant of arrest is the best evidence of its own legality, in a prosecution for resisting arrest it should be produced. Secondary evidence of it is not competent until its nonproduction is accounted for. *Scott v. State*, 3 Tex. Cr. App. 103.

Writ of Sequestration.—In a criminal prosecution for resisting an officer who was attempting to seize property under a voidable writ of sequestration, the writ was properly received in evidence on behalf of the state, over defendant's objections that the same was invalid as not describing the property sufficiently, and because such description did not comply with that in the affidavit, since such objections, though valid in a civil suit, are without merit as a defense on a criminal prosecution. *Witherspoon v. State*, 61 S. W. 396, 42 Tex. Cr. App. 532, 96 Am. St. Rep. 812.

Bond and Affidavit of Writ.—On a criminal prosecution for preventing an officer from seizing property under a writ of sequestration, where it was alleged as a defense that the writ was void as not conforming to the affidavit on which it was issued, evidence of the bond and affidavit for sequestration was properly refused, as the writ was simply voidable on its face, having issued from a court of competent jurisdiction under the signature of the justice, and hence the officer was justified in attempting to execute the same. *Witherspoon v. State*, 61 S. W. 396, 42 Tex. Cr. App. 532, 96 Am. St. Rep. 812; *Meador v. State*, 44 Tex. Cr. App. 468, 72 S. W. 186.

B. SUFFICIENCY.

Evidence showing that defendant objected to being arrested because his name was misspelled in the warrant, but that, on being informed that he could not question the officer's authority on that ground, he submitted to the arrest, will not support a conviction for resisting legal process. *Mc-*

Grew v. State, 17 Tex. Cr. App. 613, 614.

Subpoena Withdrawn from Jury.—On the prosecution for bribing a witness to disobey a subpoena where, after the prosecution had introduced the subpoena in evidence, the court withdrew its consideration from the jury, for any purpose except as a part of the record in the original case, the prosecution was left without any evidence of the fact that a witness had ever been served with the subpoena, and hence there was nothing for him to disobey. *Humphries v. State*, 40 Tex. Cr. App. 59, 48 S. W. 184.

Accomplice Testimony.—In a prosecution for bribing a witness to remain away from the trial of a case, accomplices of defendant who testified that defendant and others gave the witness money to remain away was not sufficiently corroborated under the statute by the mere fact of the flight of the witness and his failure to appear and testify. *Birch v. State* (Cr. App.), 106 S. W. 344.

C. BURDEN OF PROOF.

Tender or Production of Money.—When an offer to bribe a witness with money is shown on the trial of one charged under Pasch. Dig., art. 1934, it is not necessary to a conviction that the state should prove that the money was either actually tendered or produced. *Jackson v. State*, 43 Tex. 421.

V. INSTRUCTIONS.

Intent to Injure.—In a prosecution for assault on an officer while in the discharge of his duty, a refusal to charge on the question of intent to injure was error, where the violence used was of a slight character. *Brown v. State*, 60 S. W. 548, 42 Tex. Cr. App. 417, 96 Am. St. Rep. 806.

Refusal to Charge on Accomplice Testimony.—On a trial for bribing a state's witness to disobey a subpoena, where such witness' sister testified that

accused had given her money to pay such witness for leaving the county, a refusal to instruct on accomplice testimony was error. *Humphries v. State*, 40 Tex. Cr. App. 59, 48 S. W. 184. See, generally, the title ACCOMPLICES, ACCESSORIES, AIDERS AND ABETTORS, vol. 1, p. 8.

Correspondence of Writ and Affidavit.—Under Sayles' Civ., St., art. 4869, prescribing that a sequestration writ must describe the property as it is described in the affidavit on which it is issued, it was not necessary, in a criminal prosecution for resisting an officer who was attempting to seize property under a voidable writ of sequestration, that the descriptions in the writ and affidavit correspond to justify the officer in executing it, and hence an instruction to that effect was properly refused. *Witherspoon v. State*, 61 S. W. 396, 42 Tex. Cr. App. 532, 96 Am. St. Rep. 812.

Instruction Relegating to Jury Validity of Writ.—In a criminal prosecution for resisting an officer who was attempting to seize property under a writ of sequestration, it was not error to refuse to instruct that, if the jury believed that the officer was attempting to execute a writ which was not valid and legal, they should acquit, as such instruction relegated to the jury the question of the validity of the writ, which was for the court to determine. *Witherspoon v. State*, 61 S. W. 396, 42

Tex. Cr. App. 532, 96 Am. St. Rep. 812.

Charge as Less Penalty.—Though an indictment charges resistance to have been made with arms, punishment for resisting an officer in attempting to execute a warrant of arrest, with arms being greater than for the offense if committed without arms, defendant can not complain because the court failed to charge the penalty for the offense if committed with arms. *Pierce v. State*, 17 Tex. Cr. App. 232, 243.

VI. Punishment.

Felony.—If the resistance to arrest is made without arms, in case of felony, the punishment is not less than two nor more than five years. If with arms, not less than two nor more than seven years. *Pierce v. State*, 17 Tex. Cr. App. 232, 243.

Misdemeanor.—In a prosecution for resisting an officer in arresting a person for a misdemeanor, without a warrant, the charge that the penalty in case of conviction would be "any sum not less than five hundred dollars was" held error, under the act of April 4, 1881, amending the Penal Code, art. 220, so as to make the penalty in such cases not less than twenty-five dollars, nor more than five hundred dollars. *Holmes v. State* (Cr. App.), 17 S. W. 1089.

Obstructing Railroad Tracks.

See the title RAILROADS.

Obstructing Roads and Streets.

See the title STREETS AND HIGHWAYS.

Occupation Tax.

See the title LICENSES, ante, p. 413.

OFFICERS.

BY L. R. BUSKEY.

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CROSS REFERENCES.

See the titles CLERK OF COURT, vol. 1, p. 773; CONTEMPT, vol. 2, p. 43; DE FACTO OFFICERS, vol. 2, p. 221; ELECTIONS, vol. 2, p. 270; INFANTS, vol. 4, p. 374; JUSTICES OF THE PEACE, ante, p. 189; SHERIFFS AND CONSTABLES; TRIAL; UNITED STATES COMMISSIONERS; UNITED STATES MARSHALS.

As to extortion by officers, see the title EXTORTION, vol. 3, p. 218. As to liability for escape of prisoners, see the title ESCAPE AND RESCUE, vol. 2, p. 315.

I. Definitions and General Considerations.

A. IN GENERAL.

Definition.—Mr. Webster says an officer is "any person commissioned or authorized to perform any public

duty." *Sanner v. State*, 2 Tex. Cr. App. 458, 459.

Under Criminal Code.—"The term 'officer,' as used in chapter 2, art. 488, of our Criminal Code, includes not only sheriffs, deputy sheriffs, constables, and marshals of cities and towns, but cer-

tainly any other officer in the state, no matter by what name he is called." *Sanner v. State*, 2 Tex. Cr. App. 458.

The chapter of the Criminal Code "relating to the arrest and custody of prisoners" defines an "officer" in the meaning of that chapter to be "a sheriff, deputy sheriff, constable of a beat, marshal or constable of a city or town, or any person specially authorized by warrant to arrest." (Art. 1964.) *State v. Coffey*, 41 Tex. 46, 49.

An officer of the law is any magistrate, peace officer, or clerk of a court. *Gordon v. State*, 2 Tex. Cr. App. 154, 158; *Sanner v. State*, 2 Tex. Cr. App. 458, 459.

B. OFFICE A FRANCHISE.

"A person elected has the right to acquire the office to which he has been elected by qualifying as the law prescribes, and * * * such person has strictly no right to an office until he has qualified and is entitled to discharge the duties thereof. An office is a franchise, in a certain sense, and the right to the same never vests until the person elected to have the same has fully qualified and thereby become entitled to discharge the duties and receive the emoluments thereof." *Flatan v. State*, 56 Tex. 93, 102.

C. SHERIFF AN OFFICER.

A sheriff is a peace officer. *Gordon v. State*, 2 Tex. Cr. App. 154, 158.

D. POLICEMAN AN OFFICER.

"A policeman is recognized in the Penal Code as a peace officer." *Sanner v. State*, 2 Tex. Cr. App. 458, 459.

E. MARSHAL AN OFFICER.

Under express provisions of Code Cr. Proc., art. 43, the marshal of an incorporated town is a peace officer. *Jay v. State*, 55 S. W. 335, 41 Tex. Cr. App. 451.

F. DEPUTY MARSHAL NOT AN OFFICER.

"All peace-officers known to the law are carefully enumerated in the code,

and no such officer as a deputy marshal of an incorporated town or city appears. Code Cr. Proc., art. 44." *Alford v. State*, 8 Tex. Cr. App. 545, 559.

G. BAILIFF NOT AN OFFICER.

"The mere fact that at a previous term of the district court for the county he had been appointed and had acted as bailiff to the grand jury invested him with no continuing authority as a peace officer, after the adjournment of that body and the cessation of the functions for which he had been constituted." *Alford v. State*, 8 Tex. Cr. App. 545, 560.

II. Qualification and Authority.

A. TIME OF QUALIFICATION.

"The time prescribed by statute within which a person elected to an office shall qualify has been held to be directory in some of the other states, and so was held to be in this case upon former appeal. These rulings were no doubt made to cover such cases as might arise in which a person could not, for some good reason beyond his own control, qualify within the prescribed time, in order that the right of the person to qualify might not be destroyed without wrong upon his part, and that the wish of the people might not be lightly defeated; but it is not believed that the rule can be extended to cases in which there is neglect upon the part of an elected person." *Flatan v. State*, 56 Tex. 93, 98.

B. EVIDENCE OF OFFICIAL CHARACTER.

Parol Evidence.—"While the general rule is that the best evidence by which a fact can be proved must be produced, or its absence accounted for, before secondary or inferior evidence is admissible, a well-established exception to this general rule is that the official character of an alleged public officer need not be proved by the commission or other written evidence of the right of such officer to act as such, except in

an issue directly between the officer and the public. Such proof may be made originally by parol evidence, and is sufficient if it shows such person to be a de facto officer. This exception to the general rule is founded upon public convenience, and is as well established as the general rule 1 Greenl. Ev., §§ 83-92; 1 Whart. Ev., § 78; Whart. Crim. Ev., § 164; Abb. Tr. Ev. 193." *Woodson v. State*, 24 Tex. Cr. App. 153, 6 S. W. 184, 185; *Jacobs v. State*, 28 Tex. Cr. App. 79, 12 S. W. 408; *Shely v. State*, 35 Tex. Cr. App. 190, 32 S. W. 901; *Hardin v. State*, 40 Tex. Cr. App. 208, 49 S. W. 607; *De Lucenay v. State* (Cr. App.), 68 S. W. 796.

In the trial of an indictment for false swearing, a witness was allowed to testify that he was a justice of the peace, and, as such, administered the oath upon which the false swearing is predicated. Held, that parol evidence of the fact was properly admitted, and was sufficient if it showed that he was a de facto officer. *Woodson v. State*, 24 Tex. Cr. App. 153, 6 S. W. 184.

In a trial for murder, it was in proof that the deceased was killed by the defendant while the former was endeavoring to arrest the latter for unlawfully carrying a pistol, and the state proposed to prove that the deceased, when killed, was the marshal of the incorporated town in which the homicide occurred. Held that, without showing the appointment and qualification of the deceased as the town marshal, his official character could be shown by proof that he was marshal de facto, and was recognized as such by the municipal authorities. *Temple v. State*, 15 Tex. Cr. App. 304. See the title PAROL EVIDENCE.

C. COLLATERAL INQUIRY INTO AUTHORITY.

See post, "Collateral Attack," III, B, 2, a.

A person acting as an officer, under

color of a commission, is de facto such officer, until ejected by a proceeding having that object directly in view; and his authority can not be questioned in a collateral way. His official acts, until ejected, are valid. *Aulanier v. Governor*, 1 Tex. 653; *Ex parte Call*, 2 Tex. Cr. App. 497, 500. See, generally, the title DE FACTO OFFICERS, vol. 2, p. 221.

When Commission Is Void.—The rule that official acts can not be questioned in collateral proceedings does not apply where a pretended officer is acting by virtue of a void commission. *Ex parte Lewis*, 45 Tex. Cr. App. 1, 73 S. W. 811.

Collateral Inquiry into Constitutionality of Appointment.—The constitutionality of an act under which one holds by appointment the office of district clerk, will not be determined in a collateral proceeding. *Lopez v. State*, 42 Tex. 298; *Kruegel v. Daniels*, 50 Tex. Civ. App. 215, 109 S. W. 1108.

III. Vacation of Office.

A. BY APPOINTMENT TO ANOTHER OFFICE.

If an incumbent of an office be appointed to another and incompatible office, his acceptance of, and qualification for, the latter vacates the former office. *Ex parte Call*, 2 Tex. Cr. App. 497.

B. BY REMOVAL.

1. Grounds for Removal.

a. In General.

"The legislative construction of the constitution evidently implies that every official shortcoming upon the part of a county officer shall not be visited with the heavy penalty of removal, and that only such acts as involve moral turpitude, or willful negligence which borders closely upon the former, shall cause the officer to be condemned as unworthy of public confidence as a repository of a public trust. The refusal, or failure, or neglect of

the officer must be either willful or corrupt, before the state is entitled to his removal upon conviction of a misdemeanor, and not a mere act of negligence or inadvertence, which may comport with honesty on his part and a reasonable desire to properly discharge the functions of his office. It is noticeable that these elements must be found to exist even upon a direct proceeding, in the nature of a civil action, having for its object the removal of a county officer; and certainly the same rule ought to obtain, at least to an equal extent, when the removal is an incident of another proceeding which may or may not involve such removal, and the proceedings in which fail to inform a defendant that such is the object." *Watson v. State*, 9 Tex. Cr. App. 212, 215; *Hatch v. State*, 10 Tex. Cr. App. 515.

The constitution of 1869 confers power upon the district judges to remove district clerks from office, for cause spread upon the minutes of the court, yet these provisions do not invest a district judge with an arbitrary power to remove such officers for any cause which he may see proper to spread upon the minutes of his court. The officer can not be rightfully removed unless he is guilty of some breach of the trust implied by law in the tenure of his office. Only such incompetency, nonfeasance or misfeasance, corruption or partiality in office, as would amount to a forfeiture of the right to enjoy it, can rightfully call into exercise the judge's power to remove. *Ex parte King*, 35 Tex. 658. See the title *CLERK OF COURT*, vol. 1, p. 773.

Section 24, art. 6, of the constitution provides that "County judges, county attorneys, clerks of the district and county courts, justices of the peace, constables and other county officers, may be removed by the judges of the district court for incompetency, official misconduct, habitual drunken-

ness, or other causes defined by law, upon the cause therefor being set forth in writing, and the finding of its truth by a jury." *Flatan v. State*, 56 Tex. 93, 100.

Persons Must Be Officers.—"The whole context of the section of the constitution above referred to bears unmistakable evidence that the words 'may be removed,' as therein used, refer only to persons who are officers in the full sense of the word; to persons who, having been elected or appointed to an office, have qualified as provided by law and have been induced into office, whose removal is sought for some cause arising after such person has been so inducted. Only to such cases do we understand the section of the constitution above referred to to apply." *Flatan v. State*, 56 Tex. 93, 101.

Necessity of Conviction.—If the offer of a candidate for office pending his election not to charge ex officio compensation to which he would be entitled if elected, and that he would serve for his fees of office, should be construed into an offer to bribe electors, he could not, after being declared elected, and after entering upon the duties of the office, be removed therefrom until after his conviction of such bribery by a court of competent jurisdiction, in a proceeding instituted and prosecuted according to the provisions of the Code of Criminal Procedure. *State v. Humphries*, 74 Tex. 466, 12 S. W. 99.

Officer His Own Successor.—Rev. St., art. 3388, provides that all convictions of any county officer for any misdemeanor involving official misconduct shall work an immediate removal from office, etc. Article 3415 provides that no officer shall be removed for any act committed prior to his election to office. Held, that an officer, who is his own successor, and committed the unlawful act after re-election, and while performing the functions of office, but

before he had qualified, should be removed. *Brackenridge v. State*, 27 Tex. Cr. App. 513, 11 S. W. 630.

b. Official Misconduct.

(1) Definition.

"By official misconduct is meant any unlawful behavior in relation to the duties of his office, willful in its character, of any officer intrusted in any manner with the administration of justice, or the execution of the laws, etc. Rev. St., art. 3393." *Brackenridge v. State*, 27 Tex. Cr. App. 513, 11 S. W. 630, 633.

"The term 'official misconduct' may ordinarily, and in its common acceptation, imply any act, either of omission or commission, on the part of an officer, by which the legal duties imposed by law have not been properly and faithfully discharged by the officer. 'Misconduct' is defined by Bouvier as 'unlawful behavior by a person intrusted in any degree with the administration of justice, by which the rights of the parties and the justice of the case may have been affected.' It is more usually applied to jurors, arbitrators, and the like; though it may be that, in the absence of a legislative definition in furtherance of the intent and meaning of the phrase as employed in the constitution, it could be held applicable to any act of official misbehavior punishable by law as an offense against the state." *Watson v. State*, 9 Tex. Cr. App. 212, 214.

(2) Instances of Official Misconduct.

Drunkenness.—Section 24 of art. 5 of the constitution of 1876, was made in aid of, and to keep in order, the political organization of the state government, by a summary mode of removing county officers, and not until lately adopted in reference to them. It declares "official misconduct, habitual drunkenness," etc., to be a disqualification from holding such offices, and points out a summary mode of determining that fact, and of executing the declared consequence of re-

moval by the district judge, "upon the cause therefor being set forth in writing, and the finding its truth by a jury." Officer named in said § 24 of art. 5 take their offices subject to the limitation, as to duration of office, expressed therein; cause of removal being set forth, and the mode of ascertainment being prescribed. *Trigg v. State*, 49 Tex. 645.

But see *Craig v. State*, 31 Tex. Cr. App. 29, 19 S. W. 504, where it is said: "Drunkenness, in and of itself, does not indicate corruption, or willful neglect or failure of duty, and is therefore not included in the meaning of the term 'official misconduct' as defined by statute. The provisions of the statute authorizing removals from office, on account of offenses involving official misconduct, do not extend to cases of drunkenness per se." "'Official misconduct' grows out of a willful or corrupt failure, refusal, or neglect of the officer to perform a duty enjoined on him by law, or out of some willful or unlawful behavior on his part in relation to the duties of his office, while, on the other hand, drunkenness relates alone to his incapacity to discharge the duties of such office. One relates to willful or corrupt acts or omissions in relation to the duties of his office; the other, to a mental incapacity disabling him from discharging such duties. One has its basis in a wicked and corrupt mind; the other, in mental incapacity." See, generally, the title DRUNKARDS, vol. 2, p. 267.

Failure to Perform Official Duties.—

"It is made penal for any officer of the law to either willfully or negligently fail to perform any duty imposed upon him by either the Penal Code or the Code of Criminal Procedure." *Gordon v. State*, 2 Tex. Cr. App. 154, 157.

Any failure or neglect of an officer to discharge a duty imposed by law upon him renders him guilty of a misdemeanor. *State v. Baldwin*, 39 Tex. 155.

Purchase or Sale of County Property.—Pen. Code Tex., art. 250, imposing a penalty on any county officer who shall become interested "in the purchase or sale of anything made for or on account of such county," inhabits every officer of a county, city, or town, from selling to or purchasing from such corporation any property whatever, and renders such officer liable for selling a mule to the county. *Rigby v. State*, 27 Tex. Cr. App. 55, 10 S. W. 760.

Purchase of Jury Script or Witnesses Fees.—The Act of March 30, 1874, "to prevent speculations by officers," etc., repealed and superseded art. 354b of the Penal Code (Pasc. Dig., art. 1983), which prohibited the purchase of jury scrip or witness fees by certain civil officers. *Robinson v. State*, 2 Tex. Cr. App. 390; *State v. Smith*, 44 Tex. 443. See post, "Allegations of Indictment," III, B, 2, d.

"An officer who willfully demands fees not allowed by law is guilty of official misconduct, willful in its character, and that a conviction of that offense is a conviction involving official misconduct, within the meaning of the statute (Pasc. Dig., arts. 3388-3393), and not only warrants, but demands, his removal from the office." *Brackenridge v. State*, 27 Tex. Cr. App. 513, 11 S. W. 630, 633. See the title EXTORTION, vol. 3, p. 221.

For a mayor to persistently refuse to sign orders for the pay of city officers to which they are entitled under valid ordinance and without which they can not be paid, is misconduct in office within the city charter, authorizing the city council to remove officers for such cause. *Riggins v. Waco*, 40 Tex. Civ. App. 569, 90 S. W. 657, affirmed in 101 Tex. 654, no op. See the title MUNICIPAL CORPORATIONS, ante, p.

The charge of official misconduct against a county attorney was sufficiently made by an allegation that, in

assuming to prosecute a party accused of an offense, he had intentionally managed the prosecution so as to procure his acquittal, when he knew that accused was guilty of the offense with which he was charged. *Trigg v. State*, 49 Tex. 645. See the title DISTRICT AND PROSECUTING ATTORNEYS, vol. 2, p. 253.

2. Procedure.

a. Collateral Attack.

See ante, "Collateral Inquiry into Authority," II, C.

"The result from all the authorities seems to be that, in matters which concern the public, the officer's title to his office (he being in the exercise of its duties) can not be questioned unless in a direct proceeding having for its object the contestation of his right to hold the office." *Ex parte Call*, 2 Tex. Cr. App. 497, 501.

b. Removal of Clerk of Court.

The proper mode of procedure to remove a clerk of the county court is to enter a rule nisi, requiring him to show cause why he should not be removed from his office. This rule nisi may be entered by the judge of his own motion, or upon the relation of another; but in every case the cause of removal must be set forth in plain and intelligible words, and with issuable allegations affording the inculpatel officer an opportunity to contest and disprove them. General allegations of incompetency, or wholesale charges of any kind, will not suffice. *Ex parte King*, 35 Tex. 658. See the title CLERK OF COURT, vol. 1, p. 773.

c. Notice.

Person Whose Right Is to Be Affected.—After the right to an office has fully vested, the state would have to become the actor if it sought to divest such right, for any cause prescribed by law, arising after a party had qualified; and in such case notice would have to be given to the party

whose right was sought to be affected. *Flatan v. State*, 56 Tex. 93, 103.

Person Seeking to Establish Right.

—"A right to acquire an office, although an imperfect or inchoate right, may be the subject of judicial inquiry, when there is an unlawful hindrance to the acquiring of the perfect right after a person has been elected; but in such cases the party who seeks to establish the right is the actor, and need not be cited." *Flatan v. State*, 56 Tex. 93, 103.

d. Allegations of Indictment.

An indictment against a county officer for unlawfully purchasing jury scrip must charge that defendant contracted or was interested in a contract for jury scrip. An averment that he unlawfully acquired jury scrip is insufficient. *Robinson v. State*, 2 Tex. Cr. App. 390, 391. See ante, "Instances of Official Misconduct," III, B, 1, b, (2).

e. Evidence.

Conviction for unlawful traffic in

county scrip by a county officer can not be supported without distinct proof of defendant's official character. *Huff v. State*, 23 Tex. Cr. App. 291, 294, 4 S. W. 890.

3. Jurisdiction.

Under the constitution the district, and not the county court has jurisdiction to try offenses involving the misconduct of public officers; and neither the legislature nor the courts can impair that jurisdiction. *Hatch v. State*, 10 Tex. Cr. App. 515, overruling *Watson v. State*, 9 Tex. Cr. App. 212, on the question of jurisdiction. See, generally, the title JURISDICTION AND VENUE, ante, p. 60.

4. Reversing Order of Removal.

On reversing a district judge's order removing from office a district clerk, the court reinstates the clerk, who has been afforded no opportunity of defending himself in the court below. *Ex parte King*, 35 Tex. 658.

Oil.

As to inspection of, see the title INSPECTION, vol. 4, p. 384.

Once in Jeopardy.

See the title JEOPARDY, ante, p. 1.

Open and Close.

See the title TRIAL.

Open Door.

See the title BURGLARY, vol. 1, p. 720.

Opinion Evidence.

See the title EXPERT AND OPINION EVIDENCE, vol. 3, p. 175.

Order of Proof.

See the title TRIAL.

Ordinances.

See the title MUNICIPAL CORPORATIONS, ante, p. 456.

"Or" or "And."

See the titles BAIL AND RECOGNIZANCE, vol. 1, p. 609; INDICTMENT AND INFORMATION, vol. 4, p. 239; LARCENY, ante, p. 195; STATUTES.

Orthography.

See the title JUDICIAL NOTICE, ante, p. 53. .

Other Crimes.

See the titles EVIDENCE, vol. 2, pp. 445, et seq., 455, et seq.; BURGLARY, vol. 1, p. 736; LARCENY, ante, p. 195; etc.

Outcry.

See the title RAPE.

Outhouse.

See the title GAMING, vol. 3, p. 353.

Overpayment.

As to concealing overpayment as larceny, see the title LARCENY, ante, p. 195.

Overseer.

See the title STREETS AND HIGHWAYS.

Overt Act.

See the titles ASSAULT AND BATTERY, vol. 1, p. 493; HOMICIDE, vol. 3, p. 477.

Ownership.

See the title BRANDS AND MARKS, vol. 1, p. 669. As to allegation of, see the titles INDICTMENT AND INFORMATION, vol. 4, p. 239; LARCENY, ante, p. 195, and the other crimes against property.

Oysters.

See the title FISH, vol. 3, p. 298.

Packing Cotton.

As to offense of false packing, see the title FRAUD, vol. 3, p. 349.

PARDON.

BY LEONARD F. PIERSON.

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- II. Authority to Pardon, 575.
- III. Time of Granting, 576.
- IV. Delivery and Acceptance, 576.
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- VI. Effect, 577.
- VII. Revocation, 578.
- VIII. Evidence, 578.

CROSS REFERENCES.

See the titles CONVICTS, vol. 2, p. 136; SENTENCE, JUDGMENT, COMMITMENT AND PUNISHMENT.

As to plea of pardon, see the title CRIMINAL LAW, vol. 2, p. 168. As to the remission of fines, see the title FINES, vol. 3, p. 288. As to pardon qualifying witness, see the title WITNESSES.

I. Nature of Pardon.

Full, Partial and Conditional Pardons.—Executive pardon, which is a remission of guilt, is either full, partial, or conditional. It is full when it freely and unconditionally absolves the party from all the legal consequences of his crime and conviction, direct and collateral. It is partial when it relates to only a portion of the punishment, or absolves only a portion of the legal consequences of the crime.

It is conditional when it does not become operative until the grantee has performed some specific act, or when it becomes void on the occurrence of some specified event. *Carr v. State*, 19 Tex. Cr. App. 635, 53 Am. Rep. 395.

II. Authority to Pardon.

"Authority to grant pardons in Texas is conferred upon the governor by the eleventh section of art. 4 of our con-

stitution." *Cooper v. State*, 7 Tex. Cr. App. 194, 199.

The governor of Texas has power to pardon a convict who has served out his term of imprisonment and been discharged therefrom. *Hunnicut v. State*, 18 Tex. Cr. App. 498, 517; *Missouri, etc., R. Co. v. Howell* (Civ. App.), 30 S. W. 98, 101, affirmed in 87 Tex. 429.

Extent of Power.—Constitutional and statutory power of the governor to grant pardons and remit fines and forfeitures, does not extend to remission of costs adjudged against the convicted party, and payable to officers. *Ex parte Mann*, 39 Tex. Cr. App. 491, 494, 46 S. W. 828.

III. Time of Granting.

Pardon can not be granted until after conviction. *Easterwood v. State*, 34 Tex. Cr. App. 400, 408, 31 S. W. 294.

The common-law practice, and the practice in some of the American states, of continuing such a case to enable defendant to procure pardon, to be pleaded in bar, can not obtain in Texas, since the pardoning power may only be invoked in this state after conviction. *Camron v. State*, 32 Tex. Cr. App. 180, 22 S. W. 682.

Exceptions.—The constitution authorizes the governor, in all criminal cases, except treason and impeachment, to grant pardon after conviction. *Easterwood v. State*, 34 Tex. Cr. App. 400, 408, 31 S. W. 294.

To Convict after Expiration of Service.—A pardon restoring the convict to rights of citizenship may be granted after the expiration of his term of service. *Locklin v. State* (Cr. App.), 75 S. W. 305; *Hunnicut v. State*, 18 Tex. Cr. App. 498; *Easterwood v. State*, 34 Tex. Cr. App. 400, 31 S. W. 294.

IV. Delivery and Acceptance.

Necessity for.—A pardon must be

delivered and accepted and the principles applicable to the delivery of a pardon and of an ordinary deed are analogous. *Hunnicut v. State*, 18 Tex. Cr. App. 498; *Rosson v. State*, 23 Tex. Cr. App. 287, 289, 4 S. W. 897.

What Constitutes.—Where a pardon was sent by the governor to the prosecuting attorney, and was by him used as a predicate for the examination of the pardoned criminal as a witness, and not then repudiated by the witness, but he exercised his right to testify by virtue of the pardon, a sufficient delivery and acceptance of the pardon were shown. *Hunnicut v. State*, 18 Tex. Cr. App. 498, 51 Am. Rep. 330.

The delivery and acceptance of a pardon are complete when the grantor has parted with his entire control of dominion over the instrument, with the intention that it shall pass to the grantee, and the latter assents to either by himself or agent. In this case, the agent having accepted the pardon on behalf of the grantee, the pardon took effect immediately upon its delivery. *Rosson v. State*, 23 Tex. Cr. App. 287, 4 S. W. 897.

V. Validity.

Effect on Validity—Dating Conviction Incorrectly.—A pardon, in the absence of fraud, will be good though it states the date of the conviction incorrectly, if it was intended to cover and does cover the particular offense. *Hunnicut v. State*, 18 Tex. Cr. App. 498.

Effect of Reciting Grant of Previous Pardon.—The validity of a pardon restoring a convict to rights of citizenship is not affected by a recital of the grant of a previous pardon. *Locklin v. State* (Cr. App.), 75 S. W. 305.

Effect That It Was Granted to Qualify Convict as Witness.—A pardon reciting that it is granted because the convict's testimony is needed in a criminal case is not invalid, the

motives of the executive not being subject to question by the courts. *Locklin v. State* (Cr. App.), 75 S. W. 305.

Instance where the court took no notice of pardon filed in the cause but reversed judgment against sureties on bail bond on other grounds. *Grier v. State*, 29 Tex. 95, 97.

Vitiating by Fraud.—The relator applied for a writ of habeas corpus, on the ground that he had been pardoned and his pardon revoked after acceptance. It appeared prima facie that there was fraud in the procurement of the pardon, and the writ was refused. Subsequently the relator applied for a second writ, with affidavits from the governor and others rebutting the presumption of fraud in the procurement of the pardon. Held, that the presumption of fraud being removed, the pardon is of full force and effect, and the relator is entitled to a discharge from confinement. *Ex parte Rosson*, 24 Tex. Cr. App. 226, 5 S. W. 666.

A pardon described the offense as "cow-stealing." The record of conviction showed the "theft of a steer." The term of court was described in the record as the June term, 1878, and in the pardon as the September term, 1878. Held, that the pardon should be deemed sufficient, in the absence of fraud. *Hunnicut v. State*, 20 Tex. Cr. App. 632.

VI. Effect.

See post, "Revocation," VII.

The effect of absolute pardon is to absolve the party from all legal consequences of his crime and conviction, direct and collateral. *Carr v. State*, 19 Tex. Cr. App. 635, 657; *Bennett v. State*, 24 Tex. Cr. App. 73, 79, 5 S. W. 527.

The effect of a pardon is not only to remit punishment, but to reclothe the felon in a garb of innocence, whereas commutation merely mitigates the penalty, while reaffirming the guilt. *Young v. Young*, 61 Tex. 191, 194.

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Disabilities arising out of and attaching to conviction for felony are removed by absolute pardon. *Easterwood v. State*, 34 Tex. Cr. App. 400, 409, 31 S. W. 294.

Granted During Imprisonment.—A pardon signed by the governor, and to take effect when the prisoner has been in prison the full term of his sentence is a general pardon and restores one to competency and makes his affidavit sufficient basis for an information. *Rivers v. State*, 10 Tex. Cr. App. 177, 180.

Of Pardon Granted after Expiration of Service.—A full pardon after a convicted person has served his term has the same effect as a pardon granted during the term of imprisonment, and restores competency to testify. *Hunnicut v. State*, 18 Tex. Cr. App. 498, 519.

When Granted There Were Two Convictions—Operation.—Accused was, at the same term of D. district court, convicted in two cases of assault with intent to murder, and in one case was sentenced to the penitentiary for four years, and in the other for three years. After serving both terms, a pardon was granted him, reciting that, whereas he was convicted of assault with intent to murder, and sentenced to the penitentiary for five years, and whereas the papers filed in this case have been examined and considered, etc., "I * * * grant to the above-named convict a full pardon, and restore him to full citizenship and the right of suffrage." Held, that the pardon was only in one case. *Miller v. State*, 79 S. W. 567, 46 Tex. Cr. App. 59.

The effect of a conditional pardon was fully considered by the appellate court in *Carr v. State*, 19 Tex. Cr. App. 635, et seq., and it was there held such pardon did not restore the holder thereof and grantee therein to his competency as a witness. *McGee v. State*, 29 Tex. Cr. App. 596, 597, 16 S. W. 422. See, also, *Dudley v. State*, 24

Tex. Cr. App. 163, 5 S. W. 649. See post, "Revocation," VII.

Mandate on appeal in a criminal case may be made to conform to the pardon obtained after judgment. *Chambless v. State*, 20 Tex. 198, 200.

VII. Revocation.

Revocability.—The pardoning power can not revoke a pardon once delivered and accepted by the grantee or his agent. *Rosson v. State*, 23 Tex. Cr. App. 287, 4 S. W. 897.

Condition That It Might Be Revoked.—By an unbroken line of decisions in Texas it has been held that a conditional pardon does not restore the convict to his right of citizenship, because of the fact that it is subject to revocation. This, of course, means where the condition is a valid and legal one. But in every one of such cases the conditional pardon was issued before the convict had served out his term, and in such case the pardon was subject to revocation; and it was held that, as long as this condition was a valid one, it did not restore the party to his rights of citizenship. The reasoning of these opinions we adhere to, and think they are correct. If not, then the governor would have the right to restore the convict to his citizenship one day and deprive him of same the following day. As we understand the express provisions of the constitution, no man can be deprived of his rights as a citizen, in regard to voting, sitting upon juries, holding office, and testifying in the courts of the country, except on conviction for felony. Therefore, if the governor had restored the right of citizenship, if these constitutional provisions mean anything, it would take the verdict of a jury in another felony case to deprive him of such rights. It could not be done in that case by a jury; for he had been once convicted, and could

not be a second time placed in jeopardy or on his trial for the same offense. But that rule does not hold good in this case. Here the party had served his time, the pardon was issued subsequently, for the purpose of restoring citizenship, and for no other purpose, and so expressed on the face of it. There was nothing for the governor to revoke. The pardon having restored him to the full enjoyment of all the rights of citizenship, such rights could not be taken away by the governor, nor by any authority; and this would be true, whether stated in the pardon or not. *Taylor v. State*, 41 Tex. Cr. App. 148, 149, 51 S. W. 1106.

VIII. Evidence.

Proof of Pardon.—"When granted, 'a pardon may (and should) be proved by production of the charter of pardon under the great seal of the state.' *Schell v. State*, 2 Tex. Cr. App. 30; *Roberts v. State*, 2 Overt. 423; *The State v. Blaisdell*, 83 N. H. 388; 1 Greenl. on Ev., § 317. In case of loss of original, the proof may be made by certified copy under the great seal of the state. This rule is not changed by *Paschal's Digest*, art. 3110." *Cooper v. State*, 7 Tex. Cr. App. 194, 199.

Proof by Parol.—Where the law requires the secretary of state to keep "a fair register" of all official acts of the governor, he must, therefore, keep a record of all pardons. Hence, the contents of a pardon, which has been lost or mislaid, can not be proved by parol testimony, if at all by such testimony, until it is shown that a certified copy of such pardon can not be obtained from the office of the secretary of state. *Hunnicut v. State*, 18 Tex. Cr. App. 498, 521.

Delivery and acceptance of a pardon may be shown by circumstantial evidence. *Hunnicut v. State*, 18 Tex. Cr. App. 498.

PARENT AND CHILD.

CROSS REFERENCES.

As to offenses committed between parent and child, see the titles ASSAULT AND BATTERY, vol. 1, p. 493; INCEST, vol. 4, p. 227; RAPE, or other specific heads.

Right of Parent to Chastise Child.—

It was held in *Davis v. State*, 6 Tex. Cr. App. 133, that the provision of the code of this state which recognizes the right of a parent to chastise his child applies only when the real, and not a mere conventional, relation of parent and child exists between the parties.

In *Snowden v. State*, 12 Tex. Cr. App. 105. It was held that where a girl fifteen years old, living with an older brother, who stands "in loco parentis" to her, and by whom she is supported is subject to a moderate restraint and correction by him. The court said: "Does this law shield a person who stands in loco parentis towards the party injured, or must he be in fact the parent? We are of the opinion that it is not necessary for the defendant to be the parent of the assaulted party, to entitle him to the provisions of art. 490, Penal Code." In the *Davis Case* supra the injured party was held to be a domestic, see the title MASTER AND SERVANT, ante, p. 464.

By the common law, a parent may lawfully correct his child, being under age, in a reasonable manner, for this is for the benefit of his education. 1 Cooley's Bla. 451. *Davis v. State*, 6 Tex. Cr. App. 133, 141.

Immoderate Punishment.—See opinion, for facts stated, upon which a majority of the court hold: Conceding defendant's right to chastise his step-

daughter, his chastisement was clearly and unquestionably more severe than the law would permit. *Henderson*, Judge, dissenting. *Inglen v. State*, 36 Tex. Cr. App. 472, 37 S. W. 861.

Offense of Enticing Minor from Parent.—The bare fact that a party hires a minor with knowledge that that minor has a parent living is not sufficient to constitute the statutory offense of knowingly decoying or enticing a minor from his parent. *Cummins v. State*, 37 S. W. 435, 36 Tex. Cr. App. 398.

Habeas Corpus to Obtain Custody of a Child—Jurisdiction.—A proceeding by habeas corpus, sued out by parents to obtain possession and custody of their child, is a civil action of which the court of criminal appeals has no jurisdiction. Following *Ex parte Reed*, 34 Tex. Cr. App. 9, 28 S. W. 689. *Ex parte Berry*, 34 Tex. Cr. App. 36, 28 S. W. 806. See the title HABEAS CORPUS, vol. 3, p. 430.

In an indictment for theft of property belonging to a minor, who lives with the parent, it is proper to allege the ownership in the parent, though it would be a better and safer practice in such cases to present two counts, charging in one, ownership in the parent, and in the other, the ownership in the child. *Wright v. State*, 35 Tex. Cr. App. 470, 34 S. W. 273. For further treatment, see the title LARCENY, ante, p. 195.

Pari Materia.

See the title STATUTES.

Parol Evidence.

See the title EVIDENCE, vol. 2, p. 527, et seq.

Particeps Criminis.

See the title ACCOMPLICES, ACCESSORIES, AIDERS AND ABETTORS, vol. 1, p. 8.

PARTNERSHIP.

CROSS REFERENCES.

As to particular offenses by partners, see the specific heads. As to where partnership property is involved in a particular offense, see the specific heads.

In law, partners are treated, in a qualified sense, as joint tenants of partnership, having an interest therein per my et per tout. *Napoleon v. State*, 3 Tex. Cr. App. 522, 524.

Partners have a community of property and interest in the partnership

effects. *Napoleon v. State*, 3 Tex. Cr. App. 522, 524.

Indictment against.—Where a partnership is guilty of a criminal offense, the partners should be indicted as individuals, and not as a firm. *Peterson v. State*, 32 Tex. 477.

Paschal's Digest.

See the title STATUTES.

Pawnbrokers.

See the title PLEDGE AND COLLATERAL SECURITY.

Peace Bond.

See the title BREACH OF THE PEACE, vol. 1, p. 690.

Peace Officer.

See the title OFFICERS, ante, p. 567. As to assault on, see the title ASSAULT AND BATTERY, vol. 1, p. 493.

Peddlers.

See the title HAWKERS AND PEDDLERS, vol. 3, p. 473. See, also, the titles COMMERCE, vol. 1, p. 777; LICENSES, ante, p. 413.

Penal Code.

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See the titles RAPE; SODOMY.

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See the titles CONVICTS, vol. 2, p. 136; ESCAPE AND RESCUE, vol. 2, p. 315; PRISONS.

PENSIONS.

Pension Law.—The appellate court ing of applications for pensions, made has no appellate jurisdiction over pro- under the Act of July 28, 1876. Ex ceedings in the county courts dispos- parte Cosner, 4 Tex. Cr. App. 89.

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See the title SLAVES. See, also, the titles CRIMINAL LAW, vol. 2, p. 168; MASTER AND SERVANT, ante, p. 446.

Per Curiam.

See the titles COURTS, vol. 2, p. 150; CRIMINAL LAW, vol. 2, p. 168.

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See the titles CLERK OF COURT, vol. 1, p. 773; SHERIFFS AND CONSTABLES; WITNESSES.

Peremptory Challenge.

See the titles CONSTITUTIONAL LAW, vol. 2, p. 9; JURY, ante, p. 110.

Peremptory Dismissal.

See the title DISMISSAL AND NONSUIT, vol. 2, p. 229.

Peremptory Instructions.

See the titles CRIMINAL LAW, vol. 2, p. 168; TRIAL.

Perfecting Appeal.

See the title APPEAL, ERROR AND CERTIORARI, vol. 1, p. 87.

Perfecting Bail.

See the title BAIL AND RECOGNIZANCE, vol. 1, p. 572.

Performance.

As to performance of conditions in bail bonds, see the title BAIL AND RECOGNIZANCE, vol. 1, p. 572.

PERJURY.

BY L. R. BUSKEY.

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I. Offenses and Responsibility Therefor.

A. DEFINITION OF OFFENSE.

1. At Common Law.

At common law, perjury was "the

willful false oath by one who, being lawfully required to depose the truth in any proceeding in a court of justice, swears absolutely in a matter of some consequence to the point in question, whether he be believed or not."

Langford v. State, 9 Tex. Cr. App. 283, 286.

2. By Statute.

a. Perjury.

Perjury is a false statement, either written or verbal, deliberately and willfully made relating to something past or present, under sanction of an oath, where such oath is legally administered under circumstances in which the oath is required by law, or is necessary for the prosecution or defense of any private right, or for ends of public justice. *Smith v. State*, 31 Tex. Cr. App. 315, 317, 20 S. W. 707; *Mattingly v. State*, 8 Tex. Cr. App. 345, 349; *Pipes v. State*, 26 Tex. Cr. App. 318, 9 S. W. 614; *Shely v. State*, 35 Tex. Cr. App. 190, 32 S. W. 901; *Warren v. State*, 57 Tex. Cr. App. 262, 122 S. W. 541; *Hill v. State*, 22 Tex. Cr. App. 579, 3 S. W. 764; *Ferguson v. State*, 36 Tex. Cr. App. 60, 35 S. W. 369; *Langford v. State*, 9 Tex. Cr. App. 283, 285; *Lyle v. State*, 31 Tex. Cr. App. 103, 113, 19 S. W. 903.

The essential constituents of the crime of perjury, as defined by the Criminal Code, are, 1, the making of a false statement, either written or verbal; 2, said statement must be deliberately and willfully made; 3, it must relate to something past or present; 4, it must be made under the sanction of an oath, or affirmation equivalent by law to an oath; 5, the oath or affirmation must be legally administered, under circumstances in which it is required by law, or is necessary for the prosecution or defense of a private right, or for the ends of public justice. *State v. Peters*, 42 Tex. 7, 8. See post, "Elements of Offense," I, B.

Answer to General Questions.—"The court having jurisdiction to make the inquiry in general terms, any deliberate and willfully false statement of a witness in answer to questions concerning the same would constitute a

good assignment for perjury; and this, although the question might be too general to form the basis for the impeachment of the witness. The contrary doctrine, announced in *Meeks v. State*, 32 Tex. Cr. App. 420, 24 S. W. 98; *McMurtry v. State*, 38 Tex. Cr. App. 52, 43 S. W. 1010, and *Higgins v. State*, 38 Tex. Cr. App. 539, 43 S. W. 1012, is hereby overruled." *McDonough v. State*, 47 Tex. Cr. App. 227, 84 S. W. 594.

Appellant further insists that the indictment should show the questions put to the witness, and this should be such as to direct his attention to a particular time and place, and sufficiently state the circumstances to call his attention to the transaction under investigation. The cases cited by appellant, to wit, *McMurtry v. State*, 38 Tex. Cr. App. 521, 43 S. W. 1010; *Weaver v. State*, 34 Tex. Cr. App. 554, 31 S. W. 400; *Meeks v. State*, 32 Tex. Cr. App. 420, 24 S. W. 98; *Higgins v. State*, 38 Tex. Cr. App. 539, 43 S. W. 1012, were all cases originating on testimony delivered in the grand jury room; and it was held in said cases, as insisted by counsel, that the witness' attention should be directed to the matter under investigation. In *McDonough v. State*, 47 Tex. Cr. App. 227, 84 S. W. 594, these cases were reviewed, and the doctrine announced in them modified, certainly so far as cases not originating in the grand jury. In that case we held, "that aside from the cases named we know of none which announce the doctrine that before perjury can be assigned on a false statement, the question must be so definite as to time and place and persons involved as to afford the basis for the impeachment of the witness in case he make a denial. On the other hand, the authorities are numerous to the effect, that in case where the court has jurisdiction to make the inquiry, and questions are asked of a general character upon material issues, either in-

volved in the case itself, or to discredit the witness, and such witness answers falsely, and it is shown that this is deliberate and willful, his answers will afford the basis of a prosecution for perjury." *Lamar v. State*, 49 Tex. Cr. App. 563, 95 S. W. 509.

On a prosecution for perjury, the indictment alleged that defendant testified relative to a game of cards on or about a certain date with certain persons. Held, that the indictment was subject to a motion to quash, on the ground that it did not show the questions put to defendant, and that the same were made so to direct his attention to a particular time and place, and to call his attention to the transaction in question. *Clay v. State*, 52 Tex. Cr. App. 555, 107 S. W. 1129.

b. False Swearing.

Distinction between Perjury and False Swearing.—The distinction between perjury and false swearing is this, viz: if the false statement be made in an oath or affidavit "required by law," or made in "the course of a judicial proceeding," the offense is perjury; if the false voluntary oath or affidavit is "not required by law, or made in the course of a judicial proceeding," then it is false swearing. *Langford v. State*, 9 Tex. Cr. App. 283; *Davidson v. State*, 22 Tex. Cr. App. 372, 3 S. W. 662; *O'Bryan v. State*, 27 Tex. Cr. App. 339, 340, 11 S. W. 443.

We will see by examining art. 196 of the Penal Code that if the statement is made in the course of a judicial proceeding it can not be "false swearing." On the other hand, by art. 188, if the false statement under oath or affirmation is necessary for the ends of public justice, perjury, and not false swearing, is the offense. At what stage of a judicial proceeding must the false statement be made? At any. Art. 192. Where must it be made? "In or out of court." *Ibid*. It follows that if the false statement is made under oath, legally administered, under circum-

stances which make it necessary for the ends of public justice, or at any stage of a judicial proceeding, in or out of court, the making of such statement (the other elements attending) would be perjury. *Langford v. State*, 9 Tex. Cr. App. 283, 285.

B. ELEMENTS OF OFFENSE.

1. Intent.

See post, "Falsity of Testimony or Assertion and Knowledge Thereof," I, B, 6.

Mental Status.—In perjury, mental status is an essential element. *Lyle v. State*, 31 Tex. Cr. App. 103, 112, 19 S. W. 903.

To constitute perjury, the mind must be deliberate, and the false statement must be intentionally and willfully made; the accused must know the statement to be false, and must deliberately make the statement with knowledge of its falsity. *Lyle v. State*, 31 Tex. Cr. App. 103, 112, 19 S. W. 903.

Deliberation and willfulness are not extraneous matters in perjury cases but essential elements of the offense and evidence which proves or tends to prove such issues goes to the very substance of the crime of perjury. *Foster v. State*, 32 Tex. Cr. App. 39, 22 S. W. 21.

Words Indicating Intent.—At common law, the terms used, indicating intent, are "willful and corrupt." *Ferguson v. State*, 36 Tex. Cr. App. 60, 35 S. W. 369.

The Texas statute omits the word "corruptly," as used at common law, but says that the false statement must be "deliberately and willfully made." These words, "deliberately and willfully," have well-defined meanings. "Deliberately" means "with careful consideration or deliberation; with full intent; not hastily or carelessly—as a deliberately formed purpose." The latter, "willfully," has been construed by the appellate court to mean "that the act was done with evil intent, with le-

gal malice, without reasonable grounds for believing it to be lawful, or without legal justification." *Ferguson v. State*, 36 Tex. Cr. App. 60, 35 S. W. 369, 370. See post, "Willfulness and Knowledge of Falsity," II, C, 2, b.

2. Proceedings in Which Oath Was Administered.

a. Judicial Proceedings.

See post, "Jurisdiction and Authority of Tribunal or Officer Administering Oath," I, B, 3.

b. Administrative Proceedings.

Instituting Criminal Proceedings.—

A sworn complaint, made before a magistrate, for the purpose of instituting a criminal prosecution, is an affidavit "required by law," and made "in the course of a judicial proceeding." *Langford v. State*, 9 Tex. Cr. App. 283; *Simpson v. State*, 46 Tex. Cr. App. 77, 79 S. W. 530.

Motion for New Trial.—Perjury may be committed by falsely swearing to the allegations of an affidavit in support of a motion for new trial filed by a person other than the affiant, although the motion for new trial was not filed within two days after the conviction. *Hernandez v. State*, 18 Tex. Cr. App. 134. See the title NEW TRIAL AND ARREST OF JUDGMENT, ante, p. 477.

False Affidavits as to Age.—County clerks have authority to take affidavits of the consent of parents to the marriage of their daughter, and such an affidavit, if false, may be assigned as "false swearing," though not as perjury. Rev. St., art. 1149. *Steber v. State*, 23 Tex. Cr. App. 176, 4 S. W. 880.

A county clerk, having authority to administer oaths, but not being required, upon an application for a marriage license, to take an affidavit as to the age of the parties, the making of a false affidavit upon that subject will support an assignment for false swearing, but not for perjury. *Davidson v.*

State, 22 Tex. Cr. App. 372, 3 S. W. 662. See the title CLERK OF COURT, vol. 1, p. 773.

Affidavit of School Teacher.—Where a public school teacher, on making affidavit, as required by law, to the check drawn by the trustees on the county treasure for his pay, makes a false statement, he may be prosecuted for perjury, under Pen. Code, art. 188, defining perjury as a false statement made under the sanction of an oath under circumstances in which an oath is required by law. *O'Bryan v. State*, 27 Tex. Cr. App. 339, 11 S. W. 443.

Expense Account of Deputy Sheriff.

—Pen. Code, art. 188, declares that a false statement, he may be prosecuted for perjury. Article 192 provides that a false oath in a judicial proceeding shall constitute perjury. Acts 1891, p. 138, provides that, for conveying a witness from one county to another, the sheriff shall be entitled to his expenses, the amount to be stated by him under oath. Held, that an affidavit of a deputy sheriff for expenses in conveying such witness was "an oath necessary for the prosecution of a private right," and was not an oath "in a judicial proceeding," within the meaning of said articles. *Shely v. State*, 35 Tex. Cr. App. 190, 32 S. W. 901.

False Statement as to Property Owned.—The false statement as to the property owned by him, made by one justifying as a cognizor in a criminal prosecution, is in a judicial proceeding, within White's Ann. Pen. Code, art. 205, which includes, as a basis of the offense of perjury, all oaths or affirmations legally taken in such proceedings. *Warren v. State*, 57 Tex. Cr. App. 262, 122 S. W. 541.

3. Jurisdiction or Authority of Tribunal or Officer Administering Oath.

a. Jurisdiction of Court.

(1) At Common Law.

Under the common law and statutes

of many of the states in the federal union, a false statement under oath, made in the progress of a judicial proceeding, can not be assigned as perjury, unless the tribunal sitting in judgment on the proceeding, not only had jurisdiction of the matter, but such jurisdiction had already attached. *Anderson v. State*, 24 Tex. Cr. App., appx., 705, 7 S. W. 40.

(2) By Statute.

Under the constitution and statutes of Texas, a false statement may be assigned as perjury if made in the course of a judicial proceeding, before a court of competent jurisdiction over the subject matter of the proceeding, although its jurisdiction had not actually attached. *Anderson v. State*, 24 Tex. Cr. App., appx., 705, 7 S. W. 40.

(3) Defects or Irregularities Not Jurisdictional.

General Rule.—While perjury can not be assigned on an oath administered in proceedings wholly void, mere irregularities or informalities not ousting the jurisdiction of the court constitute no defense to a charge of perjury. *Manning v. State*, 81 S. W. 957, 46 Tex. Cr. App. 326; *Smith v. State*, 31 Tex. Cr. App. 315, 317, 20 S. W. 707.

Where one accused of two murders has fled, and, having been extradited for one of them, is indicted, and, without objection, tried for the other before a court which has jurisdiction of the subject matter, false testimony therein is perjury. *Cordway v. State*, 25 Tex. Cr. App. 405, 8 S. W. 670.

Defective Indictment.—Can perjury be predicated on an information that is defective? Unquestionably an acquittal on such information would be a bar to any subsequent prosecution on account of the same offense, and the authorities hold that where the court has jurisdiction, and the indictment is irregular, but the case is tried, perjury can be committed on the trial.

See *Smith v. State*, 31 Tex. Cr. App. 315, 20 S. W. 707; *Anderson v. State*, 24 Tex. Cr. App., appx., 705, 7 S. W. 40; and *Cordway v. State*, 25 Tex. Cr. App. 405, 8 S. W. 670. And it is held that, where an indictment may be held void, still perjury can be committed on the trial under such indictment. *Kelley v. State*, 51 Tex. Cr. App. 507, 103 S. W. 189.

Though an information in a prosecution for a violation of the local option law was invalid because it alleged that the local option law was put in effect in a manner other than provided by law, a prosecution for perjury may be predicated upon false testimony given on the trial under that information. *Kelley v. State*, 51 Tex. Cr. App. 507, 103 S. W. 189. See the title JEOPARDY, ante, p. 1.

Where a justice of the peace has jurisdiction of the subject-matter of an information, false swearing in the case is perjury, though the complaint on which the information is based was not sworn to. *Anderson v. State*, 24 Tex. Cr. App., appx., 705, 7 S. W. 40.

Jury Not Properly Sworn.—If the court have jurisdiction of the subject matter of an action, and power to administer an oath to a witness therein, a false statement made by him under oath will constitute perjury, even though the jury in such action have not been properly sworn. *Smith v. State*, 31 Tex. Cr. App. 315, 20 S. W. 707.

One giving false testimony on his trial for crime is guilty of perjury, though the jury were not sworn. *Schooler v. State*, 52 Tex. Cr. App. 331, 106 S. W. 359. See *Smith v. State*, 31 Tex. Cr. App. 315, 20 S. W. 707; *Cordway v. State*, 25 Tex. Cr. App. 405, 8 S. W. 670; *Anderson v. State*, 24 Tex. Cr. App., appx., 705, 7 S. W. 40.

All Members of Grand Jury Not Present.—Where, on trial for perjury before the grand jury, the court charged that, to convict, the jury

must find that the grand jury was duly organized, it was not error to refuse to charge that at the time of the alleged perjury nine grand jurors must have been present. *Chase v. State* (Cr. App.), 28 S. W. 952.

(4) Defects Rendering Action Void.

False evidence given in a matter which is a void prosecution is not perjury. Criminal Law and Procedure (Criminal Trial Brief) 414, § 1611, and note 37, for collated authorities. This is also the rule where the court has not the authority to try the case. *Wilson v. State*, 27 Tex. Cr. App. 47, 10 S. W. 749; *Curtley v. State*, 42 Tex. Cr. App. 227, 59 S. W. 44. Where the court, once having acquired jurisdiction, has lost it, the same rule applies, and perjury can not be assigned upon evidence given in the subsequent proceedings. The rule is equally well settled where the preliminary matters are such as not to confer jurisdiction upon the court in the particular case. *Wilson v. State*, 27 Tex. Cr. App. 47, 10 S. W. 749; *Curtley v. State*, 42 Tex. Cr. App. 227, 59 S. W. 44; *Emery v. State*, 57 Tex. Cr. App. 423, 123 S. W. 133, 135; *Garrett v. State*, 37 Tex. Cr. App. 198, 202, 38 S. W. 1017, 39 S. W. 108.

Loss of Jurisdiction.—Under Const., art. 1, § 10, providing that accused shall be confronted by the witnesses, and White's Ann. Code Cr. Proc., art. 633, declaring that, in all prosecutions for felonies, defendant must be personally present on the trial, where accused, in a prosecution for rape, after the examination of a witness against him, absented himself from the court, and was not present thereafter during the trial, nor while a witness claimed to have testified falsely was giving his evidence, the court, by the absence of accused, lost jurisdiction to continue the trial, and hence the evidence of such witness, though false, did not constitute perjury. *Emery v. State*, 57 Tex. Cr. App. 423, 123 S. W. 133.

b. Officers or Persons Authorized to Administer Oaths.

General Rule.—Under Pen. Code, art. 289, in order to constitute perjury, the oath must have been administered by some person duly authorized to administer it in the matter in which it was taken, and in the manner required by law. *State v. Powell*, 28 Tex. 626; *Stewart v. State*, 6 Tex. Cr. App. 184, 185; *Rambo v. State*, 43 Tex. Cr. App. 271, 64 S. W. 1039.

An indictment for perjury founded on an oath differing both in form and substance from that which the officer is authorized by the statute to administer, is bad. *State v. Perry*, 42 Tex. 238.

Assessor.—Under an act authorizing an assessor to administer an oath as to the value of property on the 1st day of January of a current year, an oath administered by him as to the value on the 23d day of May is void, and an indictment for perjury thereon will not lie. *State v. Powell*, 28 Tex. 626, 627.

De Facto Officers.—False swearing before a de facto justice of the peace is perjury. *Woodson v. State*, 24 Tex. Cr. App. 153, 6 S. W. 184.

Justice of the Peace.—There being such an office as justice of the peace, and such an officer being empowered to administer an oath, and not being required to attach a seal to his certificate, he having none, and justices of peace of counties being ex officio notaries public, and as such entitled to a seal, an affidavit on which false swearing is predicated, signed, "P., Justice of the Peace and Ex Officio Notary Public, H. County," and having a notary's seal on it, is not open to the objection of showing on its face that it was not made before an officer authorized to administer oaths. *Wilson v. State*, 93 S. W. 547, 49 Tex. Cr. App. 496.

On an examination before a justice of the peace concerning a charge of

gaming, testimony of a witness constituted a predicate for perjury, though it was not reduced to writing. *Clay v. State*, 52 Tex. Cr. App. 555, 107 S. W. 1129.

Magistrate.—One making a false affidavit before a magistrate on a retrial of a criminal charge, which the magistrate had no jurisdiction to grant, can not be convicted of perjury, but may be convicted for false swearing. *Butler v. State*, 38 S. W. 46, 36 Tex. Cr. App. 483.

Under Code Cr. Proc. 1895, arts. 282, 283, authorizing accused before the examination of the witnesses to make a statement, which shall be reduced to writing and signed, but not sworn to, a sworn statement, made before the examining magistrate by one charged with an assault, after waiver of examining trial, is not a statement on which perjury may be predicated, though, if the statement was voluntarily made, it may be the basis for a prosecution for false swearing. *Biard v. State*, 54 Tex. Cr. App. 440, 113 S. W. 275.

Notary Public.—Where parties to a civil action pending in a district court expressly agreed in writing to waive notice, time, and issuance of commission to take a deposition of plaintiff therein as evidence on the trial, and agreed that the answers to the interrogatories might be taken on the original and cross interrogatories before any officer authorized by law to take the same in the county where plaintiff might be found, a notary public of the county where plaintiff was found was authorized to take his deposition, making the deposition legal, and plaintiff guilty of perjury on giving false answers to the interrogatories. *Manning v. State*, 81 S. W. 957, 46 Tex. Cr. App. 326.

County Attorney.—Code Cr. Proc. 1895, arts. 34, 35, authorize county and district attorneys to take affidavits that an offense has been committed and to prepare pleadings, etc. Article 36 authorizes them, for the purpose men-

tioned in the two preceding articles, to administer oaths. Article 391 authorizes the issuance of process to bring witnesses before the court to examine into violations of the gaming laws, and authorizes county and district attorneys to cause such process to issue, and, when the same has been done, under art. 941 the examining court may investigate the matter and interrogate witnesses under oath. Held, that where, after a raid upon a residence where gambling was supposed to be going on, one of the persons found in the house was sworn by the county attorney and interrogated, his answers to the questions were no basis for a prosecution for perjury, as the attorney had no authority to proceed with such an investigation as a court of inquiry. *Williams v. State*, 96 S. W. 47, 50 Tex. Cr. App. 269.

Under Pen. Code, art. 203, providing that, in order to sustain a prosecution for perjury, the oath must be administered as required by law, and by some person duly authorized to administer the same in the matter in which such oath is made, an affidavit before a county attorney charging the commission of an aggravated assault by a third person may be made the predicate of perjury; such affidavit being authorized in prosecution of misdemeanors under Code Cr. Proc., arts. 34, 35. *Rambo v. State*, 64 S. W. 1039, 43 Tex. Cr. App. 271.

4. Administration, Form, and Making of Oath or Substitute Therefor.

Form of Oath.—Where, on an examination before a justice of the peace, he administered an oath to a witness, "Do you solemnly swear, * * * concerning the penal laws of Texas," it was a sufficient oath on which to predicate perjury, though he might have added, "touching violations of the penal laws." *Clay v. State*, 52 Tex. Cr. App. 555, 107 S. W. 1129.

Failure to Administer Oath.—On a prosecution for perjury, the court, after charging that, if defendant was sworn and made the false statements relied on, it would be perjury, instructed that, if the justice of the peace before whom it was charged that defendant testified falsely did not administer an oath, defendant should be acquitted. Held, that there was no error in the latter instruction. *Clay v. State*, 52 Tex. Cr. App. 555, 107 S. W. 1129.

5. Materiality of Testimony or Assertion.

See post, "What Constitutes Materiality," I, B, 5, c; "Materiality of Testimony or Assertion," II, A, 6.

a. Necessity That Testimony Be Material.

(1) In Perjury.

Assignments of perjury must be in regard to a material matter. *Rohrer v. State*, 13 Tex. Cr. App. 163, 168; *Martinez v. State*, 7 Tex. Cr. App. 394; *Williams v. State*, 28 Tex. Cr. App. 301, 302, 12 S. W. 1103; *Weaver v. State*, 34 Tex. Cr. App. 554, 555, 31 S. W. 400; *Butler v. State*, 36 Tex. Cr. App. 483, 486, 38 S. W. 46; *Mattingly v. State*, 8 Tex. Cr. App. 345, 348; *Donohoe v. State*, 14 Tex. Cr. App. 638; *Wynne v. State*, 60 Tex. Cr. App. 660, 133 S. W. 682.

Under Pen. Code, art. 193, declaring that the statement of any circumstance wholly immaterial to the matter in respect to which the declaration is made is not perjury, the matter assigned as perjury must be material to the issue on the trial of which the defendant was sworn as a witness, but the degree of materiality is of no importance. *Williams v. State*, 28 Tex. Cr. App. 301, 12 S. W. 1103.

By the express provisions of the Pen. Code, art. 193, the statement of any circumstance wholly immaterial to the matter in respect to which the declaration is made is not per-

jury. *Martinez v. State*, 7 Tex. Cr. App. 394.

Evidence offered to impeach a witness on an immaterial matter can not afford a basis for a prosecution for perjury, though such evidence is admitted without objection. *McAvoy v. State*, 39 Tex. Cr. App. 684, 47 S. W. 1000.

(2) In False Swearing.

Any false swearing as to anything past or present makes one guilty of false swearing without regard to its materiality. *Wilson v. State*, 93 S. W. 547, 49 Tex. Cr. App. 496. See ante, "False Swearing," I, A, 2, b.

b. Degree of Materiality.

The degree of materiality is of no importance. *Lawrence v. State*, 2 Tex. Cr. App. 479; *Williams v. State*, 28 Tex. Cr. App. 301, 12 S. W. 1103.

Defendant was prosecuted for perjury in testifying, on the trial of one accused of assault with intent to murder, that the accused was at his own residence, two and one-half miles distant from the place of the assault, from six to nine o'clock on the evening of the assault, which was alleged to have taken place between eight and nine o'clock. Held, that it was not necessary to prove that the assault occurred between eight and nine o'clock; but the jury would be authorized to convict defendant, if it was shown that the testimony that the accused was at his home between six and nine o'clock was false, and not made through inadvertence, or by agitation or mistake. *McCoy v. State* (Cr. App.), 73 S. W. 1057.

c. What Constitutes Materiality.

See post, "Materiality of Testimony or Assertion," II, A, 6.

(1) In General.

Instances of Testimony Held Material.—Though the blow was struck in self-defense, it was material and perjury to swear that the blow was

not struck. *Hutcherson v. State*, 33 Tex. Cr. App. 67, 74, 24 S. W. 908.

On the trial of one under an indictment charging him with an assault on K. with intent to murder, it may become material whether he gave C. a stick with which C. struck K., as a person present aiding and acting is properly charged as a principal; so that defendant's testimony therein that he did not give C. a stick may be the basis of an indictment for perjury *Henry v. State*, 63 S. W. 642, 43 Tex. Cr. App. 176.

Statements on which a prosecution for perjury is founded are material when they were part of the testimony given by accused in an examining trial of N. for stealing R.'s hogs, and were to the effect that he saw N. driving a number of hogs belonging to R., and that he was driving them in the county in which the trial was being held. *Martinez v. State*, 46 S. W. 826, 39 Tex. Cr. App. 479.

Defendant, in testifying at the trial of one accused of stealing cattle that he and the accused had driven the cattle from one pasture to another belonging to the latter, and had there branded them, and that they were not branded before, had contradicted the testimony of the owner of the cattle that they were branded at the time he saw them in the first pasture. Held, that this statement by him was material on the former trial. *Craven v. State*, 33 Tex. Cr. App. 557, 28 S. W. 472.

An indictment of M. for perjury alleged that M. swore that he saw W. "kill the steer about four months ago," and, in the traverse, that said W. "did not kill said steer at the time and place alleged by M. Held, that this did not negative the fact that W. killed the steer, and accordingly that the assignment of perjury was on a merely immaterial statement. *Martinez v. State*, 7 Tex. Cr. App. 394, overruled in *Jordan v. State*, 47 Tex. Cr. App. 133, 83 S. W. 821

Where perjury is assigned upon testimony of defendant charged with cattle theft that he had put the brand upon the cattle after same were put in his pasture, and other witnesses prove that the brand was on the cattle before that time, the court should charge that such testimony was material. *Scott v. State*, 35 Tex. Cr. App. 11, 29 S. W. 274.

In a prosecution for perjury in giving false testimony upon an investigation by a justice of the peace as to the playing of games of chance for money at a place other than a private residence, the fact that the question in response to which the alleged false testimony was given did not state that the playing inquired about was not a private residence did not prevent the answer from being material to the inquiry, so as to constitute perjury. *Foreman v. State*, 85 S. W. 809, 47 Tex. Cr. App. 179.

Under Pen. Code 1895, art. 388, prohibiting the playing of craps at a place other than a private residence, whether defendant had "seen" certain parties playing was not a material inquiry, which could be made the subject of prosecution for perjury. *Barton v. State*, 95 S. W. 110, 50 Tex. Cr. App. 161.

Where the issue in a prosecution for gaming was whether the house had a roof, without which it would not be an outhouse, as alleged in the indictment, and defendant testified that its roof was about two-thirds gone, for which testimony he was prosecuted for perjury, there was no error in charging that the fact as to which he testified was material. *Jernigan v. State*, 63 S. W. 560, 43 Tex. Cr. App. 114.

The main defense to an action on a liquor dealer's bond was that, while defendant had procured a license and given the bond for the use of another in carrying on the business, the license had at a certain date been transferred to another town, and that if the busi-

ness had since that date been resumed at the original place it had been without his knowledge and consent, and the license had been taken clandestinely. Held, that this defense made it material to show that the business had been resumed with defendant's knowledge and consent, and that he was in fact interested in it, and hence a prosecution for perjury was properly predicated on the false statements by defendant to the effect that he had no knowledge of the business. *McLeod v. State* (Cr. App.), 75 S. W. 522.

Instances of Testimony Held Immaterial.—In an action by S. against E. for half commissions on a sale of land, which E. claimed to have sold without the intervention of S., testimony of the purchaser denying that he told E. that S. told him that he had washed his hands of the affair, not being material to S.'s right to recover, afforded no ground for a charge of perjury. *Misener v. State*, 34 Tex. Cr. App. 588, 31 S. W. 858.

In an action by S. against E. for half commission on a sale of land, testimony of the purchaser denying that E. told him that he could go away, if he was not willing to buy the land, "independent of what S. had said or done," not being material to S.'s right to recover, afforded no ground for a charge of perjury. *Misener v. State*, 34 Tex. Cr. App. 588, 31 S. W. 858.

(2) Test of Materiality.

See post, "Question for Jury," II, C, 1.

Influencing Tribunal.—In a prosecution for perjury if the false statement is alleged to be material or so appears from facts stated in the indictment, the statement will be deemed material if the proof shows it could have properly influenced the tribunal investigating the case. *Martin v. State*, 33 Tex. Cr. App. 317, 26 S. W. 400.

To constitute perjury, it is not necessary that the particular fact sworn to should be immediately material to

the issue; when the incidental matter is calculated to incline the jury to give more credit to the substantial fact, it will sustain a conviction of perjury, if willfully false. *Frazier v. State*, 61 Tex. Cr. App. 647, 135 S. W. 583; *Williams v. State*, 28 Tex. Cr. App. 301, 302, 12 S. W. 1103; *Pyles v. State*, 47 Tex. Cr. App. 435, 83 S. W. 811; *Davidson v. State*, 22 Tex. Cr. App. 372, 3 S. W. 662; *Maroney v. State*, 45 Tex. Cr. App. 524, 78 S. W. 696.

Affecting Damages or Imparting Credit to Evidence.—False testimony is deemed material, so as to be the basis of an assignment of perjury not only when directly pertinent to the issue tried, but also if it tended to augment or diminish damages, or to impart greater credit to substantial parts of the evidence. The degree of materiality is of no importance. *Lawrence v. State*, 2 Tex. Cr. App. 479.

Perjury may consist not only in false and corrupt testimony relative to the main fact immediately at issue, but also in such testimony relative to material circumstances which tend to prove that issue, and irrespective of the truth or falsity of the main fact at issue. *Bradberry v. State*, 7 Tex. Cr. App. 375; *Pyles v. State*, 47 Tex. Cr. App. 435, 83 S. W. 811; *Davidson v. State*, 22 Tex. Cr. App. 372, 3 S. W. 662, 664.

Sustaining Issue or Changing Punishment.—It is not necessary that the testimony should of itself be sufficient to sustain the issue in the case in which the witness is called, or that it should change the mode of punishment if in a criminal case. If it is pertinent to the issue it is sufficient. *Pyles v. State*, 47 Tex. Cr. App. 435, 83 S. W. 811; *Davidson v. State*, 22 Tex. Cr. App. 372, 376, 3 S. W. 662.

Material Circumstances.—The rule is that "a party not only commits perjury by swearing falsely and corruptly as to the fact which is immediately in

issue, but also by swearing falsely and corruptly as to material circumstances tending to prove or disprove such fact; and this without reference to the question whether such fact does or does not exist. It is much perjury to establish the truth by false testimony as to maintain a falsehood by such testimony." *Bradberry v. State*, 7 Tex. Cr. App. 375; *Davidson v. State*, 22 Tex. Cr. App. 372, 3 S. W. 662, 664; *Downing v. State*, 61 Tex. Cr. App. 519, 136 S. W. 471, 473; *Pyles v. State*, 47 Tex. Cr. App. 435, 83 S. W. 811.

Prima Facie Effect.—"Swearing to a falsehood necessarily and absolutely ineffective is not perjury; but it is otherwise when the falsehood is capable of a prima facie, though only temporary, effect." *Hernandez v. State*, 18 Tex. Cr. App. 134, 148.

(3) Materiality of Affidavits and Statements Therein.

Affidavit to Secure Marriage License.—Upon trial of an indictment against A. for falsely swearing, in applying for a marriage license, that his financee was eighteen years of age, false testimony given by B. that the girl picked cotton with him thirteen years before, and was then a big girl, is perjury. *Davidson v. State*, 22 Tex. Cr. App. 372, 3 S. W. 662.

The making of a false affidavit in order to secure the issuance of a marriage license will support an assignment for false swearing against the affiant, but not for perjury. But the false statement, under oath, by a witness on the trial of the affiant for false swearing, will support an assignment of perjury against the witness. *Davidson v. State*, 22 Tex. Cr. App. 372, 3 S. W. 662. See ante, "Administrative Proceedings," I, B, 2, b.

Affidavit for New Trial.—In a prosecution for perjury, based on an affidavit for a new trial made by defendant in an action against him on a convict bond, in which he denied executing the bond, the fact that the number

of the case in which the bond was given was incorrectly stated therein is no defense, it not being shown that the bond was intended to be given in any other case than the one in which it was filed. *Powell v. State*, 37 S. W. 322, 36 Tex. Cr. App. 377.

The indictment for perjury alleged that, G. H. having been convicted of assault with intent to murder S. H., defendant, in support of G. H.'s motion for a new trial, made a false affidavit that, a few minutes after the assault S. H. told him that she was not hurt much, and that on the next day she said that the most that hurt her was her thumb, and that she then proposed to accompany him to a party that night. Held that, as bearing on intent of G. H. in making the assault, the statements in the affidavit were material to the issue on the motion for a new trial. *Kemp v. State*, 28 Tex. Cr. App. 519, 13 S. W. 869.

(4) Oath as to Account or Claim Sued on.

Action on Insurance Policy.—Insured in a fire policy assigned it after a loss to defendant, who assigned it to another, who sued on it, and on the trial defendant testified that at the time of the assignment insured was indebted to him. Held, that on a prosecution for perjury based on such testimony, where the indictment alleged in general terms that the testimony was material could not be regarded as material on the ground that it tended to show that insured burned the building, there being no evidence that insured owed any debts. *Maroney v. State*, 78 S. W. 696, 45 Tex. Cr. App. 524.

After a loss insured in a fire policy assigned the policy to defendant, who assigned it to one who sued on it, and on the trial defendant falsely testified that the insured at the time of the assignment was indebted to him. On a prosecution against defendant for perjury the indictment alleged that the

testimony was on a material issue, inasmuch as the transfer was for the purpose of defrauding the creditors of insured. Held, that the testimony was not material, there being no evidence that insured owed any debts. *Maroney v. State*, 78 S. W. 696, 45 Tex. Cr. App. 524.

The testimony was not material because of a clause in the policy to the effect that any fraud or false swearing concerning the insurance should render the policy void, since such provision had relation only to the insurer. *Maroney v. State*, 78 S. W. 696, 45 Tex. Cr. App. 524.

The testimony was not material as tending to mislead the insurer as to the ownership, in the absence of any showing of any creditors of the insured. *Maroney v. State*, 78 S. W. 696, 45 Tex. Cr. App. 524. See the title INSURANCE, vol. 4, p. 630.

Action on Note.—In a suit on a note defendant's false testimony that he did not sign the note is not material, where no plea of non est factum and no affidavit of the nonexecution of the note were filed, as required by statute; and hence such testimony is insufficient to base a prosecution for perjury thereon. *Garrett v. State*, 39 S. W. 108, 37 Tex. Cr. App. 198.

Where, in a suit by accused as indorsee of a note, he claimed and sought to use evidence that A., from whom he procured the note, had not signed the same until he did so at the request of accused at the time of transfer, as a circumstance to prove that accused was an innocent purchaser, and accused testified to such fact solely to prove that he was an innocent purchaser, the fact as to when A. signed the note was sufficiently material to be the subject of an assignment of perjury. *Downing v. State*, 61 Tex. Cr. App. 519, 136 S. W. 471. See the title BILLS, NOTES AND CHECKS, vol. 1, p. 667.

(5) Testimony before Grand Jury.

See ante, "Perjury," I, A, 2, a.

Necessity of Materiality.—Statements of persons testifying before the grand jury can not form the basis of a prosecution for perjury unless such statements are material in some manner to the investigation being had, since the testimony taken before a grand jury is required for the ends of public justice and its materiality must be measured by the subject-matter under investigation, and if the matter be investigated is innocent of the law then the statement should not be held materially false though in fact it is untrue. *Weaver v. State*, 34 Tex. Cr. R. 554, 31 S. W. 400.

Matter Not an Offense.—Where the grand jury had under investigation a matter which was not an offense, perjury could not be predicated on testimony delivered during such an investigation. *Gallegos v. State*, 50 Tex. Cr. App. 190, 95 S. W. 123.

False statement of defendant at investigation of criminal charge before grand jury which could not have affected guilt or innocence of accused parties is not sufficiently material to be assigned as perjury. *Brooks v. State*, 29 Tex. Cr. App. 582, 584, 16 S. W. 542.

A charge that defendant untruly testified before the grand jury that he had not purchased nor seen any one purchase intoxicating liquors in a certain town on Sunday for two years is insufficient, since the statute (Pen. Code, art. 186) makes Sunday sales criminal only when made by certain traders, and the mere sale on Sunday, not in violation of the statute, can not constitute a material inquiry for the grand jury. *Meeks v. State*, 32 Tex. Cr. App. 420, 24 S. W. 98.

Effect of Prior Complaint before Justice.—That, at the time one testified before a grand jury relative to a gaming transaction, complaint had been made before a justice on account of the same transaction, did not prevent such testimony from being a basis for prosecution for perjury, on the

ground that the matter was taken from the jurisdiction of the grand jury by such pending complaint. *Wilks v. State* (Cr. App.), 66 S. W. 787.

Testimony by Husband.—Testimony by a husband, before a grand jury, that a certain person, whom he accused of rape of his wife, submitted, through another, a proposition to pay him a certain sum, if he would drop the matter, and say no more about it, was material, and could be assigned as perjury. *Butler v. State*, 38 S. W. 46, 36 Tex. Cr. App. 483.

(6) Matters Affecting Character or Credit of Witness.

General Rule.—Perjury may be assigned upon a false statement affecting only a collateral issue, as that of the credit of the witness. *Washington v. State*, 22 Tex. Cr. App. 26, 3 S. W. 228; *Williams v. State*, 28 Tex. Cr. App. 301, 302, 12 S. W. 1103.

Perjury may be predicated on a false answer of a witness that he had never been convicted of a felony, as such answer affects his credibility, and is therefore material to the issue, within Pen. Code, art. 193. *Williams v. State*, 28 Tex. Cr. App. 301, 12 S. W. 1103.

In an indictment for perjury, the main fact under investigation can never properly be charged as being material; facts tending to elucidate and settle the main fact, and character and credibility of witnesses are material. *Buller v. State*, 33 Tex. Cr. App. 551, 553, 28 S. W. 465.

Where, pending investigation of a charge of seduction accused has a conversation with a witness before he appears before the grand jury, and the conversation or the fact of the conversation would discredit the witness' testimony in the case, the truth thereof was a material inquiry for the grand jury, and any false testimony given by the witness on that matter would sustain a charge of perjury. *McVicker v.*

State, 52 Tex. Cr. App. 508, 107 S. W. 834.

On trial of a prosecution for assault, a witness testified that the one who committed the assault was a small man, defendant being a large man; and in answer to a question on cross-examination denied that he had stated to certain persons, shortly after the assault, that the one making it was a large man. Held, that the answer was material, and assignable as a predicate for perjury. *George v. State*, 51 S. W. 378, 40 Tex. Cr. App. 646, denying rehearing 50 S. W. 374, 40 Tex. Cr. App. 646.

Evidence Too Remote.—In a prosecution for crime, evidence that defendant had sixteen years before been convicted of forgery was too remote to affect the credibility of defendant as a witness, and hence false testimony by defendant that he had not been so convicted was not material, and not sufficient foundation for a prosecution for perjury. *Busby v. State*, 86 S. W. 1032, 48 Tex. Cr. App. 83.

(7) Incompetency of Witness or Testimony and Waiver Thereof.

Though the testimony taken at an examining trial should be reduced to writing, as directed by the Code of Procedure, yet perjury may be assigned upon oral testimony taken, but not reduced to writing, in such trial. *Covey v. State*, 23 Tex. Cr. App. 388, 5 S. W. 283.

(8) Testimony as to Statements Made Elsewhere.

If, on a criminal prosecution, a witness gave certain testimony, and on cross-examination falsely testified that he had not previously made statements contradicting his testimony, on a prosecution for perjury it is immaterial that the contradictory statements were not made on oath. *George v. State*, 50 S. W. 374, 40 Tex. Cr. App. 646.

(9) Testimony before County Attorney.

Where an indictment for perjury charged that accused had testified before a county attorney that he did not see a certain violation of the gaming laws, it was not necessary to reduce such examination to writing, under Code Cr. Proc., art. 34, requiring a complaint made before a county attorney for an offense committed within his county to be reduced to writing, since such statement could not form the basis of the complaint. *Bailey v. State*, 53 S. W. 117, 41 Tex. Cr. App. 157.

6. Falsity of Testimony or Assertion and Knowledge Thereof.

See ante, "Intent," I, B, 1.

Statement Made by Mistake.—The Texas Code declares that a false statement, made through inadvertence, or under agitation or by mistake, is not perjury. *Freeman v. State*, 44 Tex. Cr. App. 496, 72 S. W. 1001, 1002; *Hill v. State*, 22 Tex. Cr. App. 579, 3 S. W. 764; *Davidson v. State*, 22 Tex. Cr. App. 372, 3 S. W. 662; *Brown v. State*, 9 Tex. Cr. App. 171; *Mason v. State*, 57 Tex. Cr. App. 319, 122 S. W. 871; *Sisk v. State*, 28 Tex. Cr. App. 432, 436, 13 S. W. 647.

To constitute perjury the statement made must not only be false but the person making it must know it to be so. If the witness testified under an honest mistake or misapprehension and believed that what he testified to be true, conviction can not be had, though the statement be false. *Butler v. State*, 36 Tex. Cr. App. 444, 37 S. W. 746; *Hill v. State*, 22 Tex. Cr. App. 579, 3 S. W. 764; *Brookin v. State*, 27 Tex. Cr. App. 701, 11 S. W. 645; *Aguierre v. State*, 31 Tex. Cr. App. 519, 520, 21 S. W. 256.

Defendant, being drunk or feigning drunkenness, was taken home and laid on the bed by two of his tenants, who knew he had money on his person. On awaking, he found that his money

was gone, and made inquiry of his wife and one of the tenants, who was sleeping in the house. On his prosecuting further inquiries, one of the tenants fled the country, after telling defendant's son that the other had gotten him into all the trouble, and now had defendant's money. Relying on these facts, defendant made an affidavit for a search warrant, charging the tenants with the theft of his money, and was indicted for alleged perjury contained therein. Held error not to give an instruction that, if defendant believed at the time he made the affidavit that the statements were true, he should be acquitted. *Luna v. State*, 72 S. W. 378, 44 Tex. Cr. App. 482.

It was error not to give an instruction that, if defendant believed he had reasonable grounds upon which to predicate the affidavit that his tenants took the money, he should be acquitted. *Luna v. State*, 72 S. W. 378, 44 Tex. Cr. App. 482.

Where on a trial for perjury, accused testified that he had been sick some time before he gave his testimony, that if he had ever received the money which the witnesses testified he did receive, and which he denied receiving, he did not remember it, that his memory was not good, and that it was more than four years since the money was claimed to have been paid him, the refusal to charge the substance of Pen. Code 1895, art. 202, that a false statement, made through inadvertence, or under agitation, or by mistake, is not perjury, was error. *Mason v. State*, 57 Tex. Cr. App. 319, 122 S. W. 871.

Where, on a trial for perjury based on accused falsely testifying in a civil action between third persons that he had dug a well 54 feet deep, the evidence was conflicting, and several witnesses testified that, if a well was left standing for a year or more without casing, the same would run together, a charge that if accused dug a well

fifty-four feet deep, and it filled up or there was a reasonable doubt thereof, accused must be acquitted, and, if employees of accused drilled a well fifty-four feet deep, accused was not guilty, and if he had been informed by his employees that the well was fifty-four feet deep, and he believed the statement, he was not guilty, etc., was sufficient. *Green v. State*, 60 Tex. Cr. App. 530, 132 S. W. 806.

Where Witness Knows Nothing of What He Swears.—The fact that a defendant may know at the time he makes a statement that it is false may be shown in evidence to establish his intent at the time; that is, that he swore falsely, willfully, and corruptly. But, according to the common-law authorities, this is no part of the definition of perjury; for the person may be guilty of perjury by swearing to a matter about which he has no knowledge, whether true or false. Mr. Bishop, citing authorities on this subject, uses the following language: "Consistently with this doctrine of the specific intent, it is held that, if a man swears to a thing whereof consciously he knows nothing, he commits perjury, 'although,' adds Reade J., 'he believes it to be true, and although it turns out to be true.' For the declaration of a witness is that he knows the truth of what he states, and, if he is conscious he does not know it, he means to swear falsely, however the fact may prove to be." See 2 Bish. New Cr. Law, § 1048, subd. 2. As heretofore stated, our statute on this subject does not change the rule. *Ferguson v. State*, 36 Tex. Cr. App. 60, 35 S. W. 369.

But see *Gibson v. State* (Cr. App.), 15 S. W. 118, where it is said: To constitute perjury, defendant must have known his statements to be false, and it is not enough that he did not know them to be true.

Opinion.—The general rule is thus stated in 30 Cyc. 1405: "Where the

statement which is the basis of the accusation is a matter of construction, or a deduction from given facts, the fact that it is erroneous, or is not a correct construction, or is not a logical deduction from all the facts, can not constitute it perjury or false swearing. A witness can not be guilty of perjury in giving his own opinion as to the effect of facts about which he is required to testify. Thus, a misconception or mistake in swearing to the construction of a written instrument is not sufficient to warrant a conviction of perjury." To the same effect is Mr. Bishop (Volume 2, § 1040), where he says: "Growing, it may be, out of the difficulty of proof, the doctrine is laid down that perjury can not be committed in testimony to the legal construction of a written instrument." *Schoenfeld v. State*, 56 Tex. Cr. App. 103, 119 S. W. 101.

Reply to General Question.—In a civil action against a railroad company for personal injuries plaintiff therein was asked if he had ever before claimed damages from any railroad company for personal injury, and if he had received any money for any such injury. He testified that he had never before claimed any damages from any railroad company, and denied receiving any money from any railroad company. Held that, such answer being false, it was a sufficient basis for a prosecution for perjury, though the attention of the witness was not called to any specific claim or injury. *McDonough v. State*, 84 S. W. 594, 47 Tex. Cr. App. 227, 122 Am. St. Rep. 684. See ante, "Perjury," I, A, 2, a.

False Statements in Affidavit.—One can not be convicted for perjury in making false statements in an affidavit, written in a language not understood by him, where he is shown to be illiterate, and signed the affidavit by making his mark, and there is no competent evidence satisfactorily showing that he knew the contents of the affi-

davit at the time he made it. *Hernandez v. State*, 18 Tex. Cr. App. 134, 156.

To authorize a conviction for perjury on a false statement in an affidavit made by a markman, it must be proved that affiant knew and understood the statements set out in the affidavit and alleged to be false, especially where the affidavit is in a language not understood by affiant. *Hernandez v. State*, 18 Tex. Cr. App. 134, 155.

Drunkenness.—In a trial for perjury, the court should not only admit evidence of drunkenness, but should instruct the jury that they should, in passing upon whether defendant, without agitation, willfully and deliberately made a false statement, look to all the evidence, including that relating to drunkenness, in connection with other testimony tending to show the condition of the mind of the accused. *Lyle v. State*, 31 Tex. Cr. App. 103, 118, 19 S. W. 903.

7. Defenses.

Constitutional Right.—One's constitutional right not to be compelled to give evidence against himself may be waived, and confers no immunity for false testimony. *Mattingly v. State*, 8 Tex. Cr. App. 345.

Refusal of Continuance.—The fact that a continuance was erroneously refused a defendant when on trial for theft is no defense in a prosecution for perjury committed by him when before the examining court upon such charge. *Murphy v. State*, 33 Tex. Cr. App. 314, 26 S. W. 395.

8. Persons Liable.

See ante, 'Definition of Offense,' I, A.

Ex-Convict.—An ex-convict testifying falsely in his own behalf on a prosecution can be convicted of perjury. *Murphy v. State*, 33 Tex. Cr. App. 314, 26 S. W. 395.

Voluntary Testimony.—Where a party to a transaction under investiga-

tion by a grand jury appears, whether voluntarily or otherwise, before that body, and testifies, he may be convicted of perjury, where it does not appear from the indictment or from the evidence of defendant that the false statement was made by him while testifying under compulsion to facts tending to criminate himself. *Pipes v. State*, 26 Tex. App. 318, 9 S. W. 614.

II. Prosecution and Punishment.

A. INDICTMENT OR INFORMATION.

1. Requisites and Sufficiency in General.

a. Form and Requisites.

See the title INDICTMENT AND INFORMATION, vol. 4, p. 239.

Setting Out Essential Elements.

Indictments for perjury should specify the facts essential to the offense, to wit, (1) the judicial proceeding or due course or justice in which the oath was taken; (2) the lawful taking of the oath; (3) the testimony given; (4) its materiality to the issue; and (5) its wilful falsehood. *Watson v. State*, 5 Tex. Cr. App. 11; *Brown v. State*, 9 Tex. Cr. App. 171, 172; *West v. State*, 8 Tex. Cr. App. 119; *Cox v. State*, 13 Tex. Cr. App. 479; *Anderson v. State*, 56 Tex. Cr. App. 360, 120 S. W. 462; *Cravey v. State*, 33 Tex. Cr. App. 557, 28 S. W. 472.

An indictment for perjury, which shows the court in which the proceedings were had, and alleges sufficient to show the materiality of the testimony on which the perjury was based, is good. *Adellberger v. State* (Cr. App.), 39 S. W. 103.

An indictment for perjury is good if each of the essential constituents of the offense, as defined in the code, are alleged in plain and intelligible words. *Allen v. State*, 42 Tex. 12; *Bradberry v. State*, 7 Tex. Cr. App. 375; *Brown v. State*, 9 Tex. Cr. App. 171; *Powers v. State*, 17 Tex. Cr. App. 428, 436; *State v. Peters*, 42 Tex. 7;

Turner v. State, 30 Tex. Cr. App. 691, 692, 18 S. W. 792; *West v. State*, 8 Tex. Cr. App. 119, 122; *Ferguson v. State*, 36 Tex. Cr. App. 60, 62, 35 S. W. 369.

The indictment must state the acts and things done and said by defendant, with such facts and circumstances connected with them, with such fullness and particularity for it to appear plainly and intelligibly that the matter where-with he is charged contains these essential constituents in the definition of the offense. *State v. Peters*, 42 Tex. 7, 8; *Mattingly v. State*, 8 Tex. Cr. App. 345, 349; *Smith v. State*, 1 Tex. Cr. App. 620, 624.

Following Statutory Form.—An indictment for perjury which conforms to No. 122 of Willson's *Crim. Forms* is sufficient. *Smith v. State*, 27 Tex. Cr. App. 50, 10 S. W. 751; *Parker v. State*, 25 Tex. Cr. App. 743, 750, 9 S. W. 42.

Omission of any constructive element of perjury, as defined by art. 1909, *Paschal's Digest*, is fatal to the indictment. *State v. Webb*, 41 Tex. 67, 71.

An indictment for perjury alleging the character of the issue joined between the parties in the suit in which the perjury is alleged to have been committed is sufficient, when made in accordance with the approved forms. *Garrett v. State*, 37 Tex. Cr. App. 198, 38 S. W. 1017, 39 S. W. 108.

Common Sense Form.—The form of an indictment for perjury prescribed by the common-sense indictment act is insufficient and invalid. *Gabrielsky v. State*, 13 Tex. Cr. App. 428, 439.

Statute of 23 George II prescribing requisites of indictment for perjury is binding as common law, on courts of Texas. *St. Clair v. State*, 11 Tex. Cr. App. 297, 300.

Intendment will not be called in to aid an indictment for perjury. *State v. Webb*, 41 Tex. 67, 72; *Anderson v. State*, 18 Tex. Cr. App. 17, 18.

b. Sufficiency.

Instances of Indictments Held Sufficient.—An indictment for perjury examined and held sufficient. *Luna v. State*, 44 Tex. Cr. App. 482, 72 S. W. 378.

An indictment for perjury, which alleges that a certain statement was material in the trial on which it was made under oath, and charges that such statement was false, is good. *Craven v. State*, 33 Tex. Cr. App. 557, 28 S. W. 472.

An indictment for perjury charging that defendant did, in a certain judicial proceeding, describing it, unlawfully, knowingly, willfully, and deliberately make, testify, and give in evidence certain statements, specifying them, which statements were false, as defendant well knew. Held sufficient. *Cox v. State*, 13 Tex. App. 479.

An indictment charging defendant with perjury in testifying that he did not, during a certain year, see certain named persons bet money upon a game at or near a certain place, stated the time, place, and parties with sufficient certainty. *Foreman v. State*, 85 S. W. 809, 47 Tex. Cr. App. 179.

An indictment for perjury, charging that defendant testified before the county court that M. and others named in the averments of perjury did not play at a certain game of cards, and that his testimony was false, was sufficient. *Stanley v. State* (Cr. App.), 95 S. W. 1076.

An indictment for perjury which alleges that defendant was tried on an information charging him with playing at a game with cards is not defective for failing to allege the character of the game played. *Curtis v. State*, 81 S. W. 29, 46 Tex. Cr. App. 480.

In an indictment for perjury, an assignment that it became a material inquiry whether defendant had not seen any person "bet or wager at a game, played with cards, called 'monte,'" is not objectionable, on the ground that

the game mentioned is a banking game, it appearing that it is played with cards. *Fry v. State*, 38 S. W. 168, 36 Tex. Cr. App. 582.

An indictment charging that accused testified before a grand jury which investigated gambling transactions occurring at his residence, which was a common resort for gaming, that no games were played there within his knowledge, and charging that games had been played there between specified parties, sufficiently charges perjury. *Gonzales v. State*, 54 Tex. Cr. App. 230, 112 S. W. 941.

Where accused had falsely sworn under an examination before a county attorney that he had not seen certain persons play any game with cards, it was not necessary, in an indictment charging him with perjury, to set out the particular game played, since it was not necessary to state the game played, in a complaint for gaming. *Bailey v. State*, 53 S. W. 117, 41 Tex. Cr. App. 157.

An indictment for perjury charged that on a certain day in the district court of B. county in a certain entitled cause one L. was tried for theft of a horse and duly convicted. On a certain day thereafter he filed his motion for a new trial and as a part and in support thereof H., after being duly and legally sworn by one D., duly elected, qualified, and acting as clerk of said district court and as such clerk legally authorized to administer oaths, then and there deliberately, willfully, corruptly, falsely, knowingly, voluntarily, and feloniously, under the sanction of his oath, made a false statement in writing under circumstances in which an oath was required by law and in and during the stage of a judicial proceeding in said district court. The indictment then set out the affidavit and in support of the motion for new trial signed by H. with his mark that it then became a material question on the hearing of said motion as to wheth-

er the allegations in said affidavit were true and that said H. knew such allegations were false and that in truth and fact the facts therein alleged were untrue and did not occur. Held, that the indictment was well drawn. *Hernandez v. State*, 18 Tex. Cr. App. 134.

Where an information disclosed that the material question was whether defendant charged money or other compensation for prescribing and giving drugs and medicine to D. at the time and place alleged in the information, an indictment for perjury alleging that the material question on such prior trial was whether defendant charged for prescribing and giving drugs and medicine to persons under his treatment was not objectionable for failure to name such persons or state the particular times and places, etc. *Collins v. State*, 51 Tex. Cr. App. 347, 101 S. W. 992.

Instances of Indictments Held Insufficient.—An indictment for perjury, which alleged that it was a material inquiry by the grand jury whether defendant had seen "a game played with cards in a certain outhouse situated in the town of Q., in H. county, Tex., on or about the 3rd day of October, 1896, when people did then and there resort," was bad for uncertainty in not defining the outhouse, nor giving the names of the persons. *Higgins v. State*, 43 S. W. 1012, 38 Tex. Cr. App. 539. See, also, *McMurtry v. State*, 38 Tex. Cr. App. 521, 43 S. W. 1010.

Under Rev. Civ. St., art. 5064, defining "money," as used in the provisions relating to taxes, to include deposits which the owner is entitled to withdraw in money on demand, an indictment for perjury in falsely listing the amount of money deposited in a bank is insufficient, which does not allege that the money was payable on demand. *Parker v. State*, 69 S. W. 75, 44 Tex. Cr. App. 147.

An indictment for perjury which alleges that defendant "state and testify,"

omitting the word "did," is fatally defective. *Menasco v. State* (Cr. App.), 11 S. W. 898.

c. Time.

At common law, an indictment for perjury must correctly allege the day on which the perjury was committed, and a variance between the time alleged in the indictment and the time proved would be fatal. *Lucas v. State*, 27 Tex. Cr. App. 322, 323, 11 S. W. 443.

Under the statute, an allegation as to time in an indictment for perjury is sufficient if it states the time anterior to the presentment of the indictment and not barred by limitation. *Lucas v. State*, 27 Tex. Cr. App. 322, 323, 11 S. W. 443.

An indictment charging defendant with perjury, in giving false testimony before the grand jury, in that he "did willfully and deliberately testify that the said M. [defendant] did not, * * * in the fall of 1896, or at any time from the 1st day of September, 1896, to the 15th day of March, 1897, play at a game with cards; that he did not see any person play at a game with cards"—is insufficient, as not alleging more definitely some time at which the alleged card playing took place, and some person, other than defendant, who played at such game. *McMurtry v. State*, 43 S. W. 1010, 38 Tex. Cr. App. 521.

d. Venue.

An indictment for perjury committed in giving false answers to interrogatories on the taking of a deposition, though failing to contain a direct allegation of venue, is not defective for failing to allege the venue, where it states the facts which occurred which show the place of the commission of the offense. *Manning v. State*, 81 S. W. 957, 46 Tex. Cr. App. 326.

Where an accused was indicted for perjury for falsely swearing on an examining trial wherein the evidence was reduced to writing, as the best evi-

dence as to what he testified would be contained in the examining trial evidence the indictment should be laid as therein stated. *Brown v. State*, 48 S. W. 169, 40 Tex. Cr. App. 48.

Allegation in an indictment for perjury held sufficient to charge the venue of the offense on trial in which the perjury is charged to have been committed. *Powers v. State*, 17 Tex. Cr. App. 428.

e. Joinder of Assignments.

See post, "Assignments of Perjury," II, A, 7.

Several Assignments.—It is competent for the pleader, in setting out an indictment for perjury, to present as many assignments upon material issues as he sees fit; but in such case the assignment should be distinct, and each assignment alleged to be material, and the same distinctly traversed. *Brown v. State*, 40 Tex. Cr. App. 48, 48 S. W. 169; *Harrison v. State*, 41 Tex. Cr. App. 274, 53 S. W. 863, 864.

An indictment containing two averments of perjury is not insufficient in alleging that defendant knew said "statement" to be false when he made "it." *Hollins v. State* (Cr. App.), 69 S. W. 594.

Proof of Either Sufficient.—Where there are several assignments of perjury in an indictment, a conviction may be predicated upon any of them, and it is not necessary to prove the others. *Simpson v. State*, 46 Tex. Cr. App. 77, 79 S. W. 530.

On a prosecution for false swearing to an affidavit by a chattel mortgagor on the making of a chattel mortgage on cattle, the affidavit having alleged the cattle unincumbered, the indictment charged that appellant was the lawful owner of the cattle described, to wit, was then and there the lawful owner of 386 head of steer cattle, three and four years old and upward, and was then and there the

lawful owner of 386 head of three and four year old Texas steers, branded T on left shoulder, * on left side, and Z on left thigh. Held that, conceding the indictment charged ownership of two different herds, the indictment was not bad, as the pleader could rely on proof of either. *Campbell v. State*, 68 S. W. 513, 43 Tex. Cr. App. 602.

Regarding one of the statements as explanatory, the indictment was not vague or indefinite. *Campbell v. State*, 68 S. W. 513, 43 Tex. Cr. App. 602.

Several Items in One Count.—An indictment for perjury may embrace all the items of an account to which the defendant falsely swore, in one count. *Rohrer v. State*, 13 Tex. Cr. App. 163, 167.

One Assignment Defective.—Where one of the assignments in an indictment for perjury is defective, it is not reversible error to refuse to quash the indictment, or to admit testimony upon the bad assignment. *Foreman v. State*, 85 S. W. 809, 47 Tex. Cr. App. 179.

Alternative Assignments.—An assignment of perjury predicated upon testimony that defendant had not seen any person bet or wager at a gaming table or bank kept or exhibited in a certain saloon, whereas he had seen "said Jim Love keep and exhibit a gaming table or bank for the purpose of gaming" is defective because laid in the alternative, the table and bank being different things. *Fry v. State*, 36 Tex. Cr. App. 582, 587, 37 S. W. 741, 38 S. W. 168.

2. Description of Proceeding in Which Oath Was Administered.

General Rule.—An indictment for perjury should state when and where the judicial proceeding was pending in which the alleged false statement was made, and whether it was made during an examination or on a trial under indictment. *State v. Oppenheimer*, 41 Tex. 82.

Where one was convicted of perjury, assigned upon his testimony given in

a mayor's court in a trial for a violation of a municipal ordinance, and the record does not set forth the ordinance, nor the affidavit or charge on which the trial was had, and does not contain proof of the mayor's jurisdiction to try the case in which the testimony was given, the judicial cognizance of the court of appeals can not be invoked to supply the omissions in the evidence, and the conviction will be set aside. *Lawrence v. State*, 2 Tex. Cr. App. 479.

Description of Proceedings before Justice of the Peace.—Under Code Cr. Proc., art. 941, providing that, when a justice of the peace believes that an offense has been or is about to be committed, he may summon and examine witnesses in relation thereof, etc., it is improper, in an indictment for perjury in the giving of false testimony in such a proceeding before a justice, to describe the proceeding as a "court of inquiry," but the language of the statute should be followed, and it should be alleged that the justice had good cause to believe that an offense had been committed (naming it), and, having jurisdiction to examine into the same, caused defendant to be examined as a witness. *Morris v. State*, 83 S. W. 1126, 47 Tex. Cr. App. 420.

An indictment for false swearing before a justice of the peace acting as assessor failed to charge that the accused resided or had property in the justice's precinct, or that he had been called upon to render his property for taxes, or to render to the justice as assessor a list of his property, which should be full, or that he had been sworn to answer such questions as should be put to him, and had made the alleged false statement in answer to a question so put. Held insufficient. *State v. Smith*, 43 Tex. 655.

Grand Jury.—An indictment for perjury before a grand jury need not show by direct affirmative allegation that the district court was in session

at the date of the alleged offense, the organization of the grand jury, the name of the foreman thereof, or that he administered the oath when the jury was in session. This could be shown by the records of the court. *St. Clair v. State*, 11 Tex. Cr. App. 297.

An indictment alleging that accused appeared before the duly-organized grand jury for a certain county, which was then in session, and of which a certain member was legally appointed foreman, is sufficient as against an objection that it does not allege that the grand jury was duly selected, impaneled, and sworn. *Flournoy v. State* (Cr. App.), 59 S. W. 902; *Vanvickle v. State*, 22 Tex. Cr. App. 625, 2 S. W. 642.

In a prosecution for perjury, an indictment charging that the perjury was committed in an investigation before the grand jury to determine whether certain persons unlawfully carried weapons at a certain place was sufficient, as charging that the acts-under investigation were in violation of law. *Francis v. State*, 57 Tex. Cr. App. 555, 123 S. W. 1114.

Information Only Sufficient.—An indictment for perjury which alleges that defendant was tried on an information presented in the county court is not defective for failing to allege that he was tried on an information and complaint. *Curtis v. State*, 81 S. W. 29, 46 Tex. Cr. App. 480.

Designation of Issue.—If an indictment for perjury shows by its allegations that the perjury was committed in a judicial proceeding in a court of competent jurisdiction, and describes the judicial proceeding with reasonable certainty, it need only allege in general terms that a certain issue was joined in said proceeding, and need not specifically allege what the issue was. *Covey v. State*, 23 Tex. Cr. App. 388, 5 S. W. 283.

Entry of Plea of Guilty.—An indictment for perjury, alleging that issue

was joined between the state and defendant in the trial of a certain case on which the charge of perjury was predicated, is sufficient, without an allegation that defendant entered a plea of not guilty. *Montgomery v. State* (Cr. App.), 40 S. W. 805.

Calling Ready for Trial.—An indictment charging defendant with perjury in making application for a continuance need not allege that the state had called ready for trial before the application was made, an allegation being sufficient that the cause was upon regular call. *Beach v. State*, 32 Tex. Cr. App. 240, 22 S. W. 976.

Local Option Law.—In an indictment for perjury alleged to have been committed on a prosecution for a violation of the local option law, it is not necessary to allege the method in which the local option law was put in force. *Kelley v. State*, 51 Tex. Cr. App. 507, 103 S. W. 189.

3. Jurisdiction and Authority to Administer Oath.

a. Jurisdiction of Court.

See ante, "Jurisdiction of Court," I, B, 3, a.

General Rule.—In a prosecution for perjury committed in a judicial proceeding, it must be made to appear by the allegations of the indictment that the court had jurisdiction of the judicial proceeding. *Wilson v. State*, 27 Tex. Cr. App. 47, 10 S. W. 749; *Anderson v. State*, 18, Tex. Cr. App. 17; *McDonough v. State*, 47 Tex. Cr. App. 227, 84 S. W. 594.

An indictment for perjury must allege that the oath assigned as perjury was administered by competent authority or by an authorized officer. *Stewart v. State*, 6 Tex. Cr. App. 184, 188.

In *State v. Webb*, 41 Tex. 67, 68, it was held that "an indictment for perjury which charges the false statement under oath to have been made on the trial of a party charged with

a criminal offense is bad if it fails to state that an indictment had been found against such party, or that the case in which the false statement was made was one over which the court trying it had jurisdiction." And in *State v. Oppenheimer*, 41 Tex. 82, it was held that an indictment for perjury should state when and where the judicial proceeding was pending in which the false statement was made, the name of the judge, court or officer before whom it was made, and whether it was made during an examination or on a trial under indictment. But we can not tell from the published report of either of said cases whether or not, as in the case at bar, there was in the indictments in said cases an allegation expressly, affirmatively and positively alleging that the court did have jurisdiction of the case in which the witness committed perjury. Most clearly, to our minds, both in reason and under the approved modern authorities, and especially under our codes, such allegation is not essential where the indictment does, as is the case here, allege in general terms that the court had jurisdiction to try the case; though, perhaps, it would be as well if not the better practice for the pleader to show how its jurisdiction was acquired, that is, whether by indictment or information. *Powers v. State*, 17 Tex. Cr. App. 428, 434.

Under Acts 1899, p. 40, c. 33, § 2, limiting the jurisdiction of corporation courts in criminal cases to those arising within the territorial limits of the city wherein the corporation court exists, an indictment for perjury, based on alleged false testimony given in a cause pending in a corporation court, charging the defendant therein with having played at a game of cards not at a private residence occupied by a family, etc., which does not charge that the game was played within the corporation limits, is insufficient, though it does charge that the game was played in the county in which the

corporation is located. *Moss v. State*, 83 S. W. 829, 47 Tex. Cr. App. 459.

Justice's Court.—An indictment charged that perjury was committed before a justice of the peace in a case wherein the state was plaintiff and one W. was defendant, and in which said W. was charged with unlawfully carrying a pistol. Held, that the indictment was fatally defective because it failed to allege or show that the justice court had jurisdiction of the offense charged. *Anderson v. State*, 18 Tex. Cr. App. 17.

Grand Jury.—Evidently in alleging jurisdiction of the grand jury the indictment should charge, first, that they were examining some particular case, the same being as offense under the laws of the state, etc., and, secondly, if they were not examining some particular offense, that body is authorized to inquire of the witness in general terms whether he has knowledge of violation of any particular law by any person; and, if so, what person. So that, in the latter contingency it should be shown in the pleadings that the violation of some particular law by some person was being inquired about; and that certain questions were asked in regard thereto. *McDonough v. State*, 47 Tex. Cr. App. 227, 84 S. W. 594.

b. Authority of Officer to Administer Oath.

Name and Authority.—An indictment for perjury must name officers who administered the oath and must in some form allege his authority to do so. *Jefferson v. State* (Cr. App.), 29 S. W. 1090, 1091.

Commission of Officer.—Through force of precedents, it had no doubt become an essential and necessary averment, in indictments for perjury in the English courts prior to the statute of 23 Geo. II, ch. 11, to charge that the oath on which the perjury is assigned, to have been taken before an officer authorized by law to administer it, and to show his authority for do-

ing so by setting out in the indictment a copy of his commission. But these precedents have never been followed or held of force in this state. This statute, as says Bishop, was not enacted to change the common-law form of indictments, but to get rid of prolix and embarrassing forms under which the better common-law form of indictment for this offense had been obscured and superseded by a series of precedents which tended much more to facilitate the escape of offenders than the security of innocent parties improperly indicted. *Allen v. State*, 42 Tex. 12; *State v. Peters*, 42 Tex. 7, 9.

Justice of the Peace.—An indictment for perjury committed in a trial before a justice of the peace in an action of forcible entry and detainer need not set out a copy of the commission of the justice. *State v. Peters*, 42 Tex. 7.

Under the code, an indictment for perjury need not allege the means whereby was acquired the magistrate's authority to administer the oath. It is sufficient to allege that he was a justice of the peace having authority to administer oaths. *Bradberry v. State*, 7 Tex. Cr. App. 375.

The provision of *Pasc. Dig.*, art. 1911, that to constitute perjury the oath must have been administered by some one "duly authorized," etc., does not require any allegation whereby the authority was acquired; as, for instance, the election, qualification, or commission of a justice of the peace. *Stewart v. State*, 6 Tex. Cr. App. 184.

An indictment for perjury committed in a trial before a justice of the peace, in an action of forcible entry and detainer, need not allege how his jurisdiction attached to the case; it being sufficient to allege that he was a justice, and had jurisdiction to try the case. *State v. Peters*, 42 Tex. 7.

An allegation that the officer before whom an alleged false affidavit was made "was a justice of the peace" was sufficient as to his official capacity.

Waters v. State, 30 Tex. Cr. App. 284, 17 S. W. 411.

Under *Sayles' Civ. St.*, art. 1535, which provides that each justice of the peace shall be commissioned a justice of the peace of his precinct and ex officio notary public of his county, etc., a jurat to an affidavit signed, "J. J. L., J. P. Precinct No. 5, Bell County Texas," sufficiently shows the officer's official capacity. *Waters v. State*, 30 Tex. Cr. App. 284, 17 S. W. 411.

The purport clause of an indictment for perjury, which alleges that the affidavit was signed by W. before J. J. L., "acting as justice of the peace and ex officio notary public," is not repugnant to the tenor clause, which showed the jurat was signed by J. J. L., "J. P. Precinct No. 5, Bell County, Texas." *Waters v. State*, 30 Tex. Cr. App. 284, 17 S. W. 411.

An objection that an indictment for perjury alleged to have been made before a justice of the peace fails to show he was authorized by law to administer oaths, is answered fully by an allegation that "he (the said J. J. L.) was then and there duly and fully authorized by law to administer oaths." *Waters v. State*, 30 Tex. Cr. App. 284, 17 S. W. 411.

An indictment for perjury alleged to have been committed at an inquest, charging that, anterior to the presentment of the indictment, in the county of B. and state of Texas, in a judicial proceeding then and there held and conducted by C., the legally qualified justice of the peace of Precinct No. 1, defendant appeared as a witness, etc., sufficiently alleged the fact that Justice Precinct No. 1 was in B. county, and that C. was the legally qualified justice of such precinct. *Stanley v. State* (Cr. App.), 74 S. W. 318.

Coroner.—An allegation that the oath was administered by a "coroner," without stating that it was by a justice acting as coroner, fails to show that it was by lawful authority; the office of

coroner not having existed since the adoption of the constitution of 1869. *Stewart v. State*, 6 Tex. Cr. App. 184.

4. Administration, Form, and Making of Oath or Substitute Therefor.

Form of Oath.—In an indictment for perjury, it is not necessary to allege in what particular form the defendant was sworn to testify. It is sufficient to allege that he was "duly sworn." *Beach v. State*, 32 Tex. Cr. App. 240, 22 S. W. 976; *Massie v. State*, 5 Tex. Cr. App. 81; *West v. State*, 8 Tex. Cr. App. 119, 122.

An indictment for perjury was not defective for not setting out the oath administered to defendant, where the alleged perjury was committed on the trial of a cause, and an allegation that the witness was sworn and took his corporeal oath as a witness to testify in the cause, and that the judge duly and legally administered the same according to the law, in such cases made and provided, was sufficient. *Lamar v. State*, 95 S. W. 509, 49 Tex. Cr. App. 563.

But in *Shely v. State*, 35 Tex. Cr. App. 190, 32 S. W. 901, it is said that, in an indictment for perjury, an averment that the oath taken by defendant was one required by law, does not show that it was for the prosecution or defense of any private right, so as to be punishable under Pen. Code, art. 188. And in *Parker v. State*, 44 Tex. Cr. App. 147, 69 S. W. 75, the court said that where Rev. Civ. St., art. 5098, prescribes the form of oath each person is required to take after the rendition of a list of taxable property to the assessor; art. 5100 prescribes that the assessor shall forfeit \$50 if he does not administer the oath so prescribed; and art. 5103 requires that the list shall be made under oath, as prescribed in article 5098. Held, that an indictment for perjury for falsely listing the amount of taxable property which did not set out the oath prescribed by art. 5098, nor show any attempt to admin-

ister such oath after all the property had been listed, was insufficient.

Administration of Oath.—An indictment for perjury must allege that the defendant was sworn in the proceedings in which he is alleged to have falsely testified. *Curtley v. State*, 59 S. W. 44, 42 Tex. Cr. App. 227.

An indictment alleging that accused appeared before the grand jury, and was duly sworn as a witness before such grand jury by the foreman, who was authorized to administer the oath, is not subject to objections that it did not show that accused was legally sworn by the foreman of the grand jury. *Flournoy v. State* (Cr. App.), 59 S. W. 902.

In an indictment for perjury, the averment that the oath was "legally administered by the clerk," without giving the form, is sufficient only when the indictment states the circumstances under which the oath was required and the occasion on which it was made, so as to show that its violation would be perjury. *State v. Umdenstock*, 43 Tex. 554.

5. Setting Forth Testimony, Affidavit or Other Writing.

Oath.—An indictment for perjury is fatally defective which charges the offense to have consisted of a false oath in writing, and fails to set forth the written oath in words or substance. *State v. Umdenstock*, 43 Tex. 554.

An indictment for perjury need not set out in *hæc verba* the oath taken by the defendant. *Jackson v. State*, 15 Tex. Cr. App. 579.

False Testimony.—An indictment for perjury need not set out the whole of what the defendant had sworn. Only that portion of the statement alleged to be false need be set out. *Gabrielsky v. State*, 13 Tex. Cr. App. 428, 437.

An indictment for perjury should allege the false testimony as nearly as possible in the language of the witness, and then the materiality of the false

testimony so given. *Higgins v. State*, 50 Tex. Cr. App. 433, 97 S. W. 1054.

Where it is permissible in an indictment for perjury to set out in detail the alleged false testimony on which the perjury is predicated, such testimony should be concisely alleged. *Higgins v. State*, 50 Tex. Cr. App. 433, 97 S. W. 1054.

False Affidavit.—An indictment for perjury in making a false affidavit initiating a criminal prosecution is not defective, though it does not set out the affidavit in *hæc verba*, nor give the number and style of the case in which the affidavit was made. *Simpson v. State*, 79 S. W. 530, 46 Tex. Cr. App. 77.

An indictment for perjury in making a false affidavit should either set out the precise words or at least the substance of the affidavit. *Shely v. State*, 35 Tex. Cr. App. 190, 32 S. W. 901.

Where an indictment based on an alleged false affidavit in effect averred that the affidavit was made for the purpose of enabling defendant to establish according to law a note and claim against the estate of one C. McM., deceased, it was held that it sufficiently averred the fact that C. McM. was dead. *Waters v. State*, 30 Tex. Cr. App. 284, 17 S. W. 411.

It having been previously alleged that the affidavit was administered "under circumstances in which an oath is required by law," it sufficiently alleged that the claim was sought by the affidavit to be established as a valid one against such estate. *Waters v. State*, 30 Tex. Cr. App. 284, 17 S. W. 411.

Affidavit as to Salary of School Teacher.—Under Rev. St., art. 3761, providing that the amount contracted by the trustees to be paid a teacher shall be paid on a check drawn by a majority of the trustees on the county treasurer, and approved by the county judge, the check in all instances to be accompanied by the affidavit of the teacher that he is entitled to the

amount specified in the check as compensation under his contract as a teacher, in order to constitute perjury in making the affidavit, it is essential that the indictment set forth both the check and the affidavit. *Anderson v. State*, 20 Tex. Cr. App. 312.

Former Indictment.—An indictment for perjury, in making application for a continuance of a trial under a former indictment, need not set out the former indictment. *Ross v. State*, 50 S. W. 336, 40 Tex. Cr. App. 349.

Itemized Account.—An indictment for perjury in making a false affidavit before the proper officer, that a certain person was justly indebted to affiant in the several amounts of an itemized account, held fatally defective in not setting out the account with oath attached, and negating each of the items. *Rohrer v. State*, 13 Tex. Cr. App. 163.

6. Materiality of Testimony or Assertion.

a. Mode of Pleading Materiality.

Following Approved Form.—If an indictment for perjury specifically charges the materiality of the matter assigned for perjury, such allegation is sufficient, though it does not literally follow the approved form. *Kitchen v. State*, 26 Tex. Cr. App. 165, 9 S. W. 461.

Option of Pleader.—In charging perjury the pleader may set out all the facts in the indictment and thus make it appear that the alleged false testimony was material to the issue, or he may set out the false testimony and merely allege that the same was material. *McAvoy v. State*, 39 Tex. Cr. App. 684, 47 S. W. 1000; *Adams v. State* (Cr. App.), 29 S. W. 270, 271; *Garrett v. State*, 37 Tex. Cr. App. 198, 38 S. W. 1017, 39 S. W. 108; *Rahm v. State*, 30 Tex. Cr. App. 310, 17 S. W. 416; *Buller v. State*, 33 Tex. Cr. App. 551, 28 S. W. 465; *Tellis v. State*, 42 Tex. Cr. App. 574, 61 S. W. 717; *Mar-*

tin *v.* State, 33 Tex. Cr. App. 317, 26 S. W. 400; Massie *v.* State, 5 Tex. Cr. App. 81, 85; Donohoe *v.* State, 14 Tex. Cr. App. 638, 642; Partain *v.* State, 22 Tex. Cr. App. 100, 2 S. W. 854; Harrison *v.* State, 41 Tex. Cr. App. 274, 53 S. W. 863; Yardley *v.* State, 55 Tex. Cr. App. 486, 117 S. W. 146; Jordan *v.* State, 47 Tex. Cr. App. 133, 83 S. W. 821.

The materiality may be shown by introducing all the pleadings or so much thereof as sufficiently shows the materiality of the issue joined, or enough of the pleadings, together with the facts proved on the former trial, as would tend to show that the alleged false testimony was upon a material issue in the trial. Maroney *v.* State, 45 Tex. Cr. App. 524, 528, 78 S. W. 696.

b. Necessity of Averments of Materiality.

Materiality of Testimony.—An indictment for perjury, which states distinctly what accused swore to and alleges that his testimony was material, is sufficient, without showing how or wherein the testimony was material; but, where the indictment does not allege that the false statement was material, it must show on its face its materiality. Yardley *v.* State, 55 Tex. Cr. App. 486, 117 S. W. 146, distinguishing *McVicker v. State*, 52 Tex. Cr. App. 508, 107 S. W. 834; Jordan *v.* State, 47 Tex. Cr. App. 133, 83 S. W. 821; Smith *v.* State, 1 Tex. Cr. App. 620, 623; Cravey *v.* State, 33 Tex. Cr. App. 557, 558, 28 S. W. 472.

No false testimony can be included in an assignment of perjury, unless its materiality is alleged. Donohoe *v.* State, 14 Tex. Cr. App. 638; Martinez *v.* State, 7 Tex. Cr. App. 394, 396; Maroney *v.* State, 45 Tex. Cr. App. 524, 78 S. W. 696; Massie *v.* State, 5 Tex. Cr. App. 81, 85; Brooks *v.* State, 29 Tex. Cr. App. 582, 585, 16 S. W. 542; Garrett *v.* State, 37 Tex. Cr. App. 198, 203, 38 S. W. 1017, 39 S. W. 108; Wynne *v.* State, 60 Tex. Cr. App. 660,

133 S. W. 682; Buller *v.* State, 33 Tex. Cr. App. 551, 554, 28 S. W. 465; Maddox *v.* State, 28 Tex. Cr. App. 533, 535, 13 S. W. 861.

An indictment for perjury before the grand jury, which fails to allege that the statement assigned as perjury was material to the matter under examination, or to state facts which show that the statement was material, is defective, though the indictment alleges that the subject of the examination was a material issue before the grand jury. Buller *v.* State, 33 Tex. Cr. App. 551, 28 S. W. 465; *McMurtry v. State*, 38 Tex. Cr. App. 521, 525, 43 S. W. 1010.

Where perjury is assigned on testimony given in a judicial proceeding, the indictment must allege and proof must show that the false testimony was material to the issue upon which it was given. Lawrence *v.* State, 2 Tex. Cr. App. 479, 484.

In a trial for perjury, no fact is material unless assigned as perjury, nor unless the fact assigned is relevant to the issue in the case. Anderson *v.* State, 24 Tex. Cr. App. Appx., 705, 721, 7 S. W. 40.

On a prosecution for perjury the materiality of the false testimony must be averred in the indictment, though it may be done in general terms. Maroney *v.* State, 78 S. W. 696, 45 Tex. Cr. App. 524.

In an indictment for perjury, to allege that a certain fact was material, and allege perjury on another fact, which is material to the main fact, or the part alleged to be material, is not sufficient. Cravey *v.* State, 33 Tex. Cr. App. 557, 558, 28 S. W. 472.

Materiality of Issue.—It is not sufficient to allege that the issue to be tried was material, but the fact the witness swore to, and which constitutes the perjury, must be charged to be material. *McMurtry v. State*, 38 Tex. Cr. App. 521, 43 S. W. 1010; Buller *v.* State, 33 Tex. Cr. App. 551, 28 S. W. 465; Morris *v.* State, 47 Tex. Cr. App.

420, 83 S. W. 1126; *Rosebud v. State*, 50 Tex. Cr. App. 475, 98 S. W. 858.

"We understand the rule to be, where the alleged perjury was committed in the trial of a case, that the indictment should aver the case being tried, and that issue was joined in said case. But it is not necessary to allege that the issue or factum probandum to be proven was material. Then, the indictment must set out the alleged false testimony which constitutes the assignment of perjury, and this must be averred to be material, or sufficiently pleaded to show its materiality. This must be traversed or stated to be false." *Jordan v. State*, 47 Tex. Cr. App. 133, 136, 83 S. W. 821, overruling *Martinez v. State*, 7 Tex. Cr. App. 394. See, also, *Covey v. State*, 23 Tex. Cr. App. 388, 390, 5 S. W. 283; *Cravey v. State*, 33 Tex. Cr. App. 557, 558, 28 S. W. 472.

c. Necessity of Averring Facts to Show Materiality.

Facts Not Necessary.—An indictment for perjury, which charged that the false testimony given on the trial of the issue was material, is sufficient without setting out the facts from which such materiality appears. *Washington v. State*, 22 Tex. Cr. App. 26, 3 S. W. 228; *Partain v. State*, 22 Tex. Cr. App. 100, 2 S. W. 854; *Sisk v. State*, 28 Tex. Cr. App. 432, 13 S. W. 647; *Adams v. State* (Cr. App.), 29 S. W. 270; *Scott v. State*, 35 Tex. Cr. App. 11, 29 S. W. 274; *Pyles v. State*, 47 Tex. Cr. App. 435, 83 S. W. 811; *Smith v. State*, 1 Tex. Cr. App. 620; *Williams v. State*, 28 Tex. Cr. App. 301, 12 S. W. 1103; *Charvarria v. State* (Cr. App.), 63 S. W. 312; *Jernigan v. State*, 43 Tex. Cr. App. 114, 63 S. W. 560; *Henry v. State*, 43 Tex. Cr. App. 176, 63 S. W. 642.

On a prosecution for perjury, an indictment merely alleging that "it became a material question whether defendant had knowingly defaulted as a witness in a certain cause" was de-

fective as failing to show any fact showing the materiality of the question. *Crow v. State*, 90 S. W. 650, 49 Tex. Cr. App. 103.

But see *Jordan v. State*, 47 Tex. Cr. App. 133, 83 S. W. 821, 822, and *Schoenfeld v. State*, 56 Tex. Cr. App. 103, 119 S. W. 101, where it is said: "We understand that all the authorities required that the alleged statement or testimony of the witness on which the assignment of perjury is based is required to be set out and charged to be material."

Quære, whether, in assigning perjury on testimony given in a judicial proceeding, it is not indispensable to set out, in the indictment, enough of the proceedings to enable the court to judge whether the alleged false testimony was material or not. *Lawrence v. State*, 2 Tex. Cr. App. 479, 486.

d. Necessity of Averments of Materiality When Facts Are Alleged Showing It.

Facts Sufficient.—It is sufficient for an indictment for perjury to set out the facts whence the materiality of the alleged false testimony is made to judicially appear. *Garrett v. State*, 37 Tex. Cr. App. 198, 38 S. W. 1017, 39 S. W. 108.

An indictment for perjury need not allege the materiality of testimony alleged to be false, where the materiality is shown by the nature of the case. *Smith v. State*, 1 Tex. Cr. App. 620, 623; *McVicker v. State*, 52 Tex. Cr. App. 508, 107 S. W. 834.

Where defendant was indicted for perjury in swearing that he did not sign a certain order, which was set out in the indictment, it was not necessary for the indictment to allege the materiality of such order. *Rahm v. State*, 30 Tex. Cr. App. 310, 17 S. W. 416, 28 Am. St. Rep. 911.

An indictment for perjury need not allege wherein the alleged perjured testimony was material. *Anderson v.*

State, 56 Tex. Cr. App. 360, 120 S. W. 462.

An indictment for perjury showing what defendant did swear and charging that defendant's answer to the question asked him in the judicial proceeding was willfully and deliberately false as he well knew, where the materiality of a false oath appears on the face of the indictment, is sufficient. *Massie v. State*, 5 Tex. Cr. App. 81, 86.

An indictment for perjury in testifying before a grand jury to an alibi in behalf of a person accused of crime, which does not specifically allege that the person in whose behalf the testimony was given had committed a crime which was being investigated by the grand jury, is not bad as failing to show that the alleged false testimony was material if it alleges facts which are sufficient basis for the conclusion of materiality. *Tellis v. State*, 61 S. W. 717, 42 Tex. Cr. App. 574.

e. Sufficiency of Averments of Materiality.

Instances of Indictments Held Sufficient.—An indictment in a prosecution for perjury charges that the substance of testimony given by accused before a grand jury was material, and then avers that "whereas, in truth and in fact," stating wherever such matter was false was sufficient. *Donohoe v. State*, 14 Tex. Cr. App. 638.

An indictment for perjury, which alleged that on the trial of the cause in which the offense was committed defendant testified that he did not play at a game of dice called "craps," at a place not a private residence, when in truth he did so play, and that such testimony was material to the issue then being tried, sufficiently alleged the materiality of the statement assigned as perjury. *Johnson v. State*, 34 Tex. Cr. App. 555, 31 S. W. 397.

On a prosecution for perjury, the indictment alleged that T. was on trial for playing at a game of cards, and the testimony of defendant that he did not

see the game was set out and alleged to have been material and false. Held, that the indictment was not insufficient on the ground that it should have directly alleged that T. played at the game of cards. *Lamar v. State*, 93 S. W. 509, 49 Tex. Cr. App. 563.

An indictment for perjury charged that, on a prosecution for rape, defendant testified that he heard a conversation between defendant in the rape case and prosecutrix therein at a party in January, 1902, in which defendant in the rape case told the prosecutrix that, if she was going to be his woman, she must let other men alone, and that she replied that she was not having anything to do with other men, and the statement was alleged to be material, and traversed as false. Held, that in the absence of any evidence on the prosecution for perjury to the effect that defendant therein made the statement as to the conversation, locating it at some other time and place, the indictment was not insufficient to sustain a conviction on the ground that it only negated the fact that the conversation occurred at a certain place and at a certain time, and hence merely negated immaterial matters. *Jordan v. State*, 83 S. W. 821, 47 Tex. Cr. App. 133.

In a prosecution for carrying a pistol, testimony by defendant that he did not have in his possession or on his person any pistol at the time alleged in the indictment is a sufficient basis for an indictment for perjury; the use of the disjunctive not rendering the statement duplicitous. *Trevino v. State*, 88 S. W. 356, 48 Tex. Cr. App. 350.

Instances of Indictments Held Insufficient.—Where defendant was indicted for perjury alleged to have been committed during a grand jury's investigation as to whether certain persons had played cards in violation of Pen. Code, art. 379, as amended by Acts 27th Leg., p. 26, c. 22, and alleged that it became a material matter of in-

quiry and investigation whether defendant had "seen" the persons named play cards in the house described, and assigned perjury on his testimony that he had not seen them play, etc., the indictment was fatally defective; the material inquiry being whether the persons referred to had in fact played cards in violation of such section, and not whether defendant had "seen" them play as alleged. *Gallegos v. State*, 95 S. W. 123, 50 Tex. Cr. App. 190.

An indictment charging perjury, in giving false testimony before a grand jury, alleged that it was "a material inquiry before said grand jury," etc., "whether one M. * * * played at a game of cards, in a room over B's saloon," held insufficient, under the language of the statute, proving "if any person shall play at a game with cards, at any house for retailing spirituous liquors," etc., as not showing that said room was attached to a place for retailing spirituous liquors. *McMurtry v. State*, 43 S. W. 1010, 38 Tex. Cr. App. 521.

Where an indictment for perjury charged that the perjury was committed during an investigation by a grand jury concerning whether certain individuals had played cards at a certain house on a specified date, which house was a private residence occupied by a family, but did not allege that any bet or wager was laid on the game, it did not allege that the matter under investigation constituted an offense, so that perjury could be predicated on false testimony given during such investigation. *Gallegos v. State*, 95 S. W. 123, 50 Tex. Cr. App. 190.

An indictment for perjury, alleging that, at the time the false testimony was given, it was a material inquiry whether a certain person unlawfully and fraudulently took certain property with intent to appropriate the same and deprive the owner of it, and that de-

fendant testified to certain facts, did not allege the materiality of the false testimony, but merely alleged the materiality of the alleged theft. *Morris v. State*, 83 S. W. 1126, 47 Tex. Cr. App. 420.

An indictment for perjury in falsely denying before a grand jury having made sales of liquor in a local option county, which does not aver that the sales made by the witness were unlawful sales, does not sufficiently show the materiality of the testimony. *Mattingly v. State*, 8 Tex. Cr. App. 345.

An indictment for making a false statement before the grand jury, alleging that on an inquiry into the question whether one J. had stolen a certain satchel containing money on November 23, 1893, defendant falsely and willfully testified that on November 28, 1893, J. hid a satchel in a straw stack, should be quashed for failure either to allege or to show plainly that such statement was material. *Martin v. State*, 33 Tex. Cr. App. 317, 26 S. W. 400.

An indictment for perjury alleged that defendant testified that he believed that a certain cause wherein he was a witness under legal process had been continued for the term. Held, that the indictment was defective for failing to show that defendant had been under legal process as a witness and had disobeyed the process. *Crow v. State*, 90 S. W. 650, 49 Tex. Cr. App. 103.

f. Sufficiency of Statements of Facts and Issues to Show Materiality.

Alibi.—An indictment for perjury, which merely sets out that on the trial of B. for assault defendant testified that B. was at his (B.'s) house all the time between the hours of about 6 p. m. and 9 p. m. on the night of August 9, 1900, and that such testimony was material and false, was bad; the material question being, if alibi was intended to be proved, not whether B.

was at his own residence, but whether he was at the place of the assault. *McCoy v. State*, 68 S. W. 686, 43 Tex. Cr. App. 606.

The indictment is bad because not charging that the assault was committed on August 9th, between the hours of 6 and 9 p. m. *McCoy v. State*, 68 S. W. 686, 43 Tex. Cr. App. 606.

Defendant, on a trial at which C. was convicted of robbery at a certain time and place, testified that at that time and place he was at another place, D., and there saw C. The indictment for perjury alleged that defendant swore to the above facts on said trial, averred that they were material, and assigned perjury, in that defendant was not at D., but at another place, and therefore could not have seen C. at D. at the time he swore he was there. The indictment further alleged that on the trial of C., his defense being an alibi, it was a material issue whether he was at the place of the robbery or at D. Held that, the indictment having failed to allege that C. was not at D. at the time sworn to by defendant, there was no assignment of perjury on a material fact; the allegation that defendant was at another place being only a statement of evidence. *Maddox v. State*, 28 Tex. Cr. App. 533, 13 S. W. 861.

Assault.—Indictment for perjury averred the material inquiry to have been "whether B. made an assault on C.," and charged that the accused, being asked where B. was standing when C. was assaulted, falsely swore that B. was near the stove, and not near C. when the latter was assaulted. Held, that these allegations are not sufficient to show that the false testimony was material to the issue, the indictment not stating how the assault was committed. No presumptions or inferences are allowable to supply such averments as are wanting in the indictment to show the materiality. *Smith v. State*, 1 Tex. Cr. App. 620.

An indictment for perjury which merely alleges that defendant testified before the grand jury that he had not stated at a specified time and place to certain parties that he knew who struck another man is insufficient, as it does not show that defendant swore falsely in any material particular. *Agar v. State*, 29 Tex. Cr. App. 605, 16 S. W. 761.

Forgery.—An indictment for perjury at the trial of a third person charged with passing a forged instrument, which alleges that accused testified on the trial that he was with the third person in another county on a designated date, and that the statement was material and was false, is fatally bad, for failing to affirmatively show the materiality of the testimony, by showing that the testimony was in defense of an alibi that the third person was not in the county on the day on which it was alleged he passed the instrument. *Wynne v. State*, 60 Tex. Cr. App. 660, 133 S. W. 682.

Gaming.—Under Pen. Code 1895, art. 388, prohibiting the playing of craps at a place other than a private residence, an indictment for perjury, charging that the same was committed at an inquiry before a justice as to whether defendant had at a certain house seen certain designated persons "play at or bet any money or valuable thing at a game played with dice, called 'craps,' at a place that was not then and there a private residence occupied by a family," was fatally defective for failure to charge that the place was "other than a private residence." *Barton v. State*, 95 S. W. 110, 50 Tex. Cr. App. 161.

An indictment for perjury charged that defendant falsely testified before the grand jury that one "A. S. did not play at a game with cards in a house on A. S.'s place." Held, that the indictment was insufficient, because the testimony was not material to the investigation of the grand jury, card

playing not being prohibited, except, as provided by Pen. Code, art. 355, at certain public houses. *Weaver v. State*, 34 Tex. Cr. App. 554, 31 S. W. 400.

Guilt of Defendant.—An indictment for perjury, charging that defendant stated to several that he was present at the burglarizing of a certain store, and participated therein; that his subsequent denial of the statement under oath before the grand jury was willfully and deliberately false; and that the matter was a material inquiry before that body; but without alleging whether the issue under investigation was the guilt of defendant or of other parties—fails to show such materiality. *Brooks v. State*, 29 Tex. Cr. App. 582, 16 S. W. 542.

Knowledge of Falsity.—An indictment for perjury, alleging that it was a material inquiry whether one H. knew certain facts, and that the defendant falsely swore that he heard H. tell a certain person that she did not know the facts in question, did not charge the materiality of the false oath. *Rosebud v. State*, 50 Tex. Cr. App. 475, 98 S. W. 858.

Motion for Continuance.—An indictment assigning perjury in making a motion for continuance, which sets out the motion as part thereof, and alleges that the statement made therein was material to enable accused to obtain a continuance, is defective, in not stating the particular portion that was material, and on which the perjury is predicated. *Ross v. State*, 50 S. W. 336, 40 Tex. Cr. App. 349.

Remission of Fine.—An indictment for perjury which alleged that defendant testified falsely in an action for the remission of a fine was defective for failing to allege that any fine had previously been imposed. *Crow v. State*, 90 S. W. 650, 49 Tex. Cr. App. 103.

Sheriff's Fees.—An indictment of a deputy sheriff for making a false affidavit of his expenses in conveying a

witness, which fails to allege the circumstances under which the sheriff was entitled to receive fees for his service, is insufficient. *Shely v. State*, 35 Tex. Cr. App. 190, 32 S. W. 901.

An indictment for perjury in making affidavit to an account for witness fees and mileage, which alleged the materiality and falsity of the statement to consist in a false statement as to the distance traveled and the total amount due, was not sufficient to charge the accused with making a false affidavit, claiming witness fees to which he was not entitled. *Bridgers v. State*, 70 S. W. 767, 44 Tex. Cr. App. 294.

g. Effect of Averments Relating to Immaterial Matters.

Not a Fatal Defect.—The fact that an indictment or information charging perjury contains some statements on which perjury is assigned that are immaterial is not a fatal defect. *Jefferson v. State* (Cr. App.), 49 S. W. 88.

An indictment for perjury is not bad because it alleges the falsity of immaterial testimony given by defendant as well as the falsity of material testimony. *Dorrs v. State* (Cr. App.), 40 S. W. 311.

Where an indictment for perjury in testifying falsely before a grand jury on charges against another for assault with a knife does not allege that defendant's testimony as to the ownership of the knife was material, and the prosecution did not proceed on the theory that such testimony was material, a further allegation in the indictment that defendant swore to the ownership of such knife was immaterial. *Dorrs v. State* (Cr. App.), 40 S. W. 311.

In Tax Assessments.—Under Rev. Civ. St., art. 5097, authorizing assessors to administer all oaths necessary to obtain a full assessment of all taxable property situated in their respective counties, and art. 5068, providing that all property shall be listed and assessed in the county where it is situ-

ated, an indictment for perjury for falsely listing taxable property is defective when it appears from the indictment that the property was situated in another county than that where listed. *Parker v. State*, 69 S. W. 75, 44 Tex. Cr. App. 147.

7. Assignments of Perjury.

a. In General.

See ante, "Joinder of Assignments," II, A, 1, e.

Specific Assignment of Each Point.—In an indictment for perjury, there should be a specific assignment each matter claimed to be material. *Harrison v. State*, 41 Tex. Cr. App. 274, 53 S. W. 863.

An indictment for perjury, which omits the proper assignment of the perjury, can not be maintained as a good indictment. *Gabrielsky v. State*, 13 Tex. Cr. App. 428, 438, distinguishing *State v. Lindenburg*, 13 Tex. 27.

An indictment for perjury is sufficient which charges the defendant with having sworn falsely to one material fact and sufficiently assigns the perjury as to that fact. *State v. Lindenburg*, 13 Tex. 27, distinguishing *Gabrielsky v. State*, 13 Tex. Cr. App. 428.

Where, in a prosecution for perjury, it was claimed that the witness falsely swore to several facts, each should be stated in distinct and separate assignments, and each traversed so that if either assignment is proved, the indictment may be sustained. *Higgins v. State*, 50 Tex. Cr. App. 433, 97 S. W. 1054.

Where a charge of perjury is brought against a witness because he testified that defendant did not use the language he was charged with, the court errs in charging the jury that if defendant is proved to have sworn falsely in regard to hearing or not hearing said language, then the falsity would be in regard to a material matter, where there was no assignment of perjury covering this proof and au-

thorizing such a charge. *Leverette v. State*, 32 Tex. Cr. App. 471, 24 S. W. 416.

General Assignment.—All matter alleged to be material can, by proper assignment, be made the basis of perjury, but if a general assignment is made upon all the matter, and some of it should, in law, be immaterial, the assignment would be bad. *Donohoe v. State*, 14 Tex. Cr. App. 638.

Two Conflicting Statements.—If there be two conflicting statements, an assignment of perjury thereon should select one, and not assign both. *Whitaker v. State*, 37 Tex. Cr. App. 479, 36 S. W. 253.

b. Necessity of Averring Falsity of Oath.

See ante, "Falsity of Testimony or Assertion and Knowledge Thereof," I, B, 6.

Must Aver Falsity.—An indictment for perjury is bad which does not aver that the defendant swore falsely. *Juaraqui v. State*, 28 Tex. 625.

In an indictment for perjury the falsity of the statement ought to appear by averment, and should not be left to be deduced by argument and intendment. The conclusion that the defendant did "falsely, wickedly, willfully, and corruptly, in manner and form aforesaid, commit willful and corrupt perjury," is not sufficient. *Juaraqui v. State*, 28 Tex. 625.

An objection that the indictment in a prosecution for perjury does not positively negative the proof of the matter stated in the allegation at the time a false affidavit is alleged to have been made, is fully met by the following allegation, viz: "Which said statements (and each and all of such statements) so made by the said J. H. W. (defendant), as aforesaid, were willfully and deliberately false, and he (the said J. H. W.) then and there well knew the same to be false when he made them." *Waters v. State*, 30 Tex. Cr. App. 284, 17 S. W. 411.

The indictment in a prosecution for perjury was fatally defective, where, after alleging that a material inquiry in a former suit was whether J. E. D. called M. D. a liar, and raised his hand to strike her at a certain house, it then failed to allege that defendant falsely testified to those facts as happening at that place. *Lowe v. State*, 59 Tex. Cr. App. 557, 129 S. W. 842.

When an indictment for perjury sets forth the whole matter to which defendant swore, the word "falsely" does not import that the whole is false, but simply that it is false in some particular. *Rohrer v. State*, 13 Tex. Cr. App. 163, 168.

c. Necessity of Stating Particular Facts or Terms of Testimony.

An indictment, in a prosecution for perjury assigned on a certain affidavit made by defendant, which alleges that said affidavit is false, without setting out any particular portion thereof and alleging that the same is false and material, is fatally defective. *Harrison v. State*, 53 S. W. 863, 41 Tex. Cr. App. 274.

d. Willfulness and Knowledge of Falsity.

See ante, "Definition of Offense," I, A; "Falsity of Testimony or Assertion and Knowledge Thereof," I, B, 6.

Statutory Requirements.—Since the adoption of the Penal Code, an indictment for perjury must allege that the statement upon which the perjury is assigned was deliberately and willfully made. *Allen v. State*, 42 Tex. 12; *State v. Perry*, 42 Tex. 238; *State v. Webb*, 41 Tex. 67; *West v. State*, 8 Tex. Cr. App. 119, 122; *State v. Powell*, 28 Tex. 626, 630.

In an indictment for perjury, under the code, the statutory words, "deliberately and willfully," must be used in characterizing the false statement alleged to have been made. *Smith v. State*, 1 Tex. Cr. App. 620.

An indictment for perjury for under-

valuation of property as assessor, should aver that defendant knew he had undervalued the property, and willfully and deliberately made the false statement in reference thereto. *State v. Powell*, 28 Tex. 626.

Using Similar Words.—A charge in the indictment that the defendant "willfully, unlawfully, knowingly, corruptly, and feloniously did commit willful and corrupt perjury," and that he did "willfully, knowingly, corruptly, and falsely state under oath," etc., and that he did then and there, on the trial of said case, "unlawfully, willfully, knowingly, and feloniously commit willful and corrupt perjury," does not meet the requirements of the code, nor avoid the necessity for charging that the false statement was "deliberately and willfully made" under the sanction of an oath. *State v. Webb*, 41 Tex. 67.

Knowledge of Falsity.—Neither at common law, nor under Rev. St. 1895 (Pen. Code, art. 201), providing that "perjury is a false statement deliberately and willfully made, relating to something past or present, under the sanction of an oath or affirmation," etc., is it necessary for an indictment to allege that the party charged with making the false statements knew they were false when he made them, but it is sufficient to allege that he deliberately and willfully swore falsely. *Ferguson v. State*, 36 Tex. Cr. App. 60, 35 S. W. 369, overruling *State v. Powell*, 28 Tex. 626, 628.

"It has been held in this state that an indictment for perjury, to be good, should allege that the defendant knew the statements (on which the perjury is predicated) were false when he made them, and that this must be distinctly averred. This was so held in *State v. Powell*, 28 Tex. 626, 627, which appears to follow *Juaraqui v. State*, 28 Tex. 625. We have examined that case, and the language there used is as follows: 'The indictment ought to charge that the defendant deliberately and will-

fully swore falsely.' This is all that is said upon the subject, and appears, in this regard, to follow our statute explicitly, and is the rule at common law." *Ferguson v. State*, 36 Tex. Cr. App. 60, 35 S. W. 369.

"From the authorities cited, and our statute on the subject, we hold that it is not necessary, in an indictment for perjury, to charge that the party making the alleged false statements knew they were false when he made them; and so far as the authority of *State v. Powell*, 28 Tex. 626, 627, is in conflict with this opinion, the same is overruled." *Ferguson v. State*, 36 Tex. Cr. App. 60, 35 S. W. 369.

An indictment for perjury, alleging that defendant deliberately and willfully swore falsely, is sufficient, though it failed to state, in positive terms, the falsity of the alleged statement at the time of making it. *Chavarria v. State* (Cr. App.), 63 S. W. 312.

e. Sufficiency of Denials.

An averment that the defendant "well knew" the reverse of the facts to which he testified, instead of averring the negative of the oath, is sufficient. *State v. Lindenburg*, 13 Tex. 27.

What Must Be Negated.—An indictment for perjury which fails to negative truth of alleged false statement assigned as perjury is insufficient. *Maddox v. State*, 28 Tex. Cr. App. 533, 535, 13 S. W. 861.

An indictment for perjury need not negative the whole matter to which defendant swore, but only such parts as the prosecutor can falsify, admitting the truth of the rest. *Rohrer v. State*, 13 Tex. Cr. App. 163, 167.

Each part of defendants' testimony alleged to be false should be negated specially. *Brown v. State*, 40 Tex. Cr. App. 48, 50, 48 S. W. 169; *Gabrielsky v. State*, 13 Tex. Cr. App. 428.

An indictment for perjury in making an affidavit which is partly true should specify the part which is false. *Morris*

v. State, 83 S. W. 1126, 47 Tex. Cr. App. 420; *Turner v. State*, 30 Tex. Cr. App. 691, 692, 18 S. W. 792.

An indictment for perjury need not negative that the false statement was made, as in the provision of Pen. Code, art. 189, "through inadvertence, or under agitation, or by mistake." *Brown v. State*, 9 Tex. Cr. App. 171.

Setting Out Truth.—An assignment of perjury that does not set out the truth in regard to the alleged false statements, is insufficient. *Turner v. State*, 30 Tex. Cr. App. 691, 693, 18 S. W. 792.

An indictment for perjury in swearing to a plea to a suit on three different notes should negative the statement as to each note, and set out the truth in regard thereto, instead of averring in general that each and all the statements contained in the plea are false. *Gabrielsky v. State*, 13 Tex. Cr. App. 428.

An indictment for perjury, after stating the matter on which the perjury was assigned, simply recited: "Which statement, so made by T., before and to the justice of the peace as aforesaid, was willfully and deliberately false, and the said T. knew the same to be false when he made it." Held, that the indictment was fatally defective, in that it did not specially negative the alleged false statement, and set out the truth in regard to the same. *Turner v. State*, 30 Tex. Cr. App. 691, 18 S. W. 792.

An indictment for perjury alleged that defendant was a witness in a cause wherein it became material whether defendant had knowingly defaulted as a witness in a certain cause, and that he falsely testified that he believed that the cause had been continued for the term, when in fact he knew that it had not been so continued when he defaulted as a witness. Held, that the indictment was defective for failing to allege what constituted the true facts with reference to the alleged false

testimony. *Crow v. State*, 90 S. W. 650, 49 Tex. Cr. App. 103.

8. Subornation of Perjury.

Where the only allegation, in an indictment for subornation of perjury, of the materiality of the evidence given by the witness alleged to have been suborned, was that it was a material question "whether" said witness was in a certain county and witnessed the matters stated, and there were no circumstances set out showing the materiality of the evidence, the indictment is insufficient. *Miller v. State*, 65 S. W. 908, 43 Tex. Cr. App. 367.

To sustain conviction for offering to bribe a witness it is unnecessary to allege that the indictment had been found for a criminal charge about which it was expected a witness might testify, or that process had issued for the witness. *Jackson v. State*, 43 Tex. 421, 424. See the title BRIBERY, vol. 1, p. 692; OBSTRUCTING JUSTICE, ante, p. 560.

9. Issues, Proof and Variance.

a. Issues.

In the absence of an issue joined in the trial court that would render the testimony material, there could be no predicate on which to base an accusation of perjury. *Garrett v. State*, 37 Tex. Cr. App. 198, 38 S. W. 1017, 39 S. W. 108.

b. Matters to Be Proved.

Allegation of Materiality.—In a prosecution for perjury, the allegation of materiality must be proved, and it is not enough that the testimony was actually admitted. *Garrett v. State*, 37 Tex. Cr. App. 198, 38 S. W. 1017, 39 S. W. 108.

Either of Two Material Allegations.—Where two statements are assigned in the indictment, the state can prove either one of them, and show its falsity in order to convict. *Adellberger v. State* (Cr. App.), 39 S. W. 103.

Where an indictment for perjury

contains but one count, in which perjury is assigned on two statements made before a grand jury at the same time, and about the same subject-matter, proof of the falsity of either statement, if both are material, will support a general verdict of guilty. *Moore v. State*, 32 Tex. Cr. App. 405, 24 S. W. 95.

On the trial of G., who was indicted with M. for theft, a witness testified that he saw M., and not G., in possession of the property stolen. Afterwards, on the trial of M., said witness testified that he saw G., and not M., in possession of the stolen goods, and denied that he testified to the contrary on the former trial. Held, on a trial for perjury in testifying that he did not make such statement on the first trial, that it was immaterial which of the statements as to the possession of the stolen property was false. *Whitaker v. State*, 37 Tex. Cr. App. 479, 36 S. W. 253.

Inducement.—Where an indictment for subornation of perjury contained allegations by way of inducement to secure the perjury which were descriptive of the offense, it was error for the court to instruct that it is not material that such allegations should be proved, if perjury was committed, and at the instigation of defendant, though such allegations may have been unnecessarily contained in the indictment, since such inducement should be proved as laid. *Miller v. State*, 65 S. W. 908, 43 Tex. Cr. App. 367.

Custody of Defendant.—On a trial for perjury committed by defendant while on trial for swindling, it is not necessary to introduce the warrant for the arrest of defendant in the swindling case, nor to prove that he was under arrest at the time he testified in that case. *King v. State*, 32 Tex. Cr. App. 463, 24 S. W. 514.

c. Evidence Admissible under Pleadings.

See post, "Admissibility," II, B, 2.

d. Variance between Allegations and Proof.

Proof Must Follow Allegations.—

On an indictment setting out an affidavit, and assigning perjury only on two statements, defendant can not be convicted on proof of the falsity of other statements therein. *Butler v. State*, 38 S. W. 46, 36 Tex. Cr. App. 483.

An indictment for perjury charged that, on a prosecution for theft of hogs by N., accused deliberately swore that N. was seen with the hogs, the property of R., in his possession, which was false. The prosecution left it in doubt as to whether accused swore that the hogs were the property of R. The court instructed that, it being a material inquiry as to whether N. was seen in possession of the hogs, if accused stated on oath that he was so seen, and such statement was false and knowingly made, it was immaterial whether he stated who was the owner of the hogs. Held error; as the indictment was in one assignment, the failure to prove all the statements substantially as alleged was fatal to the prosecution. *Brown v. State*, 48 S. W. 169, 40 Tex. Cr. App. 48.

Where defendant is charged with perjury in testifying that he did not see gambling at a certain place, it is error to fail to charge that defendant can not be convicted for any matter connected with a game in another place. *Hollins v. State* (Cr. App.), 69 S. W. 594.

Form and Administration of Oath.

—If indictment for perjury sets out oath more minutely than is necessary, or needlessly describes the manner in which it was administered, such manner can not be rejected as surplusage, and variance between indictment and proof will be fatal. *Massie v. State*, 5 Tex. Cr. App. 81, 85; *West v. State*, 8 Tex. Cr. App. 119, 122; *Beach v. State*, 32 Tex. Cr. App. 240, 22 S. W. 976; *Waters v. State*, 30 Tex. Cr. App.

284, 287, 17 S. W. 411. See ante, "Administration, Form, and Making of Oath or Substitute Therefor," II, A, 4.

Description of Officer.—Where an indictment for false swearing in executing a marriage license affidavit charged that the affidavit was made before A. L. K., deputy clerk of the county court, and set out the affidavit, which appeared to be subscribed and sworn to before "A. K., Clerk County Court, by A. L. K. Deputy," an objection that the indictment contained a variance as to the officer before whom the affidavit was made was not sustainable. *Mahon v. State*, 79 S. W. 28, 46 Tex. Cr. App. 234.

Where an indictment for subornation of perjury charges that habeas corpus had been sued out "before the Honorable Gustave Cook, the duly and legally appointed and qualified judge of the criminal district court of Harris county" and order of the judge on habeas corpus is signed "Gustave Cook, Judge, Criminal Dist. Court, Galveston and Harris Counties," there is no such material variance between the style of office set out in the indictment and that set out in the evidence, as to render the petition and order thereon inadmissible in the trial under the indictment. *Watson v. State*, 5 Tex. Cr. App. 11, 24. See ante, "Authority of Officer to Administer Oath," II, A, 3, b.

Description of Property.—On a prosecution for false swearing to an affidavit by a chattel mortgagor on the making of a chattel mortgage, which alleged that the cattle were unincumbered, the indictment charged that accused was the lawful owner of the cattle described, to wit, 386 head of steer cattle, three and four years old and upward, and was the lawful owner of 386 head of three and four year old Texas steers, with certain brands. Held, that the mortgage, which was on 386 head of three and four year old Texas steers, was not inadmissible

because of variance between it and the indictment, even conceding it contained two averments of false swearing. *Campbell v. State*, 68 S. W. 513, 43 Tex. Cr. App. 602.

Instrument and Description Thereof.

—Where, on a trial for perjury alleged to have been committed by defendant when on trial for swindling a bank by means of a draft, the draft is set out in the indictment by way of inducement, a variance between the draft and the description thereof in said indictment is immaterial. *King v. State*, 32 Tex. Cr. App. 463, 24 S. W. 514.

Language Tending to Breach of the Peace.—On indictment charging that accused testified that one S. did not use to him certain abusive language tending to a breach of the peace, proof that defendant testified that he did not hear or remember the language alleged is a fatal variance. *Leverette v. State*, 32 Tex. Cr. App. 471, 24 S. W. 416.

Intoxicating Liquors.—Where an indictment for perjury charged accused with having testified before the grand jury that he did not buy intoxicating liquors without the prescription of a physician, and not for sacramental purposes, and the evidence showed that defendant testified before the grand jury that he never bought any whisky in a certain prescription house, and did not get anything at such prescription house on a certain date, and there was nothing in the testimony showing that he testified anything in regard to buying whisky on prescription, or denied having bought any on prescription, or wine for sacramental purposes, the variance was fatal. *Ray v. State*, 90 S. W. 632, 49 Tex. Cr. App. 173. See the title INTOXICATING LIQUORS, vol. 4, p. 633.

Gaming.—Where, in a prosecution for perjury, the indictment charged that defendant testified that one M. did not play or bet at a game of cards with four other persons designated at a certain time and place, when in fact

M. did at such time and place play and bet at a game of cards with such persons, and the proof was that defendant swore that M. did not play at all, there was a fatal variance. *Stanley v. State*, 89 S. W. 829, 48 Tex. Cr. App. 565.

Where an indictment charges that defendant committed perjury in swearing that he did not see a gaming table in a certain "house," proof that he did see a gaming table in a structure attached to a saloon closed in on four sides, but not above, is insufficient to sustain a conviction. *Waul v. State*, 33 Tex. Cr. App. 228, 26 S. W. 199.

The meaning of the word "house" in relation to perjury is its usual, ordinary meaning, the meaning given the term by Code, art. 709, relating to burglary, and art. 652, relating to arson, being inapplicable. *Waul v. State*, 33 Tex. Cr. App. 228, 26 S. W. 199. See the title ARSON, vol. 1, p. 484.

Where an indictment for perjury charged defendant with having falsely testified that M. and others named in the averments of perjury did not play at a game of cards in question, evidence of M. and others that defendant on the trial of the latter's case stated that M. did not play cards on or about December 1, 1902, as alleged, was not objectionable as at variance with the allegation of the indictment. *Stanley v. State* (Cr. App.), 95 S. W. 1076.

Where an indictment for perjury charged defendant with having falsely testified that he did not see or did not recollect seeing certain persons engaged in playing cards on a certain Sunday at any place in a certain county, there was no variance, though the evidence showed that questions specifically asked of defendant related to a game of cards on the date mentioned at different places within the county named, where the examination also related to the particular place where the game was played and to

the county generally. *Hambright v. State*, 91 S. W. 232, 49 Tex. Cr. App. 162.

Subornation of Perjury.—Where an indictment for subornation of perjury states the means used in an attempt to corrupt a witness with great particularity, the state must prove means used substantially as law in indictment. *Watson v. State*, 5 Tex. Cr. App. 11, 29.

An allegation that W. offered M. \$150 if M. would give certain false testimony on the hearing of a writ of habeas corpus pending in behalf of G., was held not to be supported by proof that W. told M. that G. would pay M. that sum, if M. would so testify. *Watson v. State*, 5 Tex. Cr. App. 11.

B. EVIDENCE.

1. Presumption and Burden of Proof.

Presumption of Guilt.—The law does not presume that the testimony of accused, alleged in the indictment charging perjury, is true, nor does a presumption of guilt attach from the indictment, but the facts must be proved by testimony. *Anderson v. State*, 56 Tex. Cr. App. 360, 120 S. W. 462.

Essential Elements.—Of course, the burden was on the state to show the essential elements of the offense charged. *Lamar v. State*, 49 Tex. Cr. App. 563, 95 S. W. 509, 512.

Materiality.—In a prosecution for perjury, where the record of the trial court in which the perjury is alleged to have been committed did not contain the plea of non est factum to the note sued on, it can not be presumed that defendant's testimony, that he had not signed the note was material. *Garrett v. State*, 38 S. W. 1017, 39 S. W. 108, 37 Tex. Cr. App. 198.

Swearing of Jury.—In a prosecution for perjury committed in a jury trial before a justice court, the state should show that the jury was sworn. *Curtley v. State*, 59 S. W. 44, 42 Tex. Cr. App. 227.

Facts Inculcating Accused.—Where a person has been forced to testify to facts which would tend to inculcate himself in the crime, if such facts exist and do not appear on the face of an indictment for perjury, the burden is on accused to establish them by proof. *Pipes v. State*, 26 Tex. Cr. App. 318, 9 S. W. 614.

2. Admissibility.

a. In General.

Identity of Accused.—Where, in a prosecution for false swearing in a marriage license affidavit, one of the main contested issues was the identity of the defendant as the person who made the affidavit, and it was shown that the marriage license was delivered to the same person that made the affidavit, and was received by the clergyman who married defendant from him, the license was admissible on the issue of defendant's identity. *Mahon v. State*, 79 S. W. 28, 46 Tex. Cr. App. 234.

Facts and Circumstances.—In a prosecution for perjury in testifying in favor of one on trial for assault with intent to murder that he (defendant) did not pick up at the place where the shooting occurred a portion of a certain newspaper claimed to have been used by the one accused of the shooting as wadding for his gun, it was proper to permit the facts and circumstances attending the shooting to be considered by the jury. *Freeman v. State*, 72 S. W. 1001, 44 Tex. Cr. App. 496.

Evidence Bearing Only on Merits of Prior Case.—On a prosecution for perjury, consisting of testifying in a seduction case that prosecutrix had had intercourse with another than defendant therein, it is error to admit evidence bearing only on the merits of the seduction case. *Peyton v. State* (Cr. App.), 32 S. W. 892.

Conduct of Prosecuting Witness.—Evidence of a third person as to the

acts and declarations of the prosecuting witness in a perjury case is inadmissible, where such evidence does not tend to corroborate his testimony, or otherwise elucidate the issue on trial. *Kitchen v. State*, 29 Tex. Cr. App. 43, 14 S. W. 392.

Terms of Trade in Purchase of Notes.—In a prosecution for perjury consisting of evidence given by accused in another action to show that he was a bona fide purchaser of certain notes sued on, evidence as to the terms of a trade in which the notes were canceled and delivered to one of the alleged makers before they were transferred by the latter to accused, there being no claim that accused was present at that time or had any knowledge thereof when he purchased the notes, was irrelevant. *Downing v. State*, 61 Tex. Cr. App. 519, 136 S. W. 471.

Evidence as to Weapons.—In a trial for perjury, based on accused's testimony that he, and not his brother, committed a homicide with which the brother was charged, it was improper to allow the state to ask the constable who arrested the brother whether any one delivered a knife to him after the difficulty, where the brother was not seen with it, and it did not appear that he owned it, and to allow the state to show that witness, with whom the brother lived, missed his knife about two weeks before, and that he last saw it at a certain place, since neither accused nor his brother were connected with the knife. *Hardin v. State*, 55 Tex. Cr. App. 631, 117 S. W. 974.

Failure to Testify.—The state could not show that the brother did not testify in the case wherein he was charged with the homicide. *Hardin v. State*, 55 Tex. Cr. App. 631, 117 S. W. 974.

Prior Acquittal.—The state could not show accused was tried for simple assault on decedent in a difficulty wherein decedent was killed, since conviction

would not involve moral turpitude, nor show per se accused swore falsely as to the killing, and accused could not show the assault case was dismissed on appeal. *Hardin v. State*, 55 Tex. Cr. App. 631, 117 S. W. 974.

Details of Homicide.—On a trial for perjury, a witness who has been convicted of murder can not be questioned as to the details of the killing. *Flournoy v. State* (Cr. App.), 59 S. W. 902.

Guilt of Accused.—In a trial for perjury alleged to consist in false statements made by the accused in his affidavit in support of a motion for new trial filed by one H., who was previously convicted of theft of a colt, the state was properly allowed, over objection by the defense, to adduce evidence tending to prove that the said H. was guilty of the theft for which he had been convicted, as corroborative of the testimony of the only witness who directly testified to the falsity of the statements assigned as perjury. *Hernandez v. State*, 18 Tex. Cr. App. 134.

b. Intent, Knowledge and Motive.

General Rule.—On a trial for perjury, evidence showing that the alleged false testimony was deliberately and willfully made is relevant and admissible. *Foster v. State*, 32 Tex. Cr. App. 39, 40, 22 S. W. 21.

Supporting Immaterial Statements.—Under an indictment for perjury, alleging the two false statements, one with reference to material and the other immaterial matter, evidence is admissible in support of the immaterial statement, where, if true, it conclusively establishes that the material statement assigned for perjury was made willfully, and not through inadvertence or mistake. *Jefferson v. State* (Cr. App.), 29 S. W. 1090.

Statements of Accused.—On a trial for perjury in swearing in an application for continuance on a trial of defendant for theft on the ground of the

absence of two witnesses, that such witnesses were "not absent by defendant's procurement or consent," witnesses testified that defendant some time before the theft trial excused them from attending on his behalf. Held, that evidence that, after so excusing them, and before the theft trial, defendant told a third person to countermand his excuse, and tell them to attend, is admissible to show that defendant's false statement was made through mistake, which by Pen. Code, art. 189, is not perjury. *Brookin v. State*, 27 Tex. Cr. App. 701, 11 S. W. 645.

Where, in a prosecution for perjury alleged to have been committed at a coroner's inquest, defendant testified that the statements made by him at the inquest were made under agitation caused by loss of sleep, etc., evidence that, on the morning of the inquest over the remains of defendant's sister, he told witness that his sister died from cramps, and that he was not agitated, but spoke naturally and intelligently, was admissible. *Stanley v. State* (Cr. App.), 74 S. W. 320.

In a prosecution for false swearing on a former trial, it was error to permit a state's witness, in explaining why a certain fact was impressed on him, to state that after the former trial a witness told him that all the witnesses (including accused) had lied on that occasion. *Jefferson v. State* (Cr. App.), 49 S. W. 88.

In a prosecution for perjury, based on defendant's false testimony in his civil action against a railroad company for personal injuries that he had never had any other claim for injuries against a railroad company, it was proper to admit evidence that about the time the civil action was commenced defendant stated to witness that he had never been injured on any other railroad. *McDonough v. State*, 84 S. W. 594, 47 Tex. Cr. App. 227, 122 Am. St. Rep. 684.

Conduct of Accused.—Evidence, in a prosecution for perjury for making a false affidavit charging theft of money, that the defendant, the morning after he missed the money, assaulted the person charged, and threatened to cut his throat if he had taken the money, and that the person threatened fled the country, should have been admitted, as showing the defendant's belief in regard to what became of his money. *Luna v. State*, 72 S. W. 378, 44 Tex. Cr. App. 482.

In a prosecution for perjury committed by defendant in testifying in favor of one on trial for assault, testimony was admitted as to statements and acts of the one accused of assault on the day after his trial. Held, that this testimony was properly admitted for the purpose of showing the guilt of the one accused of the assault. *McCoy v. State* (Cr. App.), 73 S. W. 1057.

Conduct of Accused during Trial.—On a trial for perjury before the grand jury during its investigation of an assault case, it is proper for a justice of the peace, before whom defendant was brought for examination in such case, to testify that her conduct and language were insolent while testifying before him, and that he had occasion to rebuke her, since deliberation and willfulness are essential elements of the crime of perjury, and evidence to prove such issues goes to the very substance of the offense. *Foster v. State*, 32 Tex. Cr. App. 39, 22 S. W. 21.

Drunkenness.—In a trial for perjury, evidence of drunkenness is admissible to show defendant's inability to commit the crime, his mind being incapable of intent. *Lyle v. State*, 31 Tex. Cr. App. 103, 118, 19 S. W. 903.

Conduct of Other Parties.—Evidence, in a prosecution for perjury in making a false affidavit charging two of defendant's tenants with theft of money, that one of the tenants tried to induce the other to leave the coun-

try, should have been admitted, as it showed a circumstance suggesting to defendant the belief that the tenants were acting together, and had taken his money. *Luna v. State*, 72 S. W. 378, 44 Tex. Cr. App. 482.

On a prosecution for perjury committed at defendant's trial for assault, wherein, as it is alleged, he falsely swore that the person assaulted had presented a pistol at him before the assault, evidence that such person had previously insulted defendant's wife is inadmissible. *Pearson v. State* (Cr. App.), 33 S. W. 224.

Statement of Attorney as to Object in Allowing Accused to Testify.—The state, on a trial for perjury, may call an attorney who, on the trial wherein the alleged perjury was committed, appeared for defense, to show the object of such attorney in calling alleged perjurer as a witness in said trial. *Davidson v. State*, 22 Tex. Cr. App. 372, 382, 3 S. W. 662.

In a prosecution for perjury committed by defendant in testifying in favor of one on trial for assault, the latter's attorneys were permitted to testify that they used defendant to prove an alibi for their client, and that before putting defendant on the stand they had talked with him as to what his testimony would be. Held, that this testimony was properly admitted. *McCoy v. State* (Cr. App.), 73 S. W. 1057.

Upon trial for perjury, the state may show, by the attorney in the case in which the perjury is alleged to have been committed, why he called defendant as a witness in such case, in order to show, if possible, that the false statement was made with premeditation; Pen. Code, art. 189, making it a defense if the false statement was made by mistake, through inadvertence, or under agitation. *Davidson v. State*, 22 Tex. Cr. App. 372, 3 S. W. 662.

In a prosecution for perjury in testifying in favor of one on trial for as-

sault with intent to murder that he (defendant) did not pick up at the place where the shooting occurred a portion of a certain newspaper introduced in evidence, and claimed to have been used by the one accused of the shooting as wadding for his gun, the latter's attorney was permitted to testify that his purpose in using defendant as a witness was to show that the paper picked up by him was not torn in the same way as the one introduced in evidence, and was not the same piece of paper. The attorney also testified that prior to putting defendant on the stand he had talked to him about what his testimony would be. Held, that the testimony was properly received. *Freeman v. State*, 72 S. W. 1001, 44 Tex. Cr. App. 496.

Understanding Contents of Writing.—Proof that an affiant, who signed his name to an affidavit written in a language not understood by him, and making his mark, knew and understood the contents of such affidavit, does not have to be made by the jurat or testimony of an officer who administered oath, to sustain a conviction for perjury in making false statements in such affidavit. Proof that he knew and understood its contents may, like any other fact, be made by any competent evidence. *Hernandez v. State*, 18 Tex. Cr. App. 134, 155.

Warnings in Regard to Gambling.—On a prosecution for perjury consisting of testimony given by defendant on a prosecution for playing at a game of cards, to the effect that he was not present, and did not see the game, it was error to permit a witness to testify that while he was working for defendant he warned defendant on several occasions about permitting gambling to be carried on in a certain room over defendant's place of business. *Lamar v. State*, 95 S. W. 509, 49 Tex. Cr. App. 563.

Proceedings in Prior Trial.—An indictment charging defendant with mur-

der, and oral testimony that M. was a witness against him on his trial, are admissible to show motive for his alleged perjury on the joint trial of M. and another, for the same murder. *Kitchen v. State*, 26 Tex. Cr. App. 165, 9 S. W. 461.

c. Description of Proceeding in Which Oath Was Administered.

Record of Trial.—To show that the false statement was made in a judicial proceeding, and that it was material, it was proper to admit in evidence the proceedings of the trial upon which the perjury was committed, and proof of the defendant's testimony in that trial. *Pertain v. State*, 22 Tex. Cr. App. 100, 2 S. W. 854.

In a trial for perjury, alleged to have been committed by defendant while testifying before an examining court on the trial of one for forgery, the state read in evidence the complaint filed in such cause, and also the testimony of the complaining witness therein. Held that, such evidence being admissible only to show the issue in the cause in which it was alleged that defendant had committed perjury, it was the duty of the court to charge that the evidence could not be considered in determining the truth or falsity of defendant's statements, but could only be considered for the special purpose named; and a failure to so charge was error. *Higgenbotham v. State*, 24 Tex. Cr. App. 505, 6 S. W. 201.

Where an indictment for perjury charged defendant with having falsely testified that M. and others did not play a game of cards, on the trial of an indictment against M. and others for gaming, such indictment was admissible as inducement and to identify the case in which the perjury was alleged to have been committed. *Stanley v. State* (Cr. App.), 95 S. W. 1076.

In a trial for perjury, information is inadmissible in evidence to prove that the judicial proceeding at which the alleged perjury was committed was a

trial in the county court wherein a certain person was charged with carrying a pistol. *Wilson v. State*, 27 Tex. Cr. App. 47, 49, 10 S. W. 749.

The record and judgment in the proceeding in which the perjury was alleged to have been committed, while not admissible in evidence to be considered by the jury indiscriminately, was admissible as matter of inducement in the matter assigned as perjury. When admitted for this specific purpose, the court should have instructed the jury as to the purpose of its admission, and the extent to which they could consider it. *Washington v. State*, 23 Tex. Cr. App. 336, 5 S. W. 119; *St. Clair v. State*, 11 Tex. Cr. App. 297, 300; *Hutcherson v. State*, 33 Tex. Cr. App. 67, 24 S. W. 908; *Littlefield v. State*, 24 Tex. Cr. App. 167, 5 S. W. 650; *Gabrielsky v. State*, 13 Tex. Cr. App. 428; *Kitchen v. State*, 26 Tex. Cr. App. 165, 172, 9 S. W. 461; *Martinez v. State*, 39 Tex. Cr. App. 479, 46 S. W. 826; *Ross v. State*, 40 Tex. Cr. App. 349, 50 S. W. 336; *Estill v. State*, 38 Tex. Cr. App. 255, 42 S. W. 305; *Maines v. State*, 23 Tex. Cr. App. 568, 5 S. W. 123; *Downing v. State*, 61 Tex. Cr. App. 519, 136 S. W. 471; *Franklin v. State*, 38 Tex. Cr. App. 346, 348, 43 S. W. 85; *Davidson v. State*, 22 Tex. Cr. App. 372, 383, 3 S. W. 662; *Hill v. State*, 22 Tex. Cr. App. 579, 584, 3 S. W. 764; *Jefferson v. State* (Cr. App.), 29 S. W. 1090.

Judgment.—The statement for which defendant was indicted for perjury was alleged to have been made on the joint trial of M. and J., for murder. At the close of the state's testimony the court directed the acquittal of J., but the trial proceeded as to M., thus resulting in two judgments. Held, that the judgment acquitting J. was properly admitted. *Kitchen v. State*, 26 Tex. Cr. App. 165, 9 S. W. 461.

The judgment need not show that the court ordered the acquittal. *Kitchen v. State*, 26 Tex. Cr. App. 165, 9 S. W. 461.

Judgment in a case where the alleged perjury was committed is admissible as an inducement, but not as proof of perjury, and it must be so limited in the charge to the jury. *Davidson v. State*, 22 Tex. Cr. App. 372, 382, 3 S. W. 662.

But see *Warren v. State*, 57 Tex. Cr. App. 518, 123 S. W. 1115, where it is said that, on a prosecution for perjury, the judgment on the prosecution of defendant on which the alleged false testimony was given is not admissible. And in *Hutcherson v. State*, 33 Tex. Cr. App. 67, 24 S. W. 908, the court said that while the judgment of acquittal on the trial in which the perjury was committed is admissible as inducement, it is not admissible to show the defendant's innocence, and it would be the better law to exclude judgment of a case in which perjury is alleged to have been committed from the jury passing on the question of perjury.

Record of Case Other Than That in Which Perjury Was Committed.—On an indictment for perjury alleged to have been committed by defendant in testifying to facts to establish an alibi for one J. on the trial of J. for theft, the record of a second trial of J. for such theft is not admissible in evidence. *Gibson v. State* (Cr. App.), 15 S. W. 118.

On a prosecution for perjury, on the trial of one charged with a criminal offense, the record of conviction of such person in cases other than that in which the perjury is alleged to have been committed is inadmissible. *Jefferson v. State* (Cr. App.), 29 S. W. 1090.

On a trial for perjury alleged to have been committed by defendant when, on trial for theft, he, as a prosecuting witness, swore to his ownership of the alleged stolen animal, the judgment in a civil suit between defendant and the defendant in such theft case is not admissible for the defense to show ownership of the animal to have been as sworn to on such trial for theft. *Hill v. State*, 22 Tex. Cr. App. 579, 584, 3 S. W. 764.

Order Continuing Cause.—In a prosecution for perjury in a motion for continuance it is not necessary to introduce an order of the court continuing the cause on such motion, but to do so is harmless error. *Ross v. State*, 40 Tex. Cr. App. 349, 352, 50 S. W. 336.

Defect in File Mark.—On trial for perjury alleged to have been committed in justice's court, a claim that the file papers and judgment of conviction in the prosecution in justice's court can not be admitted in evidence because the justice's file mark did not show of what precinct he was justice is without merit. *Smith v. State*, 31 Tex. Cr. App. 315, 20 S. W. 707.

Defect in Information.—In a prosecution for perjury, alleged to have been committed on the trial of a criminal case, the information in that case, substantially charging the crime, is admissible in evidence in the perjury case, notwithstanding a variance between it and an unnecessary allegation in the indictment for perjury as to details of description of that offense, which would be ignored as surplusage. *Kelley v. State*, 51 Tex. Cr. App. 507, 103 S. W. 189.

Correction of Certificate.—Where it appeared, on a trial for perjury at an inquest, that the alleged false testimony was given on another than the date on the certificate of inquest, it was proper to show that said certificate was erroneously dated. *Rogers v. State*, 35 Tex. Cr. App. 221, 32 S. W. 1044.

Waiver of Time.—On a trial for perjury alleged to have been committed by defendant while giving his deposition in a civil action for the purpose of making the same evidence on the trial thereof, the admission in evidence of defendant's waiver of time and commission to take the deposition was not erroneous because it failed to waive the filing of the deposition, the offense being complete when the deposition was taken for the purpose of being filed and used in the trial of the

civil case. *Manning v. State*, 81 S. W. 957, 46 Tex. Cr. App. 326.

Testimony at Trial at Which Perjury Was Committed.—On a prosecution for perjury alleged to have been committed while testifying at a certain trial, evidence of what other witnesses testified to such trial is inadmissible. *Freeman v. State*, 67 S. W. 499, 43 Tex. Cr. App. 580.

Statements by Grand Juror.—In a trial for perjury, it was not competent to admit evidence as to what a grand juror said regarding the intoxication of defendant at the time he made the alleged false statement before the grand jury. *Sisk v. State*, 28 Tex. Cr. App. 432, 437, 13 S. W. 647.

d. Jurisdiction and Authority to Administer Oath.

Jurisdiction of Court.—On a prosecution for perjury, charged to have been committed in the trial of a case in a corporation court, it is error to reject evidence tending to show that the crime which was before the court for trial was not committed within the limits of the corporation wherein the corporation court exists. *Moss v. State*, 83 S. W. 829, 47 Tex. Cr. App. 459.

On a prosecution for perjury consisting of false testimony given on the trial of a prosecution for gaming in the corporation court of a certain city, it was competent to introduce parol evidence showing acts of user and the recognition of the corporate existence of such city. *Lamar v. State*, 95 S. W. 509, 49 Tex. Cr. App. 563.

Authority of Justice of Peace.—A witness was allowed to testify that he was a justice of the peace, and, as such, administered the oath upon which the false swearing is predicated. Held, that parol evidence of the fact was properly admitted. *Woodson v. State*, 24 Tex. Cr. App. 153, 6 S. W. 184.

Clerk of Court.—Since in a prosecution for false swearing in an affidavit made before a deputy county clerk, such clerk could have sworn to

his official character, it was not error to permit the introduction of the deputation showing his appointment. *Mahon v. State*, 79 S. W. 28, 46 Tex. Cr. App. 234.

Impanelment of Grand Jury.—On a trial for perjury committed before the grand jury, while it is proper to prove impanelment of the grand jury by minutes of court, omission of such proof is not ground for an acquittal, if, the impanelment is otherwise proved without objection. *Foster v. State*, 32 Tex. Cr. App. 39, 41, 22 S. W. 21.

Proceedings in Prior Case.—On a trial for perjury predicated on testimony of defendant on the trial of L. for seduction, so much of the proceedings in the latter case is admissible as will show that the trial was pending before a court of competent jurisdiction, and that the testimony in question was not a material issue therein. *Peyton v. State* (Cr. App.), 32 S. W. 892.

Where in a prosecution for perjury, the parol proof showed that the trial at which the offense was alleged to have been committed was in the county court, on a charge against defendant for playing at a game of cards, and that issue was joined between the state and defendant on the charge, it was not necessary in order to show a proper legal trial in the county court to introduce the information or complaint in evidence. *Curtis v. State*, 46 Tex. Cr. App. 480, 81 S. W. 29.

On a prosecution for perjury, all that is necessary to show jurisdiction of the court is to show that it had jurisdiction of the prosecution on which the alleged false testimony was given; and though the prosecution is in the county court, where such false testimony was given, and the prosecution in which the false testimony was given originated in a justice court, it is unnecessary and improper to introduce the transcript of such court, though it is proper to introduce the complaint.

Warren v. State, 57 Tex. Cr. App. 518, 123 S. W. 1115.

Cost Bill.—On the issue as to whether the judge or the clerk swore defendant in the former trial, the cost bill, containing the clerk's charge for swearing the witness, was competent. Jefferson v. State (Cr. App.), 49 S. W. 88.

e. Administration, Form, and Making of Oath.

On a prosecution for perjury, it was proper to permit a witness to testify that defendant was sworn by a justice of the peace and the oath administered to him. Clay v. State, 52 Tex. Cr. App. 555, 107 S. W. 1129.

On the trial of an indictment for perjury, alleging that the oath was administered to defendant by a person named as county judge, it is error to exclude testimony tending to prove that defendant was sworn by a different person. Jefferson v. State (Cr. App.), 29 S. W. 1090.

Where, in a prosecution for perjury, it was alleged that a justice of the peace administered the oath to defendant at the time the perjury was alleged to have been committed, it was proper to prove by an interpreter who acted at that time that he had interpreted the oath to defendant. Trevinio v. State, 88 S. W. 356, 48 Tex. Cr. App. 350.

f. Materiality of Testimony on Which Perjury Is Alleged.

General Rule.—On a prosecution for perjury the materiality of the issue on which the testimony was given may be shown by introducing all or so much of the pleadings in the action as shows the materiality, together with such facts proved as would tend to show the testimony on a material issue. Maroney v. State, 78 S. W. 696, 45 Tex. Cr. App. 524.

Evidence of Other Offenses.—Where defendant is charged with perjury in testifying that he did not see gambling at a certain place, evidence that he

gambled at another game conducted at another place on the same day is inadmissible. Hollins v. State (Cr. App.), 69 S. W. 594.

Contemporaneous Occurrences.—

Where, in a prosecution for perjury, in that defendant swore that he did not, on a particular occasion, assault his wife, it was competent for the state to show, in connection with testimony of the assault, what occurred at the time, in order to develop the materiality of the issue laid in the indictment. Townley v. State (Cr. App.), 81 S. W. 309.

Testimony of Witness in Original Prosecution.—

In a prosecution for perjury, consisting of defendant's testimony on a prosecution for assault to murder, testimony of a witness in such prosecution can not be used as original evidence in the perjury trial to show that defendant's testimony therein was material. McCoy v. State, 43 Tex. Cr. App. 606, 68 S. W. 686.

Opinion.—On a trial for perjury before the grand jury, defendant can not prove by the opinion of some of the grand jurymen the want of materiality in her testimony on which the perjury is assigned. Foster v. State, 32 Tex. Cr. App. 39, 22 S. W. 21.

Self Defense.—Where defendant, in a trial for assault and battery, falsely swears that he did not strike the prosecuting witness, the fact that he struck in self-defense is immaterial in his trial for perjury. Hutcherson v. State, 33 Tex. Cr. App. 67, 24 S. W. 908.

Ownership of Land.—On a prosecution for perjury for falsely swearing that a credit was indorsed on a note given for land, evidence as to the ownership of the land by the payee at the time of a renewal of the note is irrelevant, in that it does not tend to prove that the credit was in fact indorsed as testified. Miller v. State, 60 S. W. 673, 42 Tex. Cr. App. 383.

Assignment of Insurance Policy.—

Under the allegations of an indictment

for perjury that the evidence was material as showing that an assignment of the policy to defendant was to defraud creditors it was not permissible for the state to show the materiality of the testimony, on the theory that it would tend to show that the insured burned his house. *Maroney v. State*, 78 S. W. 696, 45 Tex. Cr. App. 524.

Designation of Place.—On the trial of one indicted for falsely swearing that a certain person never kept a gaming table at the house of another person, it was immaterial that such other person occupied only a part of the house; this being a mere designation of the place. *Jefferson v. State* (Cr. App.), 49 S. W. 88.

g. Evidence of What Accused Swore to.

It is proper in a trial for perjury to prove what defendant testified on the trial wherein the perjury was committed. *Freeman v. State*, 43 Tex. Cr. App. 580, 67 S. W. 499.

Form of Oath Not Set Out.—Though the form of the oath upon which an assignment of perjury was based was not set forth in the indictment, evidence is competent, under an allegation that defendant was duly sworn, that he swore that the statement alleged to be false was true to the best of his knowledge and belief. *Beach v. State*, 32 Tex. Cr. App. 240, 22 S. W. 976.

Testimony of Accused at Inquest.—Where the defendant in a prosecution for perjury alleged to have been committed at a coroner's inquest testified at such inquest as an ordinary witness, and was not then suspected of any crime, and was not under arrest, his evidence given at such inquest could not be excluded on the ground that he was not warned that any statements made by him might be used against him. *Stanley v. State* (Cr. App.), 74 S. W. 318.

The fact that the testimony of a witness, alleged, to constitute perjury given at a coroner's inquest held be-

fore a justice of the peace, was not reduced to writing, as required by Code Cr. Proc. 1895, art. 1028, did not authorize the exclusion of oral testimony of defendant's evidence at such inquest. *Stanley v. State* (Cr. App.), 74 S. W. 318.

Witness Unable to Report Entire Testimony.—The fact that a witness is unable to report the entire testimony given by defendant does not prevent him from testifying to the particular part of his testimony on which the perjury is assigned. *Hutcherson v. State*, 33 Tex. Cr. App. 67, 24 S. W. 908.

Cross-Examination.—In a prosecution for perjury, based on defendant's false testimony in his civil action, evidence as to what defendant testified to on cross-examination in such civil action is admissible. *McDonough v. State*, 84 S. W. 594, 47 Tex. Cr. App. 227, 122 Am. St. Rep. 684.

Stenographic Report.—Where perjury was based on alleged testimony by accused in a prior suit on certain notes, it was proper for the state to permit witnesses, including the stenographer at the trial, to testify what testimony was given by him in such suit. *Downing v. State*, 61 Tex. Cr. App. 519, 136 S. W. 471. See the title TRIAL.

Corroborative Testimony.—Where perjury was assigned on defendant's testimony that M. and others did not play cards on a certain occasion in question, a witness who heard defendant's testimony was properly permitted to testify that it was his recollection that defendant swore that M. did not play on that occasion; that he, defendant, went into the storehouse where the game was alleged to have been played with M. and stayed there as long as the latter did; and that M. did not play. *Stanley v. State* (Cr. App.), 95 S. W. 1076.

h. Truth or Falsity of Oath or Assertion.

See ante, "Falsity of Testimony or

Assertion and Knowledge Thereof," I, B, 6.

Mental State of Accused.—On a trial for perjury in testifying, on a trial for murder, that a confession of defendant therein offered by the prosecution had been obtained by intimidation, evidence of the attorneys for such defendant that, about an hour after his purported confession, they visited him in jail, found him greatly agitated, and that he told them that the county attorney had threatened him that he would be hung if he did not confess, and evidence that the purported confession was false in fact, other persons having committed the murder, is admissible, where defendant's testimony as to the intimidation, though positively denied by the prosecution, was corroborated by circumstances. *Parker v. State*, 25 Tex. Cr. App. 743, 9 S. W. 42.

Subsequent Statements by Accused.—On the trial of A. for perjury committed on the trial of B. for burglary, evidence that testimony given by A. on the trial of the burglary case contradicted his own testimony given before the grand jury which investigated the burglary case, and that, after B.'s trial, A. stated that his reason for testifying as he did on B.'s trial was that B.'s friends got him drunk, and induced him to do so, is competent, and tends to prove the perjury charged; and such statement by A. is tantamount to an admission that his testimony on B.'s trial was not true. *Littlefield v. State*, 24 Tex. Cr. App. 167, 5 S. W. 650.

On a trial of one for perjury, in testifying on a murder trial that deceased was armed when shot, his testimony at the inquest, which is not corroborative of that adduced at the trial, and his statement the day after the murder that deceased was unarmed, are admissible to show the falsity of his testimony. *Cordway v. State*, 25 Tex. Cr. App. 405, 8 S. W. 670.

Confessions.—On indictment for making false statements before the grand jury as to a certain theft, confessions as to the theft by the thieves are admissible, though made in the absence of defendant. *Martin v. State*, 33 Tex. Cr. App. 317, 26 S. W. 400.

Opinion of Jurors.—The perjury assigned being the defendant's testimony on the trial of G., the court erred in permitting certain witnesses who served as jurors on the trial of G. to testify on this trial that they discredited and discarded the defendant's testimony in the G. case. *Washington v. State*, 23 Tex. Cr. App. 336, 5 S. W. 119.

As to Truth of Affidavit.—On a trial for falsely swearing that a certain person was of age, and that no legal objection existed to her marriage to defendant, testimony that said person's parents objected to said marriage, if not material, was at least not prejudicial. *Harkreader v. State*, 35 Tex. Cr. App. 243, 33 S. W. 117, 60 Am. St. Rep. 40.

On a trial for perjury predicated upon affidavit to procure a marriage license wherein the age of the female was set forth falsely, it is incompetent by way of rebutting proof of her parents' objections to marriage to prove that defendant gave the girl presents which her parents allowed her to retain. *Harkreader v. State*, 35 Tex. Cr. App. 243, 251, 33 S. W. 117.

It was in proof that, when the marriage license was obtained upon appellant's affidavit that the bride's mother consented to the marriage, the said mother had been dead two years, and thereupon one G., who stood in loco parentis to the bride, was permitted to testify that he did not consent to the marriage. Held, that the testimony of G. was wholly irrelevant, and should have been excluded. *Steber v. State*, 23 Tex. Cr. App. 176, 4 S. W. 880.

Signature of Notes.—Where in a suit

on certain notes accused testified that A., from whom he purchased the notes, had not signed them until he did so at the request of accused at the time of the transfer, to establish that accused was a bona fide purchaser for value, and perjury was assigned on such testimony, evidence that witnesses had seen the notes prior to the date of the purchase, and that A.'s name was on them at that time, and also that other witnesses saw A. sign the notes prior to the purchase, and prior to their indorsement by the payees before they were delivered to A., who delivered them to accused, was admissible. *Downing v. State*, 61 Tex. Cr. App. 519, 136 S. W. 471.

Gambling.—Where defendant was charged with perjury in testifying in a prosecution against M. and others that they did not play at a game of cards as alleged it was proper for the court to prove by M. and others, over defendant's objection, that they did play cards at the time and place in question. *Stanley v. State* (Cr. App.), 95 S. W. 1076.

On the trial of an indictment for perjury, assigned on defendant's testimony before a grand jury that he had not seen any card playing in a room described, it was competent for the state to introduce evidence to show that he testified that he had not seen any card playing, as such evidence bore directly upon the issue. *Sisk v. State*, 28 Tex. Cr. App. 432, 13 S. W. 647.

Under an indictment charging perjury in testifying that defendant did not see named persons bet upon a game of chance during a certain year, evidence that defendant saw such a game played on three or four different occasions by parties named in the indictment was properly admitted. *Foreman v. State*, 85 S. W. 809, 47 Tex. Cr. App. 179.

Habits of Deceased.—On an issue as to whether defendant falsely testified

that he saw a certain person present when another was killed, testimony tending to show the manner in which deceased carried his pistol was competent to prove that deceased accidentally shot himself, and the person alleged to be present was not there. *Rogers v. State*, 35 Tex. Cr. App. 221, 32 S. W. 1044.

Alibi.—On a trial for perjury, it was proper to permit a witness to state that, if defendant testified that he saw the witness present at the time and place a certain person was killed, said testimony was false, where such statement was the same as the allegation in the indictment, and the witness had testified that he was not present and did not kill said person. *Rogers v. State*, 35 Tex. Cr. App. 221, 32 S. W. 1044.

As to Ownership of Saloon.—Defendant was prosecuted for perjury predicated on his testimony, in a civil suit on a liquor dealer's bond, that while he had procured a license, and given the bond for the use of another in carrying on the business, the license had at a certain date been transferred to another town, and that if the business had since that date been resumed at the original place it had been without his knowledge and consent, and the license had been taken clandestinely. Held, that the application, license, and bond, all being in defendant's name, were admissible to show his connection with the civil litigation. *McLeod v. State* (Cr. App.), 75 S. W. 522.

In a prosecution for perjury predicated on defendant's testimony in a civil suit on a liquor dealer's bond that while he had procured a license, and given the bond for the use of another in carrying on the business, the license had at a certain date been transferred to another town, and that if the business had since that date been resumed at the original place it had been without his knowledge and consent,

and the license had been taken clandestinely, it was shown that a witness had made a written lease for the premises in defendant's name and with his approval, that he had obtained the first cask of beer from a saloon owned by defendant and managed by another, and that he had turned over one-half of the profits to defendant and his manager. Held, that this rendered admissible the testimony of the witness that he had gotten his beer from defendant's saloon. *McLeod v. State* (Cr. App.), 75 S. W. 522.

An affidavit by defendant that he had lost the license was admissible, as tending to show that the saloon was operated by his authority. *McLeod v. State* (Cr. App.), 75 S. W. 522.

It was further shown that the license issued to defendant was tacked up in the saloon, and that defendant had the lease to the premises in his possession at the time the business was carried on by various persons. Held, that this rendered admissible testimony as to the conduct of these persons, and that the beer they sold was procured from defendant's saloon. *McLeod v. State* (Cr. App.), 75 S. W. 522.

In a prosecution for perjury, predicated on defendant's testimony in a civil suit on a liquor dealer's bond that, while he had procured a license, and given the bond for the use of another in carrying on the business, the license had at a certain date been transferred to another town, and that if the business had since that date been resumed at the original place it had been done without his knowledge and consent, and the license had been taken clandestinely, the affidavit of defendant that he had lost the license, and the evidence as to the sales and defendant's connection therewith prior to the alleged transfer of the license and after the time covered by the testimony on which the prosecution was based, could only be considered as tending to show the falsity of defendant's statements

that he had no knowledge of the resumption of business and had not consented thereto. *McLeod v. State* (Cr. App.), 75 S. W. 522.

Defendant was prosecuted for perjury predicated on his testimony, in a suit on a liquor dealer's bond, that, while he had procured license and given the bond for the use of another in carrying on the business, the license had at a certain date been transferred to another town, and that, if the business had since that date been resumed at the original place, it had been without his consent, and the license had been taken clandestinely. Held, that it was not necessary to show that the parties running the business were defendant's agents, as the main contention in the civil suit was whether the business had been resumed with defendant's knowledge and consent. *McLeod v. State* (Cr. App.), 75 S. W. 522.

i. Subornation of Perjury and Attempts to Suborn.

Accused was tried for attempting to induce a person to give certain false testimony at the impending hearing of a writ of habeas corpus awarded to one G. by the judge of the criminal district court of Harris county. The state offered in evidence an order of the judge who granted the writ, whereby the hearing of the writ was transferred to the judge of the district court of Harris county. To the admission of the order as evidence, the defence objected that it was irrelevant, and that the transfer ordered was without authority of law. Held, that the order was relevant to the allegation that the writ of habeas corpus was pending when the offense was alleged to have been committed, and that the transfer of the hearing of the habeas corpus was proper under the circumstances, and presented no objection available by the defendant in this case. *Watson v. State*, 5 Tex. Cr. App. 11.

3. Weight and Sufficiency.

a. In General.

Circumstantial Evidence.—See post, "Corroboration by Circumstances," II, B, 4, d.

Substantial Proof Sufficient.—In a perjury case the matter set out in the assignment must be substantially proved but the exact words need not be. *Hutcherson v. State*, 33 Tex. Cr. App. 67, 24 S. W. 908.

One of Several Assignments.—Perjury may be assigned on such portions of testimony as are directly or indirectly material to the issue, and proof of any one assignment would sustain conviction. *Hutcherson v. State*, 33 Tex. Cr. App. 67, 73, 24 S. W. 908; *Beach v. State*, 32 Tex. Cr. App. 240, 22 S. W. 976.

Beyond Reasonable Doubt.—Where an indictment for perjury alleges that accused swore falsely in stating he had not seen a table or bank exhibited for gaming in a certain house, it must be proved beyond a reasonable doubt that he had not seen a table or bank exhibited for gaming in a house. *Waul v. State*, 33 Tex. Cr. App. 228, 229, 26 S. W. 199.

Time.—In a trial for perjury, all that is required as to proof of the time is that the time proved be anterior to the presentment of the indictment and not so remote as to show the prosecution barred by limitation. *Lucas v. State*, 27 Tex. Cr. App. 322, 323, 11 S. W. 443.

Instances of evidence held sufficient to sustain a conviction for perjury. *Hill v. State*, 22 Tex. Cr. App. 579, 3 S. W. 764; *Gonzales v. State*, 54 Tex. Cr. App. 230, 112 S. W. 941; *Simpson v. State*, 46 Tex. Cr. App. 77, 79 S. W. 530; *Hutcherson v. State*, 33 Tex. Cr. App. 67, 74, 24 S. W. 908; *Partain v. State*, 22 Tex. Cr. App. 100, 2 S. W. 854; *Freeman v. State*, 44 Tex. Cr. App. 496, 72 S. W. 1001.

Defendant was accused of perjury while a witness in the trial of one W.

for assault to murder. While the excerpt from the defendant's testimony, set forth as the false statement, does not say in terms that W. was making the assault, it shows facts which constitute an assault. Held, that such allegation was sufficiently substantiated. *Brown v. State*, 24 Tex. Cr. App. 170, 5 S. W. 685.

Instances of evidence held insufficient to sustain a conviction for perjury. *State v. Webb*, 41 Tex. 67, 75; *Gabrielsky v. State*, 13 Tex. Cr. App. 428; *Rohrer v. State*, 13 Tex. Cr. App. 163, 168; *Carter v. State* (Cr. App.), 43 S. W. 996; *Medlock v. State* (Cr. App.), 82 S. W. 508; *Lee v. State* (Cr. App.), 70 S. W. 425; *Wilkerson v. State* (Cr. App.), 55 S. W. 49.

Defendant was charged with perjury in testifying that he did not see D. with a pistol and did not see him shoot a pistol on a certain occasion. Aside from defendant's conflicting statements, the only evidence of falsity was that defendant was riding in the same direction behind D., who had a pistol; that D. fired the same, and for fear of being caught threw it away; and that at the time he fired the same he did not know where defendant was. A police officer testified that he heard the shot in that direction, searched D., and failed to find the pistol. Held, that such facts were insufficient, apart from defendant's contradictory statements, to show that, at the time D. had and shot the pistol, defendant was within sight of him. *Billingsley v. State*, 95 S. W. 520, 49 Tex. Cr. App. 620.

The perjury assigned was that defendant testified before a grand jury that a certain person, whom he accused of rape of his wife, submitted, through one D., a proposition to pay defendant a certain sum, if he would drop the matter, and say no more about it. Defendant testified on the trial that D. told him such person would pay him such sum, and this was not denied by D., though he was

present. Held, that the evidence was not sufficient to support a conviction, though such proposition had not been made. *Butler v. State*, 37 S. W. 746, 36 Tex. Cr. App. 444.

Upon an indictment for perjury, the evidence showed that defendant had testified that at a stated time he did not play cards in a room in the rear of a certain saloon, and that he did in fact play cards at such time in an inclosure in the rear of said saloon used as a cockpit, and consisting of a space inclosed with a high plank fence, and having a covering over only a small part of it. Held, that the evidence did not show that defendant was guilty of perjury. *Gabe v. State* (Cr. App.), 18 S. W. 413.

b. Intent and Knowledge of Falsity.

See ante, "Intent," I B, 1; "Intent, Knowledge and Motive," II, B, 2, b; post, "To Establish Falsity of Oath," II, B, 4, c, (2).

c. Proceedings in Which Oath Was Administered.

Oral Proof.—Where, on a trial for perjury alleged to have been committed by defendant when on trial for swindling, the records of the trial, except the indictment, are not introduced, but no objection is made to oral proof that the court was in session at the time of the alleged perjury, it is proper to refuse to direct an acquittal on the ground of failure of proof that the court was in session. *King v. State*, 32 Tex. Cr. App. 463, 24 S. W. 514.

Information and Complaint.—In a trial for perjury, to sustain an allegation of judicial proceeding, both information and complaint upon which it is based, must be introduced in evidence. *Wilson v. State*, 27 Tex. Cr. App. 47, 49, 10 S. W. 749.

d. Jurisdiction and Authority to Administer Oath.

See ante, "Jurisdiction or Authority of Tribunal or Officer Administering Oath," I, B, 3.

Jurisdiction.—An indictment for perjury alleged that it was committed in a certain precinct, and also that it was committed before W., a justice of the peace in such precinct. W. testified that he was a justice in that precinct, and it was shown that the trial at which the crime was committed was held before him. Held sufficient to show that the crime was committed in such precinct. *Curtley v. State*, 59 S. W. 44, 42 Tex. Cr. App. 227.

Jurisdiction of a criminal trial, in which perjury is alleged to have been committed, may be shown either by a direct allegation that the court had jurisdiction, or by an allegation of facts from which the jurisdiction, in law, will appear. *Anderson v. State*, 18 Tex. Cr. App. 17, 18.

Authority of Officer.—In a prosecution for perjury by a deputy sheriff in making an affidavit to a fee-bill, the state may prove his appointment by parol, and need not introduce a formal appointment. *Shely v. State*, 35 Tex. Cr. App. 190, 193, 32 S. W. 901.

e. Administration, Form, and Making of Oath.

See ante, "Administration, Form and Making of Oath or Substitute Therefor," I, B, 4.

Evidence that the defendant testified in the proceedings in which the perjury was alleged to occur is not sufficient proof that he was sworn. *Curtley v. State*, 59 S. W. 44, 42 Tex. Cr. App. 227.

f. Materiality of Testimony or Assertion.

See ante, "Materiality of Testimony or Assertion," I, B, 5.

Actual Admission of Evidence.—Evidence that testimony was actually admitted in a case is not sufficient evidence, on a trial for perjury, of its materiality. *Lawrence v. State*, 2 Tex. Cr. App. 479, 484.

How Materiality Viewed.—In assigning perjury upon a false affidavit in

support of a motion for a new trial, filed by one not the affiant, the materiality of the alleged false statements must be viewed with reference to their bearing upon such motion and not with reference to the guilt or innocence of him who filed the motion. *Hernandez v. State*, 18 Tex. Cr. App. 134, 148.

Necessity of Materiality—Gambling.—Where an indictment charged perjury committed in the corporation court of a certain city on a complaint charging a person with playing a game of cards in said city, evidence showing that the game of cards about which defendant swore falsely was played outside of the city limits will not support a conviction, in the absence of further proof showing that such false testimony was material to the issue. *Liggett v. State*, 83 S. W. 807, 47 Tex. Cr. App. 450.

Evidence that, in a court having jurisdiction only of offenses committed in the city, on a trial for playing cards in the city, defendant falsely swore that he had not seen or played in a game outside of the city, is insufficient to sustain a conviction of perjury, without evidence to show the materiality of the facts of which he testified. *Pyles v. State*, 83 S. W. 811, 47 Tex. Cr. App. 435.

Where the evidence that the house where defendant saw a game played was one where people resorted was very meager, even if it was sufficient to show that it was a place where people resorted, so as to make it a public place, it was error to refuse to charge that, in order to convict, the evidence must show that the matter about which defendant testified was a violation of the law, and therefore the jury must be satisfied that the place was an out-house where people commonly resorted for the purpose of gaming or for some other specific purpose. *Higgins v. State*, 43 S. W. 1012, 38 Tex. Cr. App. 539.

Notation on Deposit Slip.—In an ac-

tion against a bank for a balance due on a deposit slip, a check containing a notation as to a portion of the deposit which it withdrew was introduced. There was no dispute as to the check, the only controversy being over the date of a payment shown on the deposit slip. One of the witnesses was afterwards prosecuted for perjury in his testimony concerning it. In the prosecution a witness testified as to the time when the notation was made on the check, and he in turn was prosecuted for perjury. Held, that his testimony was not shown to be material. *McAvoy v. State*, 47 S. W. 1000, 39 Tex. Cr. App. 684.

g. Falsity of Oath or Assertion.

See ante, "Falsity of Testimony or Assertion and Knowledge Thereof," I, B, 6.

Knowledge of Falsity.—A person can not be convicted of perjury, in having given evidence under oath contradicting an affidavit previously executed by him, in the absence of proof that he could read and did read the affidavit, or that it was read to him before he signed it. *Scott v. State*, 34 Tex. Cr. App. 41, 28 S. W. 947.

Testimony by Two Witnesses.—Defendant was improperly convicted of perjury for testifying that he had not seen a certain sale of liquor, when the only evidence that he had seen it was that of two men who testified that he was in a position to see it, and one of such witnesses admitted that he had been promised immunity from punishment in view of his testifying against defendant, as a conviction for perjury can not be sustained unless guilt be proved by two witnesses, or one witness with strong corroboration, or confession in open court. *Meeks v. State*, 32 Tex. Cr. App. 420, 24 S. W. 98.

Under Code Cr. Proc., art. 746, providing that no person shall be convicted of perjury except on the testimony of two credible witnesses, or of one credible witness strongly corroboration

rated by other evidence, or on his own confession in open court, a conviction can not be sustained, where the false statement charged was that a hide alleged to have been taken from a steer stolen by W. was taken by defendant and W. from a dead cow, on the testimony of a witness that he was at W.'s house on the day of the alleged theft, and found W. and one M. skinning a beef they had just killed, and that two days thereafter witness and another (who corroborates him) went to W.'s house, and found the hide of the stolen steer. *Maines v. State*, 26 Tex. Cr. App. 14, 9 S. W. 51.

Under Code Cr. Proc., art. 746, requiring the testimony of two credible witnesses or the strongly corroborated testimony of one to prove the falsity of defendant's statement under oath, evidence was sufficient to sustain defendant's conviction for perjury in swearing that he saw a certain person present when another was killed, where said person, corroborated by another, testified that he parted with deceased before he was killed, and it appeared that the night was so dark that defendant could not have seen the alleged killing from the place where he said, he did, and the circumstances indicated that deceased accidentally shot himself when alone, and that defendant did not see the affair. *Rogers v. State*, 35 Tex. Cr. App. 221, 32 S. W. 1044.

In perjury predicated on the alleged false statement by defendant that he did not, on a certain occasion, see a pistol in K.'s hand, two witnesses testified that they, with defendant and K., were standing close together, on a bright moonlight night; that K. drew his pistol, and tried to strike witness with it; that defendant could not help seeing it unless his eyes were shut. Two other witnesses testified that defendant had told them he saw the pistol on the occasion in issue. Held, that the evidence was positive, and not circumstantial, within Code Cr. Proc.

1879, art. 746, forbidding a conviction for perjury on circumstantial evidence alone. *Franklin v. State*, 43 S. W. 85, 38 Tex. Cr. App. 346.

h. Subornation of Perjury.

Offer to Bribe Witness.—On a prosecution for offering to bribe a witness, it is sufficient to prove offer to bribe with money; proof that the money was either actually tendered or produced, is unnecessary. *Jackson v. State*, 43 Tex. 421, 424. See the titles BRIBERY, vol. 1, p. 692; OBSTRUCTING JUSTICE, ante, p. 560.

4. Number of Witnesses or Corroboration.

a. Necessity of Corroboration.

Statutory Provisions.—Articles 745, 746, of Texas Code of Criminal Procedure, providing for corroborative evidence in cases of perjury, are but statutory declarations of the common law regulating prosecutions for the crime of perjury, and are founded on substantial justice. *Hernandez v. State*, 18 Tex. Cr. App. 134, 149.

Contradictory Statements of Accused.—In *Brooks v. State*, 29 Tex. Cr. App. 582, 16 S. W. 542, we held that "a conviction for perjury can not be sustained where there is no other evidence except proof of the taking of the oath, the giving of the evidence upon which the perjury is assigned, followed by proof that at other times the prisoner when not under oath made statements, the legal effect of which was to contradict his declarations under oath." *Agar v. State*, 29 Tex. Cr. App. 605, 606, 16 S. W. 761.

It has been settled by appellate court in *Brooks v. State*, 29 Tex. Cr. App. 582, 16 S. W. 542, and *Agar v. State*, 29 Tex. Cr. App. 605, 16 S. W. 761, that a party can not be convicted upon his contradictory statements, where one is under oath and the other not, or where both are under oath. *Billingsley v. State*, 49 Tex. Cr. App. 620, 95 S. W. 520.

Proof that a statement was false can not be made alone by a statement in conflict with that assigned for perjury. *Whitaker v. State*, 37 Tex. Cr. App. 479, 36 S. W. 253.

In prosecutions for perjury, evidence which presents "only oath against oath" is insufficient to warrant a conviction. *Hernandez v. State*, 18 Tex. Cr. App. 134, 149.

Where the only evidence of perjury was defendant's statement to several that he was present at the burglarizing of a certain store, and participated therein, and his subsequent statement under oath before the grand jury in denial, conviction can not be sustained. *Brooks v. State*, 29 Tex. Cr. App. 582, 16 S. W. 542.

Single Witness.—Under Willson, Cr. St., § 2460, a person can not be convicted of perjury on the uncorroborated testimony of one witness as to the falsity of the statement charged. *Taylor v. State* (Cr. App.), 22 S. W. 974; *Cox v. State*, 13 Tex. Cr. App. 479.

Defendant can not be convicted of perjury in testifying that he did not have intercourse with M. on her testimony alone that he did, there being no other evidence that he was where it was alleged to have occurred, and his declaration that she and her sister were ill treated by their parents, and that, if they wanted an education, or to leave home, he would furnish the money, and the fact that she afterwards went where he was, not being corroboration of her testimony. *Lee v. State* (Cr. App.), 70 S. W. 425.

In False Swearing.—In a prosecution for false swearing to prove that the assertion or the declaration was false in fact, there must be the same corroboration of the witness, either by another witness or by additional circumstances, as is required to support the charge of perjury. *Aguierre v. State*, 31 Tex. Cr. App. 519, 520, 21 S. W. 256.

b. Elements and Evidence Requiring Corroboration.

Materiality of Evidence.—The prosecution, to sustain a proper assignment of perjury, may show the falsity of defendant's statements regarding other and correlative facts. *Anderson v. State*, 24 Tex. Cr. App., appx., 705, 7 S. W. 40.

When a conviction is sought on the trial of one charged with perjury, on the testimony of one witness and corroborating evidence, the corroborating evidence must corroborate material testimony adduced by the state in support of the charge, and not testimony in regard to some distinct and immaterial matter. *State v. Buie*, 43 Tex. 532, overruled in opinion on rehearing in *Anderson v. State*, 24 Tex. Cr. App., appx., 705, 7 S. W. 40.

c. Number of Witnesses and Degree of Corroborative Proof Required.

(1) To Establish Oath.

In a prosecution for perjury in testifying before the grand jury, it was only necessary to prove by one witness what defendant swore to before the grand jury; its falsity being proven by several witnesses. *Hambricht v. State*, 91 S. W. 232, 49 Tex. Cr. App. 162.

In a prosecution for perjury it is sufficient to establish the oath taken and what was sworn as a predicate for perjury by a single witness. The statute only requires two witnesses to prove the falsity of the alleged false swearing. *Adams v. State*, 49 Tex. Cr. App. 361, 91 S. W. 225.

(2) To Establish Falsity of Oath.

General Rule.—In order to convict of the crime of perjury under the Texas statute, it is necessary that there be two witnesses to prove the falsity of the statement, or one witness with strong corroborating circumstances; otherwise, the conviction can not be sustained. *Cleveland v. State*, 50 Tex.

Cr. App. 6, 95 S. W. 521; Billingsley v. State, 49 Tex. Cr. App. 620, 95 S. W. 520; Franklin v. State, 38 Tex. Cr. App. 346, 347, 43 S. W. 85; Anderson v. State, 24 Tex. Cr. App., appx., 705, 720, 7 S. W. 40; Brookin v. State, 27 Tex. Cr. App. 701, 703, 11 S. W. 645; Aguierre v. State, 31 Tex. Cr. App. 519, 520, 21 S. W. 256; Whitaker v. State, 37 Tex. Cr. App. 479, 481, 36 S. W. 253; Knapp v. State (Cr. App.), 101 S. W. 449; Curtis v. State, 46 Tex. Cr. App. 480, 81 S. W. 39; Conant v. State, 51 Tex. Cr. App. 610, 103 S. W. 897; Lee v. State (Cr. App.), 70 S. W. 425; Chavarria v. State (Cr. App.), 63 S. W. 312; Washington v. State, 22 Tex. Cr. App. 26, 3 S. W. 228; Hernandez v. State, 18 Tex. Cr. App. 134, 149; Anderson v. State, 20 Tex. Cr. App. 312; Grandison v. State, 29 Tex. Cr. App. 186, 15 S. W. 174; Waters v. State, 30 Tex. Cr. App. 284, 17 S. W. 411; Kitchen v. State, 29 Tex. Cr. App. 45, 14 S. W. 392; Carter v. State (Cr. App.), 43 S. W. 996; Gabrielsky v. State, 13 Tex. Cr. App. 428; Wilkerson v. State (Cr. App.), 55 S. W. 49; Beach v. State, 32 Tex. Cr. App. 240, 22 S. W. 976; Brooks v. State, 29 Tex. Cr. App. 582, 585, 16 S. W. 542; Plummer v. State, 35 Tex. Cr. App. 202, 33 S. W. 228; Rogers v. State, 35 Tex. Cr. App. 221, 32 S. W. 1044; Anderson v. State, 56 Tex. Cr. App. 360, 120 S. W. 462; Montgomery v. State (Cr. App.), 40 S. W. 805; Holt v. State, 48 Tex. Cr. App. 559, 89 S. W. 838; Wilson v. State, 27 Tex. Cr. App. 47, 10 S. W. 749; Miller v. State, 27 Tex. Cr. App. 497, 11 S. W. 485; Gartman v. State, 16 Tex. Cr. App. 215, 220; State v. Buie, 43 Tex. 532.

In a trial for perjury, the statute provides that no person shall be convicted except on testimony of two credible witnesses or by one witness strongly corroborated by circumstances, or upon defendant's confession in open court. Gabrielsky v. State, 13 Tex. Cr. App. 428, 439; Meeks v. State, 32 Tex. Cr. App. 420, 422, 24 S. W. 98; Maines v. State, 26 Tex. Cr. App. 14, 9 S. W.

51; Wilson v. State, 27 Tex. Cr. App. 47, 49, 10 S. W. 749; Miller v. State, 27 Tex. Cr. App. 497, 11 S. W. 485; Kemp v. State, 28 Tex. Cr. App. 519, 522, 13 S. W. 869; Smith v. State, 22 Tex. Cr. App. 196, 2 S. W. 542.

On a prosecution for falsely swearing, in making an affidavit for a marriage license, that the girl "is eighteen years old and there are no legal objections to our marriage," the case having been submitted in distinct portions of the charge on two phases: (1) Whether defendant swore falsely in stating that the girl was eighteen years old, and (2) whether he swore falsely in stating in effect that he had the consent of the girl's father to marrying her—and there having been but one witness, the girl's father, that he did not give his consent, while there were two witnesses as to the girl's being under eighteen years of age, it was error to refuse an instruction that, in considering the second phase, if the jury should find the father was not corroborated by another witness, or strongly by other evidence in the case as to the want of consent, they should acquit, though the court in a general way gave a charge that it was necessary to prove the falsity of the affidavit by two credible witnesses or one witness strongly corroborated by other testimony. Holt v. State, 89 S. W. 838, 48 Tex. Cr. App. 559.

Meaning of "Confession in Open Court."—"Confession in open court," as used in art. 786, of Code of Criminal Procedure of 1895, respecting trial for perjury, means that the party making the confession must be charged with the crime confessed and that the confession must be made in open court in the case pending against the confessor. Butler v. State, 36 Tex. Cr. App. 483, 38 S. W. 46.

Who Are "Credible Witnesses."—A credible witness, within the rule that no person can be convicted of perjury except on the testimony of two credible witnesses or of one credible witness

corroborated strongly by other evidence, is one who, being competent to give evidence, is worthy of belief, and all witnesses permitted to testify on the trial are competent, and the jury are the exclusive judges as to whether a witness is worthy of belief. *Anderson v. State*, 56 Tex. Cr. App. 360, 120 S. W. 462; *Smith v. State*, 22 Tex. Cr. App. 196, 2 S. W. 542.

A "credible witness," within the meaning of the statute, is one who, being competent to have evidence, is worthy of belief. *Wilson v. State*, 27 Tex. App. 47, 10 S. W. 749, 11 Am. St. Rep. 180; *Kitcken v. State*, 29 Tex. Cr. App. 45, 14 S. W. 392.

A witness whose general reputation for truth and veracity is bad, and whose testimony is directly contradicted by defendant and an unimpeached and disinterested witness, is not a "credible witness" within the meaning of the statute. *Kitcken v. State*, 29 Tex. Cr. App. 45, 14 S. W. 392.

Under Code Cr. Proc. 1895, art. 786, providing that no person may be convicted of perjury, except upon the testimony of two credible witnesses, or of one credible witness strongly corroborated by other evidence, an accomplice being a discredited witness, to convict of perjury there must be at least one credible witness besides an accomplice. *Conant v. State*, 51 Tex. Cr. App. 610, 103 S. W. 897. See the title WITNESSES.

d. Corroboration by Circumstances.

Circumstantial Evidence.—"Our statute on the subject of perjury requires that two credible witnesses must swear to the falsity of the statement on which the perjury is predicated, or the case may be made out on the testimony of one credible witness strongly corroborated by other circumstances. We have recently held that a case of perjury may be entirely made out and supported by circumstantial evidence. See *Plummer v. State*, 35 Tex. Cr. App. 202, 33 S. W. 228." *Rogers v. State*, 35

Tex. Cr. App. 221, 222, 32 S. W. 1044. See, also, *Anderson v. State*, 24 Tex. Cr. App., appx., 705, 719, 7 S. W. 40; *Maroney v. State*, 45 Tex. Cr. App. 524, 78 S. W. 696.

Pure Circumstantial Evidence.—In *Partain v. State*, 22 Tex. Cr. App. 100, 2 S. W. 854, it is questioned whether, under the Code of this state, a conviction for perjury can be sustained on purely circumstantial evidence. And in *Maines v. State*, 26 Tex. Cr. App. 14, 21, 9 S. W. 51, it is said that a conviction for perjury can not be sustained by purely circumstantial evidence.

Code Cr. Proc., art. 746, provides that no person shall be convicted of perjury "except upon the testimony of two credible witnesses, or of one credible witness corroborated strongly by other evidence as to the falsity of the defendant's statements under oath." Only one witness testified directly to the falsity of defendant's statement. Held, that a charge that defendant could be convicted on circumstantial evidence alone was error. *Kemp v. State*, 28 Tex. Cr. App. 519, 13 S. W. 869.

Construction of Statutory Provision.

—The statute (Code Cr. Proc., art. 746) requires that the falsity of the statement be established by the testimony of two credible witnesses, or by one credible witness strongly corroborated. We hold that the falsity of the statement can be established by circumstantial evidence, but this must be done by the testimony of at least two credible witnesses, or by one credible witness strongly corroborated, as the law requires. In all criminal cases the guilt of the accused can be established by circumstantial evidence. Why can not the falsity of a statement in a perjury case be established by the same character of evidence? The difference between other cases and perjury cases is this: While one witness may be sufficient to establish the guilt of the accused in other cases, the law

requires two credible witnesses, or one credible witness strongly corroborated, in perjury cases. It is not the character of the proof that is contemplated by the statute, but the number and character of the witnesses. *Plummer v. State*, 35 Tex. Cr. App. 202, 33 S. W. 228.

While art. 746, Code of Criminal Procedure precludes conviction for perjury upon circumstantial evidence alone, it is sufficient if facts testified to by required witnesses conclusively show that defendant swore to what he necessarily knew was untrue. *Beach v. State*, 32 Tex. Cr. App. 240, 254, 22 S. W. 976.

Though Code Cr. Proc., art. 746, provides that no person shall be convicted of perjury except upon the testimony of two credible witnesses, or upon the testimony of one credible witness corroborated strongly by other evidence, a conviction can be had for falsely swearing in an application for a continuance for an absent witness that it was not made for delay, on evidence showing that a few minutes before making the application defendant was in conversation with the witness. *Beach v. State*, 32 Tex. Cr. App. 240, 32 S. W. 976.

One Witness and Corroborative Evidence.—The testimony of a witness that perjury had been committed may be "strongly corroborated" by circumstantial evidence, consisting of proof of independent facts which together tend to establish the main fact, that is, falsity of defendant's oath, and which together strongly corroborate truth of testimony of a single witness who has testified to such falsity. *Hernandez v. State*, 18 Tex. Cr. App. 134, 150.

Under the statute which permits a conviction of perjury on the testimony "of one credible witness corroborated strongly by other evidence as to the falsity," the other evidence may be circumstantial merely; but it must relate

to a material matter, and, taken together, it must produce a deep conviction upon the minds of the court and jury. *Hernandez v. State*, 18 Tex. Cr. App. 134, 51 Am. Rep. 295.

Conviction of perjury is sustained by strongly corroborated evidence of one witness. *Anderson v. State*, 24 Tex. Cr. App., appx., 705, 720, 7 S. W. 40.

e. Corroboration by Admissions of Accused.

See ante, "To Establish Falsity of Oath," II. B. 4, c, (2).

Admissions of Accused.—Testimony of several witnesses that defendant, while a witness, admitted the falsity of an affidavit made by him, is not proof by two witnesses of its falsity, within the statute. *Butler v. State*, 38 S. W. 46, 36 Tex. Cr. App. 483.

Letter Admitting Guilt.—Conviction of perjury will be reversed where the sole evidence on the part of the state was circumstantial, aside from a letter of defendant admitting guilt, and the court charged that such letter stood as a witness in the case and would support a conviction because corroborated by another witness. *Hughes v. State*, 32 Tex. Cr. App. 379, 380, 23 S. W. 891.

f. Sufficiency of Corroboration.

What Constitutes "Corroborative Evidence."—What is "corroborating evidence," in perjury cases, is not defined by any Texas statute. *Hernandez v. State*, 18 Tex. Cr. App. 134, 150.

Corroborating evidence, in perjury cases, under the Texas statute, must relate to a material matter, that is, must tend to show falsity of defendant's oath, and, taken all together, it must be, in the opinion of both the court and the jury, strong, that is, cogent, powerful, forcible, calculated to make a deep or effectual impression upon the mind. *Hernandez v. State*, 18 Tex. Cr. App. 134, 150.

Corroboration of Witness by Himself.—Under Cr. Code, art. 746, requiring for the conviction of perjury the testimony of two witnesses, or of one witness "corroborated strongly by other evidence," held, that the one witness could not corroborate himself by showing that he brought suit on notes falsely sworn by defendant to be accommodation notes. *Gabrielsky v. State*, 13 Tex. Cr. App. 428.

Several Witnesses.—Where five witnesses testified positively to the facts constituting the perjury charged, and the evidence for defendant was contradictory and uncertain, a conviction will not be set aside. *Lomax v. State* (Cr. App.), 40 S. W. 999.

In a prosecution for perjury, where the testimony of one witness tended directly to support and corroborate, and that of another tended to support, the testimony of a witness which directly traversed the alleged false testimony of the accused, the falsity of defendant's testimony was sufficiently shown. *Kelley v. State*, 51 Tex. Cr. App. 507, 103 S. W. 189.

Accused was tried for perjury, committed at an examining trial of N. for stealing R.'s hogs in G. county, in testifying that he saw N. in G. county driving fifteen or sixteen hogs belonging to R. Held, that evidence of several witnesses that N. did not have or drive in G. county sixteen hogs belonging to R., but that N. took up nine hogs in W. county, belonging to R., which he found in his corn field, and sold them under a law in force in W. county, is sufficient to convict of perjury. *Martinez v. State*, 46 S. W. 826, 39 Tex. Cr. App. 479.

One Witness and Lack of Corroborative Evidence.—Where a defendant has been convicted of theft of a colt, and perjury is assigned upon an affidavit, made by another person, in support of defendant's motion for a new trial, that others had, or acknowledged that they had, committed the theft, and

only one witness, on the trial for perjury, directly testifies to falsity of statements assigned as perjury, the court should direct an acquittal, in the perjury case, where the only corroborative evidence is that of defendant's guilt, in the theft case, but commits no error in refusing to direct an acquittal, where other corroborative evidence, such as manifest discrepancies in dates appear. *Hernandez v. State*, 18 Tex. Cr. App. 134, 152.

Upon defendant's trial for perjury, alleged to have been committed in an affidavit made by him in support of a motion for a new trial made by defendant in a theft case, and where only one witness swears to the falsity of the affidavit, evidence of defendant's guilt in the theft case, is not "strong corroborative evidence" and, standing alone, would not justify a conviction for perjury. *Hernandez v. State*, 18 Tex. Cr. App. 134, 151.

The evidence of perjury was a written release of the claim against a decedent's estate, made by the affidavit on which the indictment was found, unsupported by other testimony, and explained by defendant. Held, that under Code Cr. Proc., art. 745, which provides, "in all cases where two witnesses, or one with corroborating circumstances, are required to authorize a conviction, if the requirement be not fulfilled, the court shall instruct the jury to render a verdict of acquittal," etc., a verdict should have been directed for the defendant. *Waters v. State*, 30 Tex. Cr. App. 284, 17 S. W. 411.

If, in a prosecution for perjury, but a single witness testifies to the falsity of the alleged false oath, and there is a want of corroborating evidence, it is the duty of the trial court to instruct the jury to acquit the defendant, and failure to so instruct is fatal to the conviction. (Code Crim. Proc., Art. 745, et seq.). *Cox v. State*, 13 Tex. Cr. App. 479.

Where, in a prosecution for perjury, the only evidence that accused falsely testified that a transaction with reference to a keg of beer occurred on Monday or Tuesday before the arrival of the beer on Saturday, was that of R., who testified that the transaction occurred on Saturday after the arrival of the beer, it was insufficient, for want of corroboration, to sustain a conviction. *Cleveland v. State*, 95 S. W. 521, 50 Tex. Cr. App. 6.

It being necessary, to sustain a conviction for perjury, to prove by two credible witnesses, or by one credible witness strongly corroborated, that the statement was false, defendant can not be convicted of perjury in testifying on the trial of E. to facts making the killing of N. by E. a case of self-defense—to wit, that, at the time of the killing, N. was advancing on E., in the attitude as if about to draw a weapon—where but one witness for the state saw the beginning of the difficulty, and the others were first attracted by hearing the pistol fired; and this, though the latter witnesses state that they did not see defendant when the difficulty occurred, since he may have gone into the building immediately at hand. *Carter v. State* (Cr. App.), 43 S. W. 996.

Code Cr. Proc., art. 746, provides that no person shall be convicted of perjury, except on the testimony of two credible witnesses, or one credible witness, strongly corroborated by other evidence. Held, on an indictment for perjury, that a witness whose general reputation for truth and veracity is bad, and whose testimony is directly contradicted by defendant, and an unimpeached and disinterested witness, is not a “credible” witness, and his testimony, only slightly corroborated, is insufficient to support a conviction. *Kitchen v. State*, 29 Tex. Cr. App. 45, 14 S. W. 392.

Defendant was tried for carrying a pistol, and swore he had none. There-

upon he was indicted for perjury. On the trial it was shown that prosecuting witness was the only one present at the time defendant struck him. Prosecuting witness testified that defendant struck him with a pistol, and there was some testimony that defendant owned a pistol like the one with which it was claimed he struck prosecuting witness. Code Cr. Proc., art. 786, provides no person shall be convicted of perjury except upon the testimony of two credible witnesses, or one credible witness corroborated strongly by other evidence as to the falsity of defendant's statement under oath, etc. Held, that the evidence was not sufficient to support a verdict of guilty. *Wilkinson v. State* (Cr. App.), 55 S. W. 49.

Statements by Third Person.—On a trial for perjury based on defendant swearing falsely in support of an alibi for a third person on trial for rape, the prosecutrix testified that the third person committed the rape. The only corroborative evidence was the evidence showing that the third person, on being arrested by the prosecutrix's husband, stated he had wronged him, and that the matter could be settled. Held, that the corroborative evidence was insufficient, under the statute providing that no person shall be convicted of perjury except on the testimony of one witness “strongly corroborated by other evidence.” *Grady v. State*, 90 S. W. 38, 49 Tex. Cr. App. 3.

C. TRIAL.

1. Question for Jury.

Willfulness and Knowledge of Falsity.—In a trial for perjury, the jury must determine whether the alleged false statement was deliberately made or whether it was made through inadvertence, or by mistake, and in doing so they may consider defendant's mental condition at the time of making the alleged false statement and at the time of the card playing about which it was

made. *Sisk v. State*, 28 Tex. Cr. App. 432, 437, 13 S. W. 647.

In a trial for perjury, it is indispensable that the jury should form an opinion as to the actual state of mind with which the alleged perjury was committed, and whether the false statement was deliberately and willfully made.' *Lyle v. State*, 31 Tex. Cr. App. 103, 115, 19 S. W. 903. See ante, "Falsity of Testimony or Assertion and Knowledge Thereof," I, B, 6.

Materiality.—Where an indictment for perjury charges in general terms that the testimony was on a material issue in an action, it is for the court to determine from the record in testimony the materiality of the issue. *Maroney v. State*, 78 S. W. 696, 45 Tex. Cr. App. 524; *Luna v. State*, 44 Tex. Cr. App. 482, 72 S. W. 378; *Washington v. State*, 23 Tex. Cr. App. 336, 5 S. W. 119; *Montgomery v. State* (Cr. App.), 40 S. W. 805; *Foster v. State*, 32 Tex. Cr. App. 39, 22 S. W. 21; *Garratt v. State*, 37 Tex. Cr. App. 198, 203, 38 S. W. 1017, 39 S. W. 108.

The materiality of matter assigned as perjury is for the determination of the court, and it is error to leave it to be ascertained by the jury. *Davidson v. State*, 22 Tex. Cr. App. 372, 3 S. W. 662; *Gabrielsky v. State*, 13 Tex. Cr. App. 428; *Jackson v. State*, 15 Tex. Cr. App. 579, 580; *Smith v. State*, 27 Tex. Cr. App. 50, 10 S. W. 751; *Donohoe v. State*, 14 Tex. Cr. App. 638, 644.

Test of Materiality.—If perjury is assigned upon immaterial matter, and the trial judge in his charge submits this matter to the jury, and hinges the guilt of the defendant upon the issues therein found, the conclusion is that the judge believed the matter material. In other words, the charge of the court is an infallible test as to whether the trial judge holds matter or testimony material or immaterial. *Donohoe v. State*, 14 Tex. Cr. App. 638, 644. See ante, "Test of Materiality," I, B, 5, c. (2).

As a Mixed Question of Law and Fact.

—In a prosecution for perjury on evidence given by a witness, the materiality of the testimony is a question of law but it may be so mingled with facts that the court should submit it with proper instructions on the law to the jury, and it is for the judge and not for the jury to pass upon the materiality of the false testimony assigned as perjury. The mere opinion of witnesses can not be adduced as evidence to prove the materiality of the alleged false evidence as they are no more competent to form direct conclusions in this respect than is the jury trying the cause. *Foster v. State*, 32 Tex. Cr. App. 39, 22 S. W. 21.

If the perjury assigned be evidence given by the accused as a witness, the materiality of his testimony is a question of law, and not of fact. But, like any other question of law, it may be so mingled with the facts that the court should submit it to the jury, with proper instructions upon the law. In no event, however, can the materiality of the testimony assigned as perjury been established by the opinions of witnesses. *Washington v. State*, 23 Tex. Cr. App. 336, 5 S. W. 119; *Luna v. State*, 44 Tex. Cr. App. 482, 72 S. W. 378.

Controversy as to Facts.—Where the indictment charges perjury on both material and immaterial matter, and the latter has been eliminated by instructions, it is proper to charge the jury that, in determining the truth or falsity of the statements assigned as perjury, they may consider all the evidence which, in their judgment, relates to such statements. *Anderson v. State*, 24 Tex. Cr. App., appx., 705, 7 S. W. 40.

In a prosecution of defendant for perjury in swearing that he did not sign a certain order, the court instructed that whether the signature was a forgery, as claimed, was a material issue, if the same was under investigation before the grand jury, and that the true

test as to its materiality was whether the statement of the witness could properly have influenced the tribunal upon the question; that if it tended to so influence, and was material to a single fact, it was sufficient. Held, that this was an express charge that whether defendant signed or not was a material issue before the grand jury, and was objectionable, as leaving the question of materiality to the jury. *Rahm v. State*, 30 Tex. Cr. App. 310, 17 S. W. 416, 28 Am. St. Rep. 911.

Where the question whether testimony of a witness afterwards accused of perjury was material depends on a number of facts, the court should submit these facts to the jury, instructing them that, if they find the facts to be true, the testimony is material. *McAvoy v. State*, 47 S. W. 1000, 39 Tex. Cr. App. 684.

Where an indictment for perjury does not set out the facts showing the materiality of the testimony alleged to be false, the course is to prove all, or so much less than all, of the pleadings and evidence brought forward at the former trial as will duly present the question, whereupon the court, not the jury, will decide as of law whether what defendant is shown to have testified to was material. *Garrett v. State*, 37 Tex. Cr. App. 198, 38 S. W. 1017, 39 S. W. 108.

Upon a trial for perjury predicated upon unlawful gaming in an outhouse testified to by defendant before the grand jury, where testimony as to such outhouse being resorted to for gaming purposes is a meager, the question as to such being a fact should be submitted to the jury as determining defendant's guilt. *Higgins v. State*, 38 Tex. Cr. App. 539, 542, 43 S. W. 1012.

Where, on a trial for perjury, committed in making application for a continuance because of an absent witness, it appeared that defendant was in conversation with the witness outside the courtroom a few minutes before mak-

ing the application, there was no error in the submission of an assignment based on an allegation in the application that the witness was not absent by defendant's procurement. *Beach v. State*, 32 Tex. Cr. App. 240, 22 S. W. 976.

Nor was there error in the submission of an assignment based on a statement in the application that it was not made for delay. *Beach v. State*, 32 Tex. Cr. App. 240, 22 S. W. 976.

Subornation of Perjury.—In a trial for subornation of perjury, it seems that the materiality of the corrupt testimony is a question for the jury. *Watson v. State*, 5 Tex. Cr. App. 11, 26.

2. Instructions.

a. In General.

Following Statute.—The charge of the court in a prosecution for perjury must follow the language of the statute defining such offense. *Ferguson v. State*, 36 Tex. Cr. App. 60, 62, 35 S. W. 369.

Selecting Material from Immaterial Statements.—Where several statements are assigned as perjury, it is not error for the judge, in charging the jury, to designate the statement which is material, and submit it alone. *Sisk v. State*, 28 Tex. Cr. App. 432, 13 S. W. 647.

Where an indictment for perjury alleged that defendant falsely testified before the coroner that his daughter was not pregnant and had not given birth to a child, and that her death was not caused by an abortion committed by others, and that such statements were material to the issue, whereas, in truth, defendant's daughter had been pregnant, and an abortion had been committed on her, and she had given birth to a child, that her death was caused by an abortion committed by others than herself, the assignments of perjury therein were severable; and hence it was not error for the court to select some of them,

to the exclusion of the others, and submit the same to the jury, on which to predicate a conviction. *Stanley v. State* (Cr. App.), 74 S. W. 318.

Selection of Counts.—Where an indictment for perjury contains three counts, each of which is based on a portion of defendant's testimony before a grand jury, the court may submit two of the counts to the jury, and omit the third, and may submit such two counts in one charge. *Dorrs v. State* (Cr. App.), 40 S. W. 311.

Where, in a prosecution for perjury, the indictment assigned false swearing, in that a marriage license affidavit alleged as true that the bride was eighteen years old, that her father signed the order attached to the affidavit for the issuance of the license, and that there was no legal objection to the marriage, all of which was false, an instruction submitting all such predicates in solido was not error. *Adams v. State*, 91 S. W. 225, 49 Tex. Cr. App. 361.

Pointing Out False Testimony.—In a perjury trial, the charge was insufficient, where it did not point out the alleged false testimony. *Conant v. State*, 21 Tex. Cr. App. 610, 108 S. W. 897.

Charge Not Confined to Material Matters.—Under an indictment which assigned perjury upon matter not alleged to be material as well as upon matter alleged material, a charge that if accused as charged, deliberately and willfully made the statement set out in the indictment or any part thereof material to the matter before the grand jury, and if such statement or part thereof is shown to have been false when it was made and accused knew it was false, when he made it, if he did so, they should find him guilty as charged, etc., was erroneous because not confined to such false statements as were alleged material and therefore properly assigned and because it authorized the jury to pass upon the materiality of the alleged

false testimony. *Donohoe v. State*, 14 Tex. Cr. App. 638.

Subdividing Issue.—Where an indictment for perjury sets out several statements which are in effect the same statement, the falsity of which is the gravamen of the offense charged, an instruction that the jury may convict the defendant if they find any of the statements false, while unnecessarily subdividing the issue, does not injure the defendant, and hence is not reversible error. *Tellis v. State*, 42 Tex. Cr. App. 574, 61 S. W. 717.

Confining Jury to Assignments.—Where perjury is clearly assigned on the statement of accused that the cattle which were alleged to have been stolen by him were not branded when in a certain pasture, but were afterwards branded by him, it is proper for the court in its charge, to confine the jury to the perjury assigned, though the indictment alleged several statements to be false. *Scott v. State*, 35 Tex. Cr. App. 11, 29 S. W. 274.

Charge Without the Issues.—In a prosecution for perjury, where defendant was charged with swearing falsely as to being present at a certain place when weapons were carried and used in violation of the law, a charge relating to whether the weapons were carried and used at the time and place alleged, and whether defendant knew of it, was properly refused, as without the issues. *Francis v. State*, 57 Tex. Cr. App. 555, 123 S. W. 1114.

Where an indictment charged that perjury was committed in justice court of precinct No. 1 of J. county, and there was no particular issue joined as to the place of the commission of the crime, an instruction requiring the jury to find, in order to convict, that it was committed in the justice court in J. county, was not defective, in failing to require a finding that it was committed in the particular precinct. *Curtley v. State*, 59 S. W. 44, 42 Tex. Cr. App. 227.

Where the statement assigned as perjury relates to a past fact, the court need not charge that the false statement must relate to something past or present. *Kitchen v. State*, 26 Tex. Cr. App. 165, 9 S. W. 461.

Circumstantial Evidence.—Where, in a prosecution for false swearing in a marriage license affidavit, defendant denied that he signed the affidavit, and the main issue in the case was defendant's identity, a charge on circumstantial evidence was not required. *Mahon v. State*, 79 S. W. 28, 46 Tex. Cr. App. 234.

Special Instruction.—Where, in a prosecution for perjury, the allegation in the indictment as to the particular officer administering the oath is specially controverted, defendant is entitled to a special instruction on the effect of the variance claimed; and a general instruction that, if defendant was sworn in a certain case by a certain officer, and testified falsely, he would be guilty, is insufficient. *Crouch v. State*, 79 S. W. 524, 46 Tex. Cr. App. 76.

On a prosecution for perjury as to a credit on a note, a special charge that, if appellant was entitled to the credit, he should be acquitted of perjury, was properly refused, where he had testified that the credit was indorsed in writing on the note. *Miller v. State*, 60 S. W. 673, 42 Tex. Cr. App. 383.

Conditional Guilt.—Defendant was charged with perjury in making affidavit to an account for witness fees and mileage; it being alleged that he had not, in fact, traveled the number of miles stated in the account to which he made affidavit, and that the total amount he claimed as due was not in fact due. The evidence was unquestioned that defendant did in fact travel the distance stated in the account. The court charged that defendant's guilt or innocence depended upon the fact whether or not at the

time he swore to the account he was living in the county where the court was held, or in another county. Held, that the charge was erroneous, because making defendant's guilt depend on what county he lived in at the time he made the affidavit. *Bridgers v. State*, 70 S. W. 767, 44 Tex. Cr. App. 294.

b. Willfulness and Knowledge of Falsity.

See ante, "Definition of Offense." I, A; "Falsity of Testimony or Assertion and Knowledge Thereof," I, B, 6.

"Deliberately and Willfully."—In prosecution for false swearing, a charge failing to instruct the jury in the legal signification of words deliberately and willfully used in the statutory definition of the offense is defective. *Woodson v. State*, 24 Tex. Cr. App. 153, 162, 6 S. W. 184; *Holt v. State*, 48 Tex. Cr. App. 559, 89 S. W. 838.

"Deliberately."—In *Clay v. State*, 52 Tex. Cr. App. 555, 556, 107 S. W. 1129, it is said, "appellant's first ground of his motion for a new trial is, that the court erred in failing to define to the jury the meaning of the term 'deliberately.' The court did tell the jury, however, that if they found from the evidence that he made through inadvertence or under agitation or by mistake the statement upon which the perjury is predicated, to find him not guilty. Furthermore, the charge says a false statement made through inadvertence or under agitation or by mistake is not perjury. We think these sections of the charge cited cover appellant's complaint, and there was no error in not specifically defining the word 'deliberately.'" But in *Mahon v. State*, 46 Tex. Cr. App. 234, 79 S. W. 28, the court said, where defendant was charged with deliberately and willfully making a false marriage license affidavit, the court should define the term "deliberately." See, also, *Holt v. State*, 48 Tex. Cr. App. 559, 89

S. W. 838; *Woodson v. State*, 24 Tex. Cr. App. 153, 162, 6 S. W. 184; *Steber v. State*, 23 Tex. Cr. App. 176, 4 S. W. 880.

"Willfully."—In *Hill v. State*, 22 Tex. Cr. App. 579, 585, 3 S. W. 764, it was held that where the court charged that perjury is a false statement deliberately and willfully made, and that a false statement made through inadvertence, or under agitation, or by mistake is not perjury, failure to define "willfully" was not error especially since, even if it were error, it was not objected to at the time. And in *Chase v. State* (Cr. App.), 28 S. W. 952, 953, the court held that on a trial for perjury, where it is clearly shown defendant made the statement coolly, willfully and deliberately, there was no error, under the evidence in the case in the court's failure to define "willfully." But in *Windon v. State*, 56 Tex. Cr. App. 198, 119 S. W. 309, it was held that a charge in the language of Penal Code 1895, art. 201, that the false statement assigned for perjury must have been "deliberately and willfully" made, and that false statement made through inadvertence or under agitation or by mistake is not perjury, is defective in omitting to define the term "willful." See, also, *Steber v. State*, 23 Tex. Cr. App. 176, 4 S. W. 880; *Clay v. State*, 52 Tex. Cr. App. 555, 107 S. W. 1129.

On a prosecution for perjury, a definition of "willfully" as meaning that the act of the defendant was done with an evil intent or without reasonable grounds to believe the act to be lawful was correct. *Clay v. State*, 52 Tex. Cr. App. 555, 107 S. W. 1129.

The term "willful" signifies with evil intent or legal malice, or without legal ground to believe the act to be lawful; and the court should, as an essential part of the law of the case, instruct the jury as to the legal meaning of the term. *Windon v. State*, 56 Tex. Cr. App. 198, 119 S. W. 309.

Knowledge of Falsity.—In a prose-

cution for false swearing in obtaining a marriage license it was alleged that defendant executed an affidavit in which he swore that an order for a license, purporting to be signed by the girl's father, was in fact signed by him, and in defendant's presence. There was evidence that when the license was issued and the affidavit made defendant did not say that the order was signed by the father, or that defendant saw him sign it, but that the officer who issued the license merely asked defendant if he saw the order signed, and the latter said he did. The order was in fact signed in defendant's presence by the prospective bride. Held, that defendant was entitled to an instruction specifically calling attention to the claim that defendant did not know that the affidavit contained anything in reference to the order, and charging that, if the jury found that defendant did not know the contents of the statement, or had a reasonable doubt as to this, they should acquit; and an instruction that if the defendant did not know that the alleged false statements in the affidavit were contained therein, or if the jury had a reasonable doubt on this point, they should acquit, was not sufficient. *Porter v. State*, 88 S. W. 339, 48 Tex. Cr. App. 301.

Intoxication.—Where, on indictment for perjury, the intoxication of defendant at the time he made the false statement is relied on as a defense, a charge giving the provisions of Pen. Code, art. 189, providing that "a false statement made through inadvertence or under agitation or by mistake is not perjury," is sufficient without calling special attention to defendant's intoxicated condition. *Sisk v. State*, 28 Tex. Cr. App. 432, 13 S. W. 647. See ante, "Defenses," I, B, 7.

c. Degree of Proof Required and Effect of Evidence.

Reasonable Doubt.—An instruction that the jury should acquit, if they have a reasonable doubt whether the state-

ment made by defendant was true or false, is not prejudicial to defendant. *Kitchen v. State*, 26 Tex. Cr. App. 163, 9 S. W. 461. See ante, "Presumption and Burden of Proof," II, B, 1.

Proceedings, Record and Judgment in Trial in Which Perjury Was Committed.—See ante, "Description of Proceeding in Which Oath Was Administered," II, B, 2, c.

Formal Record Only.—On a trial for perjury, where the record testimony of a former proceeding, merely formal and excluding judgment of conviction, is admitted, the court need not charge the limiting effect of such evidence. *Franklin v. State*, 38 Tex. Cr. App. 346, 349, 43 S. W. 85.

d. Number and Corroboration of Witnesses.

Number of Witnesses and Degree of Corroboration Required.—See ante, "Number of Witnesses and Degree of Corroborative Proof Required," II, B, 4, c.

Credibility of Witness.—Under Code Cr. Proc., art. 746, which provides that, "in trials for perjury, no person shall be convicted except upon the testimony of two credible witnesses, or one credible witness corroborated strongly by other evidence as to the falsity of defendant's statements under oath, or upon his own confession in open court," it is error, in a case in which the evidence relied on for conviction consists solely of the testimony of two witnesses, for the court to refuse to instruct the jury that a conviction must depend on their belief in the "credibility" of one of the witnesses who has been impeached. *Smith v. State*, 22 Tex. Cr. App. 196, 2 S. W. 542.

Charge as to Witnesses Not Required.—Where, on trial for perjury, three witnesses testified as to the falsity of defendant's statement under oath, it was not necessary to charge, under Code Cr. Proc. 1895, art. 786, as to the necessity of proof by two credible witnesses, or by one credible wit-

ness, corroborated by other evidence. *Montgomery v. State* (Cr. App.), 40 S. W. 805.

3. Verdict.

See the title VERDICT.

Conviction on Particular Count.—Where, in a prosecution for perjury, the indictment contained a number of counts alleged to be material, the jury was not required to find on which count they convicted defendant, in the absence of a request to find on some particular count. *Townley v. State* (Cr. App.), 81 S. W. 309.

General Verdict.—Where an indictment for perjury contains both good and bad counts, and no motion to quash the bad counts has been made, and no objection made to the evidence when introduced, tending to support such counts—a general verdict will be sustained. *Fry v. State*, 36 Tex. Cr. App. 582, 37 S. W. 741, 38 S. W. 168.

Where several assignments of perjury submitted to the jury on a trial for perjury were material, and the proof was sufficient to sustain them, and a general verdict was rendered, the conviction will not be disturbed because the court also submitted an immaterial assignment of perjury. *Manning v. State*, 46 Tex. Cr. App. 326, 81 S. W. 957.

Where there are several assignments of perjury and there is proof sustaining any good assignment, a general verdict will be sustained. *Beach v. State*, 32 Tex. Cr. App. 240, 253, 22 S. W. 976.

D. APPEAL AND ERROR.

Where there is uncertainty in a verdict in a trial for perjury as to whether the jury intended to find defendant guilty of perjury or false swearing, the court of appeals will not reform the judgment denouncing defendant as guilty of false swearing. *O'Bryan v. State*, 27 Tex. Cr. App. 339, 341, 11 S. W. 443. See the title APPEAL, ER-

ROR AND CERTIORARI, vol. 1, p. 374.

E. SENTENCE AND PUNISHMENT.

See the title SENTENCE, JUDGMENT, COMMITMENT, AND PUNISHMENT.

Statutory Provisions.—Pen. Code, § 209, provides the punishment for deliberately or willfully, under oath or affirmation legally administered, making a false statement by declaration or affidavit which is not required by law, or made in the course of a judicial proceeding; article 3, Rev. Civ. St., provides that all oaths and affirmations shall be administered in the mode most binding on the conscience of the individual taking the same, and shall be taken subject to the pains and penalties of perjury; and art. 4 provides that all oaths, affidavits, or affirmations necessary or required by law may be administered by a judge, notary, etc. Held, that a contention that, the Penal Code having been presented to the governor for

approval prior to the Revised Statutes, art. 3 repealed Pen. Code, § 209, was of no merit; it appearing from art. 4 that the oaths referred to in art. 3 were those required by law. *Campbell v. State*, 68 S. W. 513, 43 Tex. Cr. App. 602.

Constitutionality.—Pen. Code, § 209, provides the punishment for deliberately or willfully, under oath or affirmation legally administered, making a false statement by declaration or affidavit which is not required by law, or made in the course of a judicial proceeding. Const., art. 1, § 5, declares that no person shall be disqualified to give evidence in any of the courts on account of his religious opinions, but that all oaths or affirmations shall be taken subject to the pains and penalties of perjury. Held, that the constitution refers to witnesses while giving evidence, and not to false swearing, within Pen. Code, § 209, and the statute is not unconstitutional. *Campbell v. State*, 68 S. W. 513, 43 Tex. Cr. App. 602.

Perpetuation of Testimony.

See the title DEPOSITIONS, vol. 2, p. 224.

Personal Communications.

See the title WITNESSES.

Personal Disabilities.

See the titles CRIMINAL LAW, vol. 2, p. 168; HOMICIDE, vol. 3, p. 477; HUSBAND AND WIFE, vol. 4, p. 222; INFANTS, vol. 4, p. 374; INSANE PERSONS, vol. 4, p. 382; and other specific titles.

Personal Injuries.

As to criminal responsibility, see the title CRIMINAL LAW, vol. 2, p. 168. And see the specific titles throughout this work.

Personal Knowledge.

See the titles EVIDENCE, vol. 2, p. 324; WITNESSES.

Personal Liberty.

See the titles ARREST, vol. 1, p. 473; CONSTITUTIONAL LAW, vol. 2, p. 9; FALSE IMPRISONMENT, vol. 3, p. 231; MALICIOUS PROSECUTION, ante, p. 438. See, also, the title SLAVES. As to the writ of habeas corpus, see the titles CRIMINAL LAW, vol. 2, p. 168; HABEAS CORPUS, vol. 3, p. 430.

Personal Name.

See the title NAMES, ante, p. 469.

PERSONAL PROPERTY.

CROSS REFERENCES.

See the titles ABANDONMENT, vol. 1, p. 1; ANIMALS, vol. 1, p. 55; BAILMENT, vol. 1, p. 650; BURGLARY, vol. 1, p. 703; CARRIERS, vol. 1, p. 759; CHATTEL MORTGAGES, vol. 1, p. 765; EMBEZZLEMENT, vol. 2, p. 277; EVIDENCE, vol. 2, p. 324; EXTORTION, vol. 3, p. 218; INTOXICATING LIQUORS, vol. 4, p. 633; LARCENY, ante, p. 195; LOTTERIES, ante, p. 427; MALICIOUS MISCHIEF, ante, p. 431; RECEIVING STOLEN GOODS; ROBBERY; SUNDAYS AND HOLIDAYS; TRESPASS; TROVER AND CONVERSION; WITNESSES.

Definitions and Distinctions.—There may be personal property which is not movable. Personal property not only includes movable property, but more. It is a more comprehensive word. Thus, crops growing upon land are held to be personal property, so far as not to be considered an interest in land, under the statute of frauds. So, annual crops, if fit for harvest, may acquire the character and incidents of personal property, so far as to be subject to execution as personal chattels. But it has never been held that an ungathered crop, still appendant to the ground, is, under any circumstances, movable property. Movable property is such as attends the person of the owner wherever he goes, in contradistinction to things immovable. A growing crop

is immovable property. An ungathered crop, still appendant to the ground can, under no circumstances, be held movable property, and can not partake of the character of personal property until ready for harvest. *Hardeman v. State*, 16 Tex. Cr. App. 1, 5.

Dogs Personal Property.—See the title ANIMALS, vol. 1, p. 57.

As to dogs being subject of theft, see the title LARCENY, ante, p. 195.

"The craven who would wantonly injure him is the subject of a fine; the thief who would steal him may be declared a felon; * * * human life may be taken justifiably in the defense of his possession; and he is made the subject of the taxable burdens of the government." *Lynn v. State*, 33 Tex. Cr. App. 153, 159, 25 S. W. 779.

Personal Relations.

As to privileged communication, see the title WITNESSES. As to effect on competency of witness, see the title WITNESSES. As to jurors, see the title JURY, ante, p. 110. As to judges, see the title JUDGES, ante, p. 40.

Personal Security.

See the titles BREACH OF THE PEACE, vol. 1, p. 684; CONSTITUTIONAL LAW, vol. 2, p. 9; INJUNCTION, vol. 4, p. 379.

Persons.

As to offenses against the person, see the titles ABDUCTION, vol. 1, p. 2; ABORTION, vol. 1, p. 4; ASSAULT AND BATTERY, vol. 1, p. 493; BIGAMY, vol. 1, p. 659; CONSPIRACY, vol. 2, p. 1; FALSE IMPRISONMENT, vol. 3, p. 231; HOMICIDE, vol. 3, p. 477; INCEST, vol. 4, p. 227; KIDNAPPING, ante, p. 192; LARCENY, ante, p. 195; MAYHEM, ante, p. 447; RAPE; ROBBERY; SEDUCTION; SODOMY; SUICIDE. As to jurisdiction of the person, see the title CRIMINAL LAW, vol. 2, p. 168. As to who are subjects of homicide, see the title HOMICIDE, vol. 3, p. 477.

Petition.

As to petition for habeas corpus, see the titles CRIMINAL LAW, vol. 2, p. 168; HABEAS CORPUS, vol. 3, p. 430.

Petit Jury.

See the title JURY, ante, p. 110.

Petit Larceny.

See the title LARCENY, ante, p. 195.

Petroleum.

See the title INSPECTION, vol. 4, p. 384.

Photographs.

See the title EVIDENCE, vol. 2, p. 324. As to obscene photographs, see the title OBSCENITY, ante, p. 558.

Physical Condition.

As to physical condition of accused as evidence, see the title EVIDENCE, vol. 2, p. 324. And see the particular titles throughout this work. As to evidence of physical condition of decedent in prosecution for homicide, see the title HOMICIDE, vol. 3, p. 477.

Physical Examination.

See the titles CRIMINAL LAW, vol. 2, p. 168; EVIDENCE, vol. 2, p. 324; HOMICIDE, vol. 3, p. 477; RAPE.

PHYSICIANS AND SURGEONS.

BY LEONARD F. PIERSON.

- I. Power to Regulate Practice, 652.**
- II. Constitutional and Statutory Provisions, 652.**
- III. Qualification to Practice, 654.**
 - A. Diploma, 654.
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CROSS REFERENCES.

As to physical examination by physicians and surgeons, see the title EVIDENCE, vol. 2, p. 324. As to expert evidence and answers to hypothetical questions, see the title EXPERT AND OPINION EVIDENCE, vol. 3, p. 175. As to cause of death through negligence of physicians, see the title HOMICIDE, vol. 4, p. 1.

I. Power to Regulate Practice.

Legislative Power to Prescribe Qualification of Practitioners.—The legislature has the power, under the constitution of 1876, to pass laws prescribing the qualifications of practitioners of medicine in the state. Logan v. State, 5 Tex. Cr. App. 306, 312.

To Authorize Appointment of Board of Examiners by District Court.—The legislature has the power to authorize the district judge to appoint a board

of medical examiners for his district as provided in the act of 1876 for the regulation of the practice of medicine. Logan v. State, 5 Tex. Cr. App. 306, 315.

II. Constitutional and Statutory Provisions.

The act of August, 1876, relating to the practice of medicine, is constitutional. Logan v. State, 5 Tex. Cr. App. 306, 314.

The provisions of the act of August 1, 1876, regulating the practice of medicine within the state, are maintainable under the police power of the state. *Logan v. State*, 5 Tex. Cr. App. 306, 313.

The purpose of the act of 1876, "to regulate the practice of medicine" was to protect the general public against imposition by charlatans. *Antle v. State*, 6 Tex. Cr. App. 202, 207; *Hilliard v. State*, 7 Tex. Cr. App. 69, 72.

Time Act Took Effect.—The Act of August 21, 1876, regulating the practice of medicine did not take effect until ninety days after its passage. *Logan v. State*, 5 Tex. Cr. App. 306, 318.

Creating Boards of Examiners—Constitutionality.—Acts 27th Leg., p. 12, c. 12, creating the boards of medical examiners of the allopathic, homeopathic, and eclectic schools of medicine, and requiring all persons practicing medicine to obtain certificates from one of these boards, is constitutional. *Stone v. State*, 86 S. W. 1029, 48 Tex. Cr. App. 114.

Constitutionality of Provisions Discriminating against Practice of Masseur Treatment.—Acts 30th Leg., c. 123, providing that it shall be unlawful for any one to practice medicine without a certificate from the state medical board, and that to obtain a certificate one must be examined as to his knowledge of various medical subjects, and § 13, providing that a person who shall publicly profess to be a physician or surgeon, and offer to treat any disease by any system, or who shall offer to treat any disease by any method for compensation, shall be regarded as practicing medicine is not unconstitutional in discriminating against the practice of the masseur treatment, in failing to provide any board or authority to whom one can apply for license to practice such treatment, for a license to practice that treatment can be obtained from the state medical board, and the con-

dition that an applicant have certain medical knowledge is not a discrimination against the practice of the masseur treatment, but a valid exercise of police power. *Germany v. State*, 62 Tex. Cr. App. 276, 137 S. W. 130.

Constitution Construed—Validity of Acts Specifying Who Must Obtain License.—Const., art. 16, § 31, provides that the legislature may pass laws prescribing the qualifications of practitioners of medicine and punish persons for malpractice, but that no preference shall ever be given by law to any school of medicine. Held, that the word "medicine," as used in the constitution, embraced the art of healing, by whatever scientific or supposedly scientific method; the art of preventing, curing, or alleviating diseases, and remedying as far as possible results of violence and accident, some thing or method supposed to possess curative power, and hence authorized the passage of Acts 30th Leg. 1907, p. 224, c. 123, requiring physicians and surgeons, including osteopaths, to obtain a license before engaging in the public practice of their profession. *Ex parte Collins*, 57 Tex. Cr. App. 2, 121 S. W. 501.

Statutory Repeal—Occupation Tax.—Acts 25th Leg. (1897), p. 49, c. 18, subd. 13, levied a tax upon doctors and surgeons traveling as specialists, and subdivision 14 levied a tax upon those practicing their profession locally. Held, that Acts 26th Leg., p. 320, c. 180, specifically repealing subdivision 14, did not repeal subdivision 13. *Fouts v. State*, 51 Tex. Cr. App. 3, 101 S. W. 223.

Statutory Repeal—Regulation of Practice.—Act Aug. 21, 1876 (Laws 15th Leg., p. 232), entitled "An act to regulate the practice of medicine," expressly repeals the Act of May 16, 1873, on the same subject; and an indictment found in 1877, for a violation of the repealed act, charges no offense against the laws of this state. *Ellison*

v. State, 6 Tex. Cr. App. 248. See, also, *Logan v. State*, 5 Tex. Cr. App. 306, 313.

III. Qualification to Practice.

A. DIPLOMA.

See post, "Certificate," III, B.

Sufficiency of Diploma of an Accredited Medical College.—It was held in *Aldenhoven v. State*, 42 Tex. Cr. App. 6, 56 S. W. 914, that a diploma of an accredited medical college was a sufficient qualification for practice under the then existing statute, but in a more recent case the court in construing the statute said: "Now, it appears from a reading of § 8 of the act of the 27th legislature, although one may have a diploma 'issued by a bona fide medical college of respectable standing,' still he must receive a certificate to practice medicine from one of the duly constituted boards of medical examiners of the state of Texas, which shall be recorded, before he would be authorized to practice. We take it, however, that it would not be necessary for appellant to be examined by said board, if he had complied with the other provisions of the statute to wit; filed his diploma with satisfactory evidence that his diploma was issued by a bona fide medical college of respectable standing, and certificate issued by the board, and properly recorded, as required by the statute. But in this instance appellant did not secure a certificate. Whether he should be examined or not is immaterial, in the absence of the certificate. It is true the statement of facts shows that the board refused to examine him or issue a certificate. This is a matter that might be reached through the civil courts. But the certificate is the sine quanon to his practicing medicine. Having received no certificate, he can not practice. As to whether the board arbitrarily refused to examine him or not, is a matter with which we have nothing to do." *Stone v. State*, 48

Tex. Cr. App. 114, 118, 86 S. W. 1029.

B. CERTIFICATE.

As a Prerequisite to Practice.—Under Acts 27th Leg., p. 12, c. 12, creating boards of medical examiners of three different schools of medicine, and requiring all persons practicing medicine to obtain a certificate from one of these boards, it is unlawful for one who has not a certificate to practice medicine, although he has a diploma issued by a bona fide medical college of respectable standing. *Stone v. State*, 48 Tex. Cr. App. 114, 86 S. W. 1029.

Those Exempted from Such Qualification.—A certificate of qualification conforming to the provisions of said act of 1876 is an indispensable prerequisite to all practitioners of medicine in this state, except, first, the aforesaid veteran class, who need no certificate at all; and, second, those who, prior to the act of 1876, obtained certificates of qualification under the act of 1873. *Hilliard v. State*, 7 Tex. Cr. App. 69.

R. testified that accused had given him medicine twenty-nine or thirty years before; that at the suggestion of one H. witness had gone to accused, who was practicing medicine in a tent. H. testified that he knew accused about thirty years ago, when the latter was practicing medicine in a house, and not a tent, and that he did not recommend accused to R., and contradicted testimony of R. in many particulars. Accused testified that he practiced on R., and had for five years practiced continuously, after coming to the state thirty years ago, in certain counties. Witnesses who had known accused well for ten or twelve years stated that accused was employed at farming and as a laborer, and that they never knew of his practicing medicine. Held to warrant the jury in discrediting the testimony that accused had practiced for five consecutive years prior to 1875,

within Pen. Code 1895, art. 441, authorizing him in that case to practice without a certificate or diploma. *Ranald v. State* (Cr. App.), 47 S. W. 976. See post "Indictment," IV, C.

Necessity to Furnish Certificate to District Clerk for Recording.—Before any certificated physician can lawfully engage in practice, his certificate must be furnished to the district clerk of the county of such physician's residence or sojourn, and the appropriate entries be made by the clerk upon his record, as required by the act of 1876. *Hilliard v. State*, 7 Tex. Cr. App. 69.

Necessity to Furnish after Change of Domicile.—A certificate of qualification, filed for record under Act May 16, 1873, protects a practitioner while he resides or sojourns in the county where it is recorded; but, if he changes his domicile to another county, he must furnish his certificate to the district clerk of the latter county for record as provided by § 2, or otherwise the protection of the statute is not available. *Hilliard v. State*, 7 Tex. Cr. App. 69.

Effect of Having Filed Certificate in County of Residence.—Under Pen. Code 1895, art. 440, punishing any person engaging in the practice of medicine without having first filed for record with the clerk of the district court in the county in which he "may reside or sojourn" a certificate from a board of medical examiners, or a diploma from an accredited medical college, a physician who has once complied by filing a certificate or diploma in the county of his residence may practice elsewhere. *Person v. State*, 53 Tex. Cr. App. 334, 109 S. W. 935.

Conflict of Statutes—Recording.—One provision of law requires the certificate of a medical practitioner to be recorded with the district clerk. Another requires the certificate to be recorded with the county clerk. Held that, the two provisions being irreconcilable, an indictment found for not

recording such certificate charged no offense. *French v. State*, 14 Tex. Cr. App. 76.

C. LICENSE.

See the title LICENSES, ante, p. 413.

Osteopath—Necessity for License.—Acts 30th Leg. 1907, p. 224, c. 123, provides for the licensing of physicians and surgeons, and declares (§ 13) that any person shall be regarded as practicing medicine who shall publicly profess to be a physician or surgeon, and shall treat or offer to treat any disease or disorder, mental or physical, or any physical deformity or injury, by any system or method, or to effect cures thereof, and charge therefor, directly or indirectly, money or other compensation. Held, that one practicing osteopathy was not entitled to practice his profession without a license. *Ex parte Collins*, 57 Tex. Cr. App. 2, 121 S. W. 501.

Dentistry—Obtaining License.—The Act of March 27, 1889, regulating the practice of dentistry does not require a person wishing to practice dentistry to procure a license from the examining board of the judicial district including his residence, but a license from any examining board of the state entitles him to practice in any district in the state. *Derrick v. State*, 34 Tex. Cr. App. 21, 22, 28 S. W. 818.

Occupation—Travelling Physicians.—A medical specialist, having two places of business, and dividing his time between the two, and attending professional calls in other counties, is not "travelling from place to place" in the practice of his profession, within Rev. St. 1895, art. 5049, requiring such a specialist to pay a tax of \$50 in each county in which he practices his profession. *Hairston v. State*, 37 S. W. 858, 36 Tex. Cr. App. 470.

A physician residing in one town and maintaining an office in another, in which he practices medicine as a

specialist, is not a specialist traveling from place to place, within the meaning of Laws Sp. Sess. 1897, p. 51, subd. 13, requiring a physician traveling from place to place as a specialist to pay an occupation tax. *Broiles v. State* (Cr. App.), 68 S. W. 685.

A physician maintaining four offices in different towns, and keeping an assistant at each place, and treating patients at the places at stated intervals, but having his headquarters at one of the places, where he lives with his family and receives his mail, is not within Sayles' Rev. Civ. St. 1897, art. 5049, imposing an occupation tax on medical specialists traveling from place to place. *Adams v. State*, 78 S. W. 935, 45 Tex. Cr. App. 566.

Vending Medicine.—Under Pen. Code, art. 110, providing that no person shall pursue any "occupation" without first obtaining a license, a sale by defendant, who is shown by the evidence to be a traveling Methodist minister, of three bottles of medicine, is not a pursuing of the the "occupation of vending medicine," such as contemplated by this article of the Code. *Love v. State*, 31 Tex. Cr. App. 469, 20 S. W. 978.

IV. Practicing without Authority.

A. WHAT CONSTITUTES.

Attending a single case is a sufficient practice to sustain a conviction under the act of 1876. *Antle v. State*, 6 Tex. Cr. App. 202, 206.

Where a physician through a mistake failed to file his certificate for record, he is entitled to be acquitted, when tried for practicing medicine without a certificate. *Pettit v. State*, 28 Tex. Cr. App. 240, 14 S. W. 127.

Masseur Practice.—A party who advertised in a local newspaper that he was a masseur doctor located at a certain place, and that he could heal all diseases, and who treated many persons who came to him afflicted with various ailments, for which he received com-

pensation, was "practicing medicine," within the meaning of Acts 30th Leg. 1907, pp. 224-228, c. 123, forbidding the practicing of medicine without a license, and declaring, by § 13, that any person shall be regarded as "practicing medicine" who shall publicly profess to be a physician or surgeon, and treat or offers to treat any disease or disorder, mental, or physical, or any physical deformity or injury, by any system or method, or to effect cures thereof, and receive compensation therefor, and hence was required to have a license, although he prescribed and used no drugs, but only massage treatment. *Newman v. State*, 58 Tex. Cr. App. 223, 124 S. W. 956.

Acts 30th Leg., c. 123, makes it an offense to practice medicine without a license, and declares, in § 13, that any person shall be regarded as practicing medicine who shall publicly profess to be a physician or surgeon, treat or offer to treat any disease or disorder by any system or method, or to effect cures thereof, and charge therefor, directly or indirectly, money or other compensation. Held, that while such act does not apply to masseurs in their particular sphere of labor who publicly represent themselves as such, yet a masseur who treats or offers to treat diseases or disorders, mental or physical, and attempts to effect a cure thereof, and charges compensations therefor, without having registered and filed a certificate authorizing him to practice medicine, is guilty of a violation of the act. *Dankworth v. State* (Cr. App.), 136 S. W. 788.

Foreign Physician—Practicing without Certificate—Effect of Clerk's Failure to Record.—A physician presented his license to practice in a foreign state to a member of the board of medical examiners, who granted him a temporary certificate, and afterwards he and the secretary of the board indorsed their names on the original certificate and returned it to him; this being the

custom where the applicant presented a certificate. The applicant paid the examination fees, and gave the certificate to the district clerk for recordation, and paid the fee, but it was returned, without recording the indorsement, through the mistake of the clerk, but the applicant supposed it was properly recorded. Held, that the applicant was not guilty of practicing without a license, within Pen. Code, art. 438, requiring him to obtain a certificate of professional qualification from some authorized board, etc. *Price v. State*, 50 S. W. 700; 40 Tex. Cr. App. 428.

Traveling Medical Specialist.—On a prosecution for pursuing the occupation of a traveling medical specialist without having paid the required tax, some of the state's witnesses testified that defendant had stated to them that he was a traveling specialist, but defendant denied that he was a traveling specialist, and the only facts shown relative to the question was that after taking up his residence at a certain place in the county, and filing his certificate there, he removed to another place, where he kept an office and practiced medicine. Held, that the evidence was insufficient to sustain a conviction. *Howe v. State* (Cr. App.), 78 S. W. 1064.

B. DEFENSES.

That Act Was Performed before Qualification Was Required.—Where, in a prosecution for practicing medicine without a license, accused testified that he never procured a license to practice medicine, and had not filed for registration a license to practice medicine in any county, it was no defense that the alleged offense was committed before he was required to register and file a certificate to practice medicine, if he desired so to do, under Acts 30th Leg., c. 123, as a legal practitioner of medicine within the state under prior laws then in force, which required a physician to file a diploma or license,

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and have the same recorded in the office of the clerk of the district court in which he practiced. *Dankworth v. State* (Cr. App.), 136 S. W. 788.

Charge Submitting the Defense of Being a Masseur.—On a prosecution for practicing medicine without having filed the required certificate, the defense was that accused was practicing as a masseur, and the court charged that if defendant did not charge for his services as a masseur, or for treatment by any method or system, and receive pay therefor, he should be acquitted, and that a masseur, in his particular sphere, is not required to secure a certificate. Held, that the charge fairly submitted the defense. *Newman v. State*, 61 Tex. Cr. App. 338, 134 S. W. 688.

C. INDICTMENT.

Essential Allegations.—An indictment for unlawfully engaging in the practice of medicine must allege that it was done without a diploma, or else without having a certificate of qualification from some authorized board of medical examiners, as provided by statute (Pasch. Dig., art. 7200), or without having practiced five consecutive years in the profession; and it must be alleged that the accused resided or sojourned in the county where such indictment was presented. *State v. Goldman*, 44 Tex. 104.

Necessity to Allege Branch of Department of Medicine.—An information under Act Aug. 21, 1876 (Gen. Laws 1876, p. 231), "to regulate the practice of medicine," and which requires that, before any person engages in the "practice of medicine in any of its branches or departments," he shall comply with certain provisions thereof, need not allege the "particular branch or department" of medicine in which defendant engaged. *Antle v. State*, 6 Tex. Cr. App. 202.

In a prosecution under Act Aug. 21, 1876 (Gen. Laws 1876, p. 231), "to regulate the practice of medicine," and

which requires that, before any person engages in the practice of medicine in any of its branches or departments, "he shall comply with certain provisions thereof," proof that defendant engaged in any branch or department of medicine sustains the allegation that he engaged in the practice of medicine. *Antle v. State*, 6 Tex. Cr. App. 202.

Necessity to Negative Exceptions.—Act 1876 (Laws 1876, p. 231), "to regulate the practice of medicine," requires a certificate of examination before engaging in the practice, and prescribes a penalty for its violation, but provides (§ 5) that it shall not apply to persons regularly engaged in the practice and to females practicing midwifery. Held, that such exceptions need not be negated in the indictment, since where an exception is not contained in the same clause of an act which creates the offense, but is contained in a subsequent clause, it is a mere matter of defense. *Blasdel v. State*, 5 Tex. Cr. App. 263; *Logan v. State*, 5 Tex. Cr. App. 306. *Antle v. State*, 6 Tex. Cr. App. 202.

A contrary holding appears under acts of 27th legislature 1901. The court said: Appellant filed a motion to quash the indictment because it does not allege that defendant was not practicing medicine in the state of Texas prior to January 1, 1885, and said indictment does not allege that defendant began the practice of medicine after January 1, 1885, and had not complied with the laws of this state regulating the practice of medicine in force prior to the passage of the act approved February 22, 1901. Section 8, p. 14, of the acts of the twenty-seventh legislature, 1901, provides: "From and after the passage of this amendment it shall be unlawful for any person to practice medicine, surgery or obstetrics in this state, except; (1) All those who were practicing medicine in Texas prior to January 1, 1885; (2) all those who began the practice of

medicine in this state after the above date who have complied with the laws of this state regulating the practice of medicine, in force prior to the passage of this act;" and all other exceptions in § 8 except the fifth. Section 13, p. 15, of said act, contains the provision "that this act does not apply to persons treating diseases who do not prescribe or give drugs or medicine." These, being exceptions in the act itself, become part and parcel of the offense, and must be negated before there can be a valid indictment under this statute. *Salter v. State*, 44 Tex. Cr. App. 591, 73 S. W. 395.

Practice of Dentistry—Negating Exceptions.—Penal Code, art. 451, which denounces a penalty for practicing dentistry without having first procured a license, contains a provision that it "shall not be construed to prevent persons from extracting teeth, nor in any way interfere with physicians or surgeons in their practice as such." Held, these are exceptions, and an indictment or information for the offense denounced in art. 451 which does not negative these exceptions is fatally defective. *McCann v. State*, 40 Tex. Cr. App. 111, 48 S. W. 512.

Necessity to Allege Practice for Fee or without License.—Information under the act of March 27, 1889, for illegally practicing dentistry without a license must allege that defendant practiced dentistry for a fee without complying with the law in such case made and provided, or that he practiced dentistry without procuring a license from an examining board created by law. *Derrick v. State*, 34 Tex. Cr. App. 21, 22, 28 S. W. 818.

Sufficiency of Allegations.—An information under the act of August 21, 1876, relating to the practice of medicine is sufficient if in the language of the statute. *Antle v. State*, 6 Tex. Cr. App. 202, 205.

An indictment for illegally practicing medicine charged in substance that

accused, being a resident of a county named, unlawfully practiced medicine therein for compensation and a livelihood, without ever having received a degree of doctor of medicine from any medical college, and without having received a certificate of qualification from any board of medical examiners, and without having complied in any manner with the law regulating the practice of medicine in the state of Texas; that he had not previously been engaged in the practice in such county for five consecutive years; and that he was a resident thereof. Held good. *Carribene v. State*, 3 Tex. Cr. App. 262.

Under Acts 30th Leg., c. 123, § 4, and subdivision 2 of § 13, defining and regulating the practice of medicine, an indictment charging the defendant with unlawfully practicing medicine, without having properly registered his authority for so doing, and treating and offering to treat physical disease and disorder, and making a charge therefor, is sufficient. *Young v. State*, 61 Tex. Cr. App. 440, 134 S. W. 736.

Under Acts 30th Leg., p. 227, c. 123, prohibiting one from practicing medicine who is not registered in the county of his residence, and providing that a person who professes to be a physician, and who treats or offers to treat any disease, etc., shall be regarded as practicing medicine, an indictment alleging that accused engaged in a designated county in the practice of medicine on a person named without first having registered is insufficient, because it does not allege that he practiced for hire and does not state the county of his residence and his failure to file his certificate therein. *Marshall v. State*, 56 Tex. Cr. App. 205, 119 S. W. 310.

An information alleging that accused practiced medicine without having filed a certificate or diploma which does not allege that accused resided in the county, and which does not allege where he

resided or that in the county of his residence he had failed to file a certificate or diploma, states no offense under Pen. Code 1895, art. 440. *Perrison v. State*, 53 Tex. Cr. App. 334, 109 S. W. 935.

Under Acts 30th Leg., c. 123, §§ 4, 6, providing that it shall be unlawful for any one to practice medicine who has not registered in the district clerk's office of the county in which he resides his authority for practicing, an indictment which charges that accused did unlawfully engage in the practice of medicine in C. county without having first filed for record with the clerk of the district court of said county his authority for practicing medicine, is insufficient for failure to allege either that accused resided in C. county or that he did not register his authority to practice in the office of the district clerk of the county in which he resided. *Lockhart v. State*, 58 Tex. Cr. App. 73, 124 S. W. 923.

An indictment under art. 7200 of Paschal's Digest regulating the practice of medicine held defective for stating defendant had not obtained a certificate from the examiners of "Wood county." *State v. Goldman*, 44 Tex. 104, 108.

Information for illegally practicing dentistry, charging defendant with illegally practicing dentistry in Tyler county for a fee without first obtaining a license from the examining board of the judicial district including Tyler county, is defective. *Derrick v. State*, 34 Tex. Cr. App. 21, 22, 28 S. W. 818.

D. EVIDENCE.

Professional Character of Defendant.

—The rule that the state is not allowed to put in issue the general character of defendant does not preclude it, in a prosecution for unlawfully practicing medicine in violation of Act Aug. 21, 1876, from proving the professional capacity in which defendant held himself out to the public. *Antle v. State*, 6 Tex. Cr. App. 202.

Records of Commissioner's Court to Show No License Had Been Obtained.

—Where a prosecution for pursuing the occupation of a traveling medical specialist without having paid the required tax was based on the fact that defendant had pursued the occupation in a certain year, it was error to admit the records of the commissioners' court, showing the levy of the tax on the occupation in question for a previous year. *Howe v. State* (Cr. App.), 78 S. W. 1064.

Accredited Medical College—Competency to Prove.—On a trial for illegally practicing medicine, where defendant held a diploma from a medical college, it is not competent for the state to prove by practicing physicians that said college is not on the list of "accredited colleges" as shown by a medical register published by a private concern purporting to give a list of accredited medical colleges. *Aldenhoven v. State*, 42 Tex. Cr. App. 6, 56 S. W. 914.

Advertisements to Obtain Practice.—In a prosecution of a physician for practicing without a license in violation of Acts 30th Leg., c. 123, evidence of advertisements issued by defendant for the purpose of obtaining practice was admissible. *Germany v. State*, 62 Tex. Cr. App. 276, 137 S. W. 130.

As to the Effect of the Treatment.—In a prosecution for practicing as a physician without a license, in violation of Acts 30th Leg., c. 123, evidence as to whether the treatment given by defendant to certain patients was harmful or beneficial was immaterial. *Germany v. State*, 62 Tex. Cr. App. 276, 137 S. W. 130.

In such case, evidence as to whether the prosecuting witness had been treated by other physicians before she was treated by defendant was immaterial. *Germany v. State*, 62 Tex. Cr. App. 276, 137 S. W. 130.

Sufficiency of Evidence.—Evidence held insufficient to show that accused

had practiced medicine five years consecutively prior to 1875, which, under the Penal Code, 1895, art. 441, would allow him to practice without a certificate. *Ranald v. State* (Cr. App.), 47 S. W. 976.

In a prosecution for the unlawful practicing of medicine without being registered in C. county, where accused was alleged to have then resided, a conviction was unauthorized in absence of proof that he resided in C. county; such proof being indispensable. *Young v. State*, 59 Tex. Cr. App. 358, 128 S. W. 1103.

On a prosecution for practicing medicine without having filed the required certificate, evidence held sufficient to sustain a finding that defendant was treating disease by some method and charging therefor. *Newman v. State*, 61 Tex. Cr. App. 338, 134 S. W. 688.

E. PUNISHMENT.

For Practicing Dentistry without License.—The punishment by a fine of not less than \$100, nor more than \$200, for engaging in the practice of dentistry without a license, as imposed by Act 1889 (Pen. Code 1895, art. 451), is not lessened by Act 1897, making \$25 the minimum and \$300 the maximum punishment, so as to authorize the court to charge the punishment provided for in the latter act, where the offense occurred after the passage of the latter act, but before it went into operation. *McCann v. State*, 48 S. W. 512, 40 Tex. Cr. App. 111.

V. Malpractice.

Prescription of Narcotics by Physicians.—Under the act of 29th legislature, p. 45, § 2, which prohibits the use of narcotics except in certain cases when physicians may prescribe, a physician is not liable for malpractice in that he did not prescribe in good faith morphine for habitual user. The good or bad faith is not the criterion,

but the good faith on the part of the physician prescribing the medicine or such substance as he may deem necessary for the treatment of such habit. Blair v. State, 50 Tex. Cr. App. 225, 96 S. W. 23.

An indictment brought under the

act of 29th legislature, § 2, p. 45, must not only negative that the narcotic was not given in good faith, but must also negative the fact that the physician did not deem it necessary to so prescribe. Blair v. State, 50 Tex. Cr. App. 225, 96 S. W. 23.

Physiology.

As to judicial notice of physiological facts, such as the average size of women, see the title JUDICIAL NOTICE, ante, p. 54.

Pickpockets.

See the titles LARCENY, ante, p. 195; ROBBERY.

Pictures.

See the titles CRIMINAL LAW, vol. 2, p. 168; EVIDENCE, vol. 2, p. 324.

Pigs.

See the title ANIMALS, vol. 1, p. 55.

Pistols.

See the titles ASSAULT AND BATTERY, vol. 1, p. 493; BREACH OF THE PEACE, vol. 1, p. 684; ROBBERY; WEAPONS.

Place.

See the titles ARREST, vol. 1, p. 473; ARSON, vol. 1, p. 484; BURGLARY, vol. 1, p. 703; CONVICTS, vol. 2, p. 136; CRIMINAL LAW, vol. 2, p. 168; EVIDENCE, vol. 2, p. 324; GAMING, vol. 3, p. 353; HOMICIDE, vol. 3, p. 477; INDICTMENT AND INFORMATION, vol. 4, p. 239; INTOXICATING LIQUORS, vol. 4, p. 633; JURISDICTION AND VENUE, ante, p. 60; LARCENY, ante, p. 195.

Play.

See the title GAMING, vol. 3, p. 353.

Plays.

See the title THEATERS AND SHOWS.

Plea.

See the title CRIMINAL LAW, vol. 2, p. 168.

PLEADING.

CROSS REFERENCES.

See the titles APPEAL, ERROR AND CERTIORARI, vol. 1, p. 87; CRIMINAL LAW, vol. 2, p. 168; EXCEPTIONS AND OBJECTIONS, vol. 2, p. 743; INDICTMENT AND INFORMATION, vol. 4, p. 239; NEW TRIAL AND ARREST OF JUDGMENT, ante, p. 477; TRIAL.

As to pleadings in actions on a bail bond or recognizance, see the title BAIL AND RECOGNIZANCE, vol. 1, p. 635, et seq.

Definition, Nature and General Consideration.—"Our system of pleading contemplates a plain and truthful statement of the facts which constitute the plaintiff's cause of action, or the defendant's matters of defense." *Heath v. State*, 14 Tex. Cr. App. 213, 215.

Necessity for Pleadings.—See the titles APPEAL, ERROR AND CERTIORARI, vol. 1, p. 87; CRIMINAL LAW, vol. 2, p. 168; INDICTMENT AND INFORMATION, vol. 4, p. 239;

Form and Requisites of Pleadings Generally.—See the titles CRIMINAL LAW, vol. 2, p. 168; INDICTMENT AND INFORMATION, vol. 4, p. 239; TRIAL.

"Pleadings in and trials of criminal causes should be in strict conformity to the provisions of our statutory law, and to the end that, when a conviction is obtained, it should be free from errors and a termination of the cause." *Earl v. State*, 33 Tex. Cr. App. 570, 572, 28 S. W. 469.

It is an elementary rule of pleading that whatever is alleged must be alleged with certainty. *Atchley v. State*, 56 Tex. Cr. App. 569, 120 S. W. 1010.

"Neither in civil nor criminal pleadings is the pleader required to plead his evidence." *Janks v. State*, 29 Tex. Cr. App. 233, 235, 15 S. W. 815.

In all pleadings in this country, and in indictments, it is well settled that Arabic numerals, and all well defined and well understood abbreviations, may be used. The dollar mark (viz, \$) is native and original to the United States, and its meaning, when used as a prefix to a figure, admits of no ques-

tion. *Earl v. State*, 33 Tex. Cr. App. 570, 28 S. W. 469.

It is a rule in civil cases that where the defendant pleads a bad plea, and it is so judged to be bad on demurrer, he is allowed to plead over; the same rule is extended to a defendant in an indictment. *Clepper v. State*, 4 Tex. 242, 246. See the title CRIMINAL LAW, vol. 2, p. 204.

"It is provided by statute that an answer by a defendant, which is a denial of the execution by himself or his authority of any instrument in writing upon which any pleading is founded, in whole or in part, and charged to have been executed by him, or by his authority, and not alleged to be lost or destroyed, must be verified by affidavit." *Heath v. State*, 14 Tex. Cr. App. 213, 215. See *Holt v. State*, 20 Tex. Cr. App. 271, 273; *Goodin v. State*, 14 Tex. Cr. App. 443. See, also, the title BAIL AND RECOGNIZANCE, vol. 1, pp. 621, 637.

Time to Plead.—See the titles CRIMINAL LAW, vol. 2, p. 202; TRIAL.

Interpretation and Construction of Pleadings.—Presumptions when indulged in regard to pleadings will be taken most strongly against the pleader. *Massie v. State*, 30 Tex. Cr. App. 64, 67, 16 S. W. 770.

Pleading is presumed to set forth correctly the matter complained of as desired to be understood by the pleader. *Massie v. State*, 30 Tex. Cr. App. 64, 67, 16 S. W. 770.

Defects in pleadings will not be supplied by presumption on the part of

the court. *Massie v. State*, 30 Tex. Cr. App. 64, 67, 16 S. W. 770.

Raising, Waiving and Curing Objections to Pleadings.—See the titles CRIMINAL LAW, vol. 2, p. 168; EXCEPTIONS AND OBJECTIONS, vol. 2, p. 743; INDICTMENT AND INFORMATION, vol. 4, p. 239; TRIAL.

In scire facias on a forfeited recognizance an exception for failure to give the date in the citation comes too late after answer to the merits. *Garrison v. State*, 21 Tex. Cr. App. 342, 17 S. W. 351.

Amendment of Pleadings.—See the titles CRIMINAL LAW, vol. 2, p. 168; INDICTMENT AND INFORMATION, vol. 4, p. 239.

Particular Pleadings.—As to allegations of offense and plea of defendant, see the specific titles in this digest. As to form and sufficiency of allegations of offense, see the title INDICTMENT AND INFORMATION, vol. 4, p. 239. As to form and sufficiency of arraignment and plea, see the title CRIMINAL LAW, vol. 2, p. 209; et seq. As to different kinds of pleas, see the titles CRIMINAL LAW, vol. 2, p. 205, et seq.; JEOPARDY, ante, p. 1. As to special pleas, see the titles CRIMINAL LAW, vol. 2, p. 209;

JEOPARDY, ante, p. 1. As to a plea of immunity, see the title JEOPARDY, ante, p. 1.

A plea of non est factum is one which explicitly denies the execution of the instrument sued on. A plea which simply denies that the instrument was executed on the particular day stated in said instrument, is not a plea of non est factum, and does not put in issue the execution of the instrument. *Lindsay v. State*, 39 Tex. Cr. App. 468, 46 S. W. 1045. See *Heath v. State*, 14 Tex. Cr. App. 213, 215.

Under the plea of non est factum the defendant may contend at the trial that the deed was never executed in point of fact. But he can not, under this plea, deny its validity in point of law. If its legal validity, and not its execution, is to be questioned, this must form the subject of a special allegation showing the circumstances out of which the illegality is supposed to arise. *Heath v. State*, 14 Tex. Cr. App. 213, 215. See the title BAIL AND RECOGNIZANCE, vol. 1, p. 621.

Issues and Proof.—As to rule that evidence must correspond with the allegations, and be confined to the issue, and exceptions thereto, see the title EVIDENCE, vol. 2, pp. 337, 338.

Pleas.

See the title CRIMINAL LAW, vol. 2, p. 168.

PLEDGE AND COLLATERAL SECURITY.

CROSS REFERENCES.

See the titles CHATTEL MORTGAGES, vol. 2, p. 765; EVIDENCE, vol. 2, p. 324.

Breach of Pawnbrokerage Law— Evidence. —On a trial for breach of the pawnbrokerage law, evidence that defendant was carrying on business of a pawnbroker and had not filed with the county clerk a copy of the advertisement or report of the sale is admissible. <i>Heitzelman v. State</i> (Cr. App.), 26 S. W. 729.	Evidence that a pawnbroker had not complied with the pawnbrokerage law in any respect is cogent evidence to show that he sold pledged property in violation of the law and to rebut any suggestion of mistake. <i>Heitzelman v. State</i> (Cr. App.), 26 S. W. 729.
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Plots.

See the titles CONSPIRACY, vol. 2, p. 1; CRIMINAL LAW, vol. 2, p. 168.

Plunder.

See the titles BURGLARY, vol. 1, p. 703; LARCENY, ante, p. 195; RECEIVING STOLEN GOODS; ROBBERY.

Plural Marriages.

See the titles BIGAMY, vol. 1, p. 659; MARRIAGE, ante, p. 441.

Pointing Weapons.

See the titles ASSAULT AND BATTERY, vol. 1, p. 493; WEAPONS.

Point Reserved.

See the titles APPEAL, ERROR AND CERTIORARI, vol. 1, p. 87; CRIMINAL LAW, vol. 2, p. 168.

Points—Citations and Authorities.

See the titles APPEAL, ERROR AND CERTIORARI, vol. 1, p. 87; CRIMINAL LAW, vol. 2, p. 168.

Poisoning.

As to murder by poison, see the title HOMICIDE, vol. 3, p. 477. As to poisoning animals, see the titles ANIMALS, vol. 1, p. 55; MALICIOUS MISCHIEF, ante, p. 431.

POISONS.

CROSS REFERENCES.

See the titles CRIMINAL LAW, vol. 2, p. 168; DRUGGISTS, vol. 2, p. 266; EXPERT AND OPINION EVIDENCE, vol. 3, p. 175; PHYSICIANS AND SURGEONS, ante, p. 652.

As to murder by poison, see the title HOMICIDE, vol. 4, p. 1.

"'Poison' has been defined 'as any substance which, when applied to the body externally, or in any way introduced into the system without acting mechanically, but by its own inherent qualities, is capable of destroying life.' See 2 Beck's Med. Jur. Wharton & Stille define 'poison' 'as a substance having an inherent deleterious property, which renders it, when taken into the system, capable of destroying life.' And in this connection they say, 'ques-

tion of the term to substances which destroy life by mechanical means, such as powdered glass,' etc. See § 493." Runnels v. State, 45 Tex. Cr. App. 446, 77 S. W. 458, 460.

Noxious Substance.—"A poison would not include powdered glass or boiling water, while 'noxious portion or substance' would not only embrace poisons, but the latter. See People v. Van Deleer, 53 Cal. 149." Runnels v. State, 45 Tex. Cr. App. 446, 77 S. W. 458, 460.

Poker—Poker Table.

See the title GAMING, vol. 3, p. 353.

Police Court.

See the titles CRIMINAL LAW, vol. 2, p. 168; JURISDICTION AND VENUE, ante, p. 60.

Police Judges.

See the titles JUDGES, ante, p. 40; JURISDICTION AND VENUE, ante, p. 60.

Police Justices.

See the titles COURTS, vol. 2, p. 150; CRIMINAL LAW, vol. 2, p. 168.

Policemen.

See the titles ARREST, vol. 1, p. 473; ASSAULT AND BATTERY, vol. 1, p. 493; HOMICIDE, vol. 3, p. 477; MUNICIPAL CORPORATIONS, ante, p. 456.

Police Power.

See the title CONSTITUTIONAL LAW, vol. 2, p. 9.

Poll.

See the titles CRIMINAL LAW, vol. 2, p. 168; JURY, ante, p. 110.

Pollution.

See the title WATERS AND WATERCOURSES. See, also, the title
ADULTERATION, vol. 1, p. 33.

Polygamy.

See the titles BIGAMY, vol. 1, p. 659; MARRIAGE, ante, p. 441.

Pool Rooms.

See the title GAMING, vol. 3, p. 353.

Pools.

See the title GAMING, vol. 3, p. 353.

Pool Tables.

See the title GAMING, vol. 3, p. 353.

Positive Evidence.

See the title EVIDENCE, vol. 2, p. 324.

Possession.

See the titles BURGLARY, vol. 1, p. 703; CONSTITUTIONAL LAW, vol. 2, p. 9; EMBEZZLEMENT, vol. 2, p. 277; HOMICIDE, vol. 3, p. 477; INTOXICATING LIQUORS, vol. 4, p. 633; LARCENY, ante, p. 195; ROBBERY; WEAPONS.

Post Mortem.

See the titles CORONERS, vol. 2, p. 143; DEAD BODIES, vol. 2, p. 219;
HOMICIDE, vol. 3, p. 477.

Postponement.

See the titles CONTINUANCES, vol. 2, p. 65; CRIMINAL LAW, vol. 2, p. 168; NEW TRIAL AND ARREST OF JUDGMENT, ante, p. 477.

Poverty.

As to proceedings in forma pauperis, see the title APPEAL, ERROR AND CERTIORARI, vol. 1, p. 87.

Prairie Fires.

See the title FIRES, vol. 3, p. 297.

Prayer.

See the titles APPEAL, ERROR AND CERTIORARI, vol. 1, p. 87; CRIMINAL LAW, vol. 2, p. 168; JUSTICES OF THE PEACE, ante, p. 189. As to request for instruction, see the title INSTRUCTIONS, vol. 4, p. 385.

Predicate.

As to laying the predicate for the admission of evidence, see the title CRIMINAL LAW, vol. 2, p. 168. As to laying the predicate for the impeachment of witnesses, see the title WITNESSES.

Prefixes.

See the title NAMES, ante, p. 469.

Pregnancy.

As to admissibility of evidence as to pregnancy of deceased in prosecution for homicide, see the title HOMICIDE, vol. 3, p. 477.

Prejudice.

See the titles CRIMINAL LAW, vol. 2, p. 168; EVIDENCE, vol. 2, p. 324; INSTRUCTIONS, vol. 4, p. 385. As to prejudice as grounds for change of venue, see the title JURISDICTION AND VENUE, ante, p. 60. As to prejudice as ground for continuance, see the title CONTINUANCES, vol. 2, p. 65.

Preliminary Complaint.

See the title CRIMINAL LAW, vol. 2, p. 168. As to deprivation of liberty without due process of law, see the title CONSTITUTIONAL LAW, vol. 2, p. 9.

Preliminary Examination.

See, ante, PRELIMINARY COMPLAINT, p. 667. As to admissibility of evidence admitted at preliminary examination or at former trial, see the title EVIDENCE, vol. 2, p. 324.

Preliminary Proceedings.

See the titles CONSPIRACY, vol. 2, p. 1; CRIMINAL LAW, vol. 2, p. 168; INTOXICATING LIQUORS, vol. 4, p. 633. See, also, the title TRIAL.

Preliminary Proof.

See the title EVIDENCE, vol. 2, p. 324.

Premature Trial.

See the title CRIMINAL LAW, vol. 2, p. 168. See, also, the title APPEAL, ERROR AND CERTIORARI, vol. 1, p. 87.

Premeditation.

See the title CRIMINAL LAW, vol. 2, p. 168. As to premeditation as an element of murder, see the title HOMICIDE, vol. 4, p. 1.

Premiums.

See the title GAMING, vol. 3, p. 353.

Prerogative Writs.

See the titles CERTIORARI, vol. 1, p. 764; HABEAS CORPUS, vol. 3, p. 430.

Presents.

See the titles CONTEMPT, vol. 2, p. 43; CRIMINAL LAW, vol. 2, p. 168.

Presentation of Grounds of Review.

See the titles CRIMINAL LAW, vol. 2, p. 168; JUSTICES OF THE PEACE, ante, p. 189.

Presentment.

See the titles GRAND JURY, vol. 3, p. 414; INDICTMENT AND INFORMATION, vol. 4, p. 239.

Presumptions.

See the titles CRIMINAL LAW, vol. 2, p. 168; EVIDENCE, vol. 2, p. 324; PRESUMPTIONS AND BURDEN OF PROOF. As to pleading presumption, see the title INDICTMENT AND INFORMATION, vol. 4, p. 239. As to presumption on appeal or writ of error in criminal prosecutions, see the title APPEAL, ERROR AND CERTIORARI, vol. 1, p. 87.

PRESUMPTIONS AND BURDEN OF PROOF.

BY MINOR BRONAUGH.

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1, pp. 498, 513, 540, et seq.; BAIL AND RECOGNIZANCE, vol. 1, pp. 590, 643; BIGAMY, vol. 1, p. 662; BURGLARY, vol. 1, p. 739, et seq.; CONFESSIONS, vol. 1, p. 815; CONSPIRACY, vol. 2, p. 6; CONSTITUTIONAL LAW, vol. 2, p. 16; CRIMINAL LAW, vol. 2, pp. 174, 196; DISTURBANCE OF PUBLIC ASSEMBLAGE, vol. 2, p. 264; ELECTIONS, vol. 2, p. 276; EVIDENCE, vol. 2, p. 324; EXCEPTIONS, BILL OF, AND STATEMENT OF FACTS ON APPEAL, vol. 3, p. 1; GAMING, vol. 3, p. 353; HAND-WRITING, vol. 3, p. 448; HOMICIDE, vol. 4, p. 1; INSTRUCTIONS, vol. 4, p. 385; JURISDICTION AND VENUE, ante, p. 60; LARCENY, ante, p. 195; LIBEL AND SLANDER, ante, p. 387; MALICIOUS PROSECUTION, ante, p. 438; RAPE; STATUTES; WITNESSES.

As to presumptions on appeal, see the title APPEAL, ERROR AND CERTIORARI, vol. 1, p. 225, et seq.

I. Scope of Title.

It is the purpose under this title to treat the subject in a broad way; stating the general rules and doctrines in which the law is expressed, giving some concrete illustrations to lend them point. The application of these rules and doctrines to specific subjects will be found under other titles in this work, reference to which will be found in the table of cross references.

II. Presumptions.

A. IN GENERAL.

In criminal cases nothing can be presumed against accused. *Martin v. State*, 44 Tex. 172, 174.

Conclusion of guilt is presumed from facts found, but these facts must be proved by testimony of witnesses under whose observation they have actually and directly fallen, or presumption of guilt must be made from the leading facts which have been established by inference from elementary facts of the case. *Ward v. State*, 10 Tex. Cr. App. 293, 297.

Inferences and conclusions can not be indulged with reference to facts which it is essential to prove to sustain conviction. *Lott v. State*, 17 Tex. Cr. App. 598, 602; *White v. State*, 11 Tex. 769, 773; *Ward v. State*, 10 Tex. Cr. App. 293, 297; *Jernigan v. State*, 10 Tex. Cr. App. 546, 550.

Extracts from commentaries upon the general nature of presumptive evi-

dence, which are intended as directions to aid the mind in arriving at a correct conclusion; those for instance, illustrating the precautionary considerations to be borne in mind in coming to a proper conclusion upon the facts, or the relative value to be given to circumstantial evidence, and duty of the jury to acquit, when less conclusive than the positive, direct evidence of one witness, are not rules of law to be obeyed, but of reason, to be considered. *Brown v. State*, 23 Tex. 195.

Construing Contract in Criminal Case.—Any presumption to be brought into play in construing a contract in a criminal case will be taken in favor of accused. *Keller v. State* (Cr. App.), 87 S. W. 669.

Right of Accused to Rebut Presumptions against Him.—A person accused of crime, wherever the law indulges a presumption adversely to him, has the right to meet and overcome that presumption, if it be within his power, by proper evidence. *Vanhouster v. State*, 52 Tex. Cr. App. 572, 108 S. W. 386.

B. PRESUMPTION UPON PRESUMPTION.

Every inference legitimately arising must be based on fact, and in the absence of such basis, the law permits no inference. *Harris v. State*, 8 Tex. Cr. App. 90, 108.

In criminal trials, presumptions

should be based upon proved facts. *Stevenson v. State*, 17 Tex. Cr. App. 618, 635.

Whenever a fact is sought to be established by inference, the elementary facts must be proved by direct evidence. So far as they are concerned, presumption can not be based upon presumption. This rule, however, does not prevent the deduction of the factum probandum in the way of inference from leading facts which have themselves been established by inference from the proved elementary facts of the case. *House v. State*, 15 Tex. Cr. App. 522, 527.

Where it is declared that a certain act shall be regarded prima facie, evidence of the existence of other facts it is not meant that there is a conclusive presumption of the existence of such other facts, but it means that there exists proof of the fact upon which the jury may find a verdict unless that fact is rebutted by other evidence. *Floock v. State*, 34 Tex. Cr. App. 314, 30 S. W. 794.

C. PRESUMPTION OF KNOWLEDGE OF LAW.

The presumption that everyone knows the law is conclusive. *Thompson v. State*, 26 Tex. Cr. App. 94, 98, 9 S. W. 486; *Phillips v. State*, 29 Tex. 226.

Exception in Case of Person between Nine and Thirteen Years of Age.—On a trial for crime of one between the ages of nine and thirteen, the state must not only show the history and character of accused and the degree of his intelligence but facts showing that he knew that the offense charged was criminal and would subject him to punishment. *Binkley v. State*, 51 Tex. Cr. App. 54, 100 S. W. 780. See post, "Knowledge of," III, B, 2, e.

It is an elementary rule of universal application that one is always presumed to intend that which is the necessary or even probable consequence

of his acts, and under Penal Code, art. 50, the intention to commit the offense is presumed whenever the means used are such as would ordinarily result in the commission of the forbidden act. *Wood v. State*, 27 Tex. Cr. App. 393, 11 S. W. 449.

Penal Code, art. 50, provides that the intention to commit an offense is presumed whenever the means used is such as would ordinarily result in the commission of the forbidden act. Held, that unless the contrary appears, a man is presumed to intend that which is necessary or even the probable consequences of his acts. *High v. State*, 26 Tex. Cr. App. 545, 10 S. W. 238.

Every person is presumed to contemplate the probable result of his acts, and, when an unlawful act is clearly shown to have been committed, it is for accused to show facts which mitigate, or justify, so that a reasonable doubt may arise on the entire evidence as to his guilt. *Hill v. State*, 5 Tex. Cr. App. 2.

D. INTENT.

A deduction, or inference and presumption, of intent from acts is permissible only after the evidence has been adduced on the trial, and can not apply to allegations in criminal pleadings. As announcing a contrary doctrine, the case of *Tomkins v. State*, 33 Tex. 228, is overruled. *Stringer v. State*, 13 Tex. Cr. App. 520.

E. MALICE.

The law presumes notice from the use of violence. *Henderson v. State*, 12 Tex. 525, 532. See the title HOMICIDE, vol. 4, p. 239.

F. INNOCENCE.

"It is a cardinal principle of criminal law, that every person accused of crime is presumed to be innocent, until his guilt is established by legal evidence, to the exclusion of any reasonable doubt. This principle has

been incorporated into our criminal codes in two separate articles, which, although different in words, mean precisely the same thing. (Penal Code, art. 11; Code Cr. Proc., art. 727.) This presumption of innocence is with the accused throughout the whole case, from its commencement to its final determination. (1 Bishop's Cr. Proc., 1104; Wharton's Cr. Ev., 330.) The effect of this legal presumption of innocence is to place the burden of proving the guilt of the accused upon the prosecution. The fact of guilt having been established to the exclusion of any reasonable doubt, the prosecution has made out its case, and this case will overcome the presumption of innocence, and produce the conviction of the accused; but the presumption of innocence never departs from the case until the conviction is finally determined." *Jones v. State*, 13 Tex. Cr. App. 1, 7.

But there is a difference between this "presumption of innocence" and the "burden of proof." A defendant has the presumption of innocence with him through the whole case. The advantage he derives, however, from the fact that the burden is on the prosecution to make out the points it advances is only temporary. As soon as this is done to such an effect as to sustain a verdict of guilty, then, should the proof close at that point, the case goes to the jury free from any presumptions arising from the prior imposition of this burden. In other words, the rule requiring the actor to take on him the burden of proof is one merely of practice, adopted for the proper development of the case, and ceases to operate when the evidence is in. The rule requiring guilt to be made out beyond reasonable doubt is a fundamental sanction of the law, applicable at all stages of a trial. The first rule concerns the order, the second the weight of testimony. *Jones v. State*, 13 Tex. Cr. App. 1, 8.

Defendant is presumed to be innocent until his guilt is established by legal evidence, and, if there is a reasonable doubt as to his guilt, the jury must acquit. *Conger v. State* (Cr. App.), 140 S. W. 1112; *Daniel v. State*, 60 Tex. Cr. App. 515, 132 S. W. 773; *Grant v. State*, 42 Tex. Cr. App. 275, 58 S. W. 1025; *Tucker v. Streetman*, 38 Tex. 71, 73; *Robertson v. State*, 10 Tex. Cr. App. 602, 608; *Miers v. State*, 34 Tex. Cr. App. 161, 188, 29 S. W. 1074; *Pollard v. State*, 33 Tex. Cr. App. 197, 203, 26 S. W. 70; *Whitcomb v. State*, 30 Tex. Cr. App. 269, 271, 17 S. W. 258; *Ex parte Sherwood*, 29 Tex. Cr. App. 334, 337, 15 S. W. 812; *Pierce v. State* (Cr. App.), 22 S. W. 587; *Rockhold v. State*, 16 Tex. Cr. App. 577, 585; *Wallace v. State*, 9 Tex. Cr. App. 299, 300; *Hatch v. State*, 6 Tex. Cr. App. 384, 397; *Coffee v. State*, 5 Tex. Cr. App. 545, 546; *Davis v. State*, 4 Tex. Cr. App. 456, 461; *Blake v. State*, 3 Tex. Cr. App. 581; *Perry v. State*, 44 Tex. 473, 477; *Black v. State*, 1 Tex. Cr. App. 368, 389; *Hampton v. State*, 1 Tex. Cr. App. 652, 661; *Chapman v. State*, 1 Tex. Cr. App. 728, 729; *Stapp v. State*, 1 Tex. Cr. App. 734; *Leonard v. State*, 7 Tex. Cr. App. 417, 448; *Fury v. State*, 8 Tex. Cr. App. 471, 472; *Jones v. State*, 13 Tex. Cr. App. 1, 7; *La Norris v. State*, 13 Tex. Cr. App. 33, 43; *Johnson v. State* (Cr. App.), 20 S. W. 368; *McMahon v. State*, 1 Tex. Cr. App. 102, 107; *Brown v. State*, 4 Tex. Cr. App. 275, 291; *Robertson v. State*, 9 Tex. Cr. App. 209, 210; *Gazley v. State*, 17 Tex. Cr. App. 267, 273; *Zwicker v. State*, 27 Tex. Cr. App. 539, 560, 11 S. W. 633; *Gaines v. State* (Cr. App.), 20 S. W. 397; *Hughes v. State*, 43 Tex. Cr. App. 511, 67 S. W. 104.

Guilt and Not Innocence to Be Determined.—In criminal cases, guilt and not innocence of defendant is to be determined. *Haynes v. State*, 10 Tex. Cr. App. 480, 482.

It is not essential to an acquittal that the jury should entertain a rea-

sonable belief or any other kind of belief that defendant is not guilty, but the law presumes that he is innocent until his guilt is established to the satisfaction of the jury, beyond all reasonable doubt. *Smith v. State*, 9 Tex. Cr. App. 150; *McMillan v. State*, 7 Tex. Cr. App. 142, 145; *Myers v. State*, 7 Tex. Cr. App. 640, 657; *Blocker v. State*, 9 Tex. Cr. App. 279; *Hackett v. State*, 13 Tex. Cr. App. 406, 413; *Johnson v. State*, 30 Tex. Cr. App. 419, 421, 17 S. W. 1070.

A charge in a criminal case is fundamentally erroneous, in which the jury are directed to find a verdict of not guilty if it appears, beyond a reasonable doubt, that the accused is not guilty, as this implies that they should not acquit him unless his innocence is proved beyond a reasonable doubt. *Haynes v. State*, 10 Tex. Cr. App. 480.

Presumption Confined to Offense Charged.—When a man is accused of crime, the presumption of innocence applies only in the prosecution and trial for the offense itself; such presumption does not attach, when defendant is a witness in his own behalf, in regard to other offenses than that for which he is on trial. *Hargrove v. State*, 33 Tex. Cr. App. 431, 457, 26 S. W. 993.

In a trial for an assault with intent to murder, the charge "in all criminal cases, the defendant is presumed to be innocent, and, unless the jury are satisfied from the evidence of the guilt of the defendant, beyond a reasonable doubt, they should acquit" is not applicable only to the minor degrees of the offense charged. *Stewart v. State*, 4 Tex. Cr. App. 519, 523.

G. GUILT.

1. Flight.

Strong presumption of guilt arises when accused attempts to escape justice. *Benavides v. State*, 31 Tex. 579, 585.

Evidence of flight is admissible to raise the presumption of guilt. *Gose v. State*, 6 Tex. Cr. App. 121, 131.

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2. Fabrication of Evidence.

Evidence offered by accused, palpably fabricated raises the presumption of guilt. *Benavides v. State*, 31 Tex. 579, 586.

3. Failure to Testify.

The statute permits defendant to be a witness in his own behalf, but his failure to testify is not even a circumstance against him, and no presumption of guilt arises from his failure to testify. *Fulcher v. State*, 28 Tex. Cr. App. 465, 473, 13 S. W. 750; *McCoy v. State* (Cr. App.), 81 S. W. 46; *Wilkins v. State*, 33 Tex. Cr. App. 320, 26 S. W. 409; *Davis v. State*, 15 Tex. Cr. App. 594.

Failure to Produce Evidence.—In a prosecution for incest, where prosecutrix testified that a seventeen year old sister of hers slept with her during all the time defendant had been copulating with her, the failure of the defendant to issue process for the sister is not a criminative act against him. *Clifton v. State*, 79 S. W. 824, 46 Tex. Cr. App. 18, 108 Am. St. Rep. 983.

4. Threats.

Upon a question as to the commencement of an affray, where it appears that one party to the affray had made threats which were communicated to the other, the presumption is at least as great that it was commenced by the party threatened as that it was commenced by the party making the threats. *Patillo v. State*, 22 Tex. Cr. App. 586, 3 S. W. 766.

5. Bribery.

It will not be presumed that the accused authorized his attorney to bribe a witness. *Luttrell v. State*, 51 S. W. 930, 40 Tex. Cr. App. 651.

H. CAPACITY TO COMMIT CRIME.

In the absence of evidence, a person is presumed to be an adult, so as to render him capable of committing a

crime. *Ake v. State*, 6 Tex. Cr. App. 398, 32 Am. Rep. 586.

I. SANITY OR INSANITY.

1. General Rule.

The law presumes every person to be sane until the contrary is proven. *Smith v. State*, 55 Tex. Cr. App. 563, 117 S. W. 966; *Thomas v. State*, 55 Tex. Cr. App. 293, 116 S. W. 600; *Carter v. State*, 12 Tex. 500, 504; *Webb v. State*, 9 Tex. Cr. App. 490, 511; *King v. State*, 9 Tex. Cr. App. 515, 557; *Sanders v. State*, 18 Tex. Cr. App. 372, 374; *Fisher v. State*, 30 Tex. Cr. App. 502, 18 S. W. 90; *Mendiola v. State*, 18 Tex. Cr. App. 462; *Leache v. State*, 22 Tex. Cr. App. 279, 3 S. W. 539; *Lovegrove v. State*, 31 Tex. Cr. App. 491, 21 S. W. 191; *Hunt v. State*, 33 Tex. Cr. App. 252, 263, 26 S. W. 206; *Webb v. State*, 5 Tex. Cr. App. 596, 607.

Rule Reversed Where Accused Pleads Guilty.—Ordinarily, the sanity of a defendant is presumed until the contrary is made to appear, but, in prosecutions for crime, if it be proposed by the accused to plead guilty, the very reverse of this presumption is the rule, and the law assumes, until it is made otherwise to appear, that the accused is insane, or has been improperly influenced. *Sanders v. State*, 18 Tex. Cr. App. 372.

Where an insane person has lucid intervals the law presumes an offense committed by him to have been committed in a lucid interval, unless the contrary be proven. *Leache v. State*, 22 Tex. Cr. App. 279, 313, 3 S. W. 539.

2. Continued Existence of Insanity Once Proven.

The rule that insanity once shown is presumed to exist only arises in cases where the insanity is continuing and permanent in its nature, or where the cause of the disorder is continuing and permanent. *Sims v. State*, 50 Tex. Cr. App. 563, 99 S. W. 555.

Where, in a prosecution for assault to rape, several witnesses testified that

defendant had been insane since childhood, and that such condition continued to the time of the act charged, it was error to refuse to charge that, if defendant was insane at any time before the commission of the crime, then such insanity was presumed to continue, and the burden was on the state to show that defendant afterwards became sane, and was so when he committed the offense. *Wooten v. State*, 51 Tex. Cr. App. 428, 102 S. W. 416.

The rule does not obtain that the law presumes insanity to continue after it is once shown to exist, and a special instruction to such effect is properly refused, where the evidence is to the effect that the insanity with which the accused was afflicted was recurrent. *Leache v. State*, 22 Tex. Cr. App. 279, 3 S. W. 539, 58 Am. Rep. 638; *Smith v. State*, 22 Tex. Cr. App. 316, 3 S. W. 684.

If derangement or imbecility be proved or admitted at any particular period, it is presumed to continue until disproved, unless the derangement was accidental, being caused by the violence of a disease. But this presumption is rather matter of fact than law, or, at most, partly of law and partly of fact. *Webb v. State*, 5 Tex. Cr. App. 596; *Hunt v. State*, 33 Tex. Cr. App. 252, 26 S. W. 206.

J. REGULARITY AND LEGALITY OF JUDICIAL PROCEEDINGS.

Presumptions are indulged in favor of the correctness of the rulings of the trial court and not against it. *Washington v. State*, 35 Tex. Cr. App. 154, 32 S. W. 693.

In a prosecution for selling liquors without a license it is not necessary that the record from the county court imposing the license should show that all of the members of said court were present when the order levying the county tax was passed, and, where the order shows that the same was done by the court, it will be presumed that

the action of the court was regular. *Pearce v. State*, 35 Tex. Cr. App. 150, 32 S. W. 697.

It is presumed that the district courts keep minutes of their proceedings. *Golden v. State*, 32 Tex. 737, 740.

Where on appeal from an order remanding accused to custody on habeas corpus the record shows that the applicant was remanded to the custody of the officer, it will be presumed that he is held in custody of such officer in obedience to the order. *Ex parte Kramer*, 19 Tex. Cr. App. 123.

In the absence of a showing, it will not be assumed that the prosecution of a paramour was instituted for the purpose of depriving defendant of her testimony, though not instituted till the day before his trial. *Perry v. State* (Cr. App.), 34 S. W. 618.

To supply by substitution the loss of an indictment, the record of the court must not only show the suggestion of loss and the leave to substitute, but also that the substitution has in fact been made. Presumptions can not be indulged to verify the substituted indictment; but the record entries may be amended nunc pro tunc, even at a subsequent term. *Turner v. State*, 7 Tex. Cr. App. 596.

Judgments and Decrees.—Every presumption is indulged in favor of a judgment of conviction for crime, and a party attacking such judgment must overcome such presumptions. *Harris v. State*, 39 Tex. Cr. App. 484, 46 S. W. 647.

K. MISCELLANEOUS PRESUMPTIONS.

Age.—Father is presumed to know age of son. *Hall v. State*, 16 Tex. Cr. App. 6, 11.

Knowledge of Owner of Habitual Acts of Slave.—On a trial of an indictment against a master for knowingly permitting his slave to carry firearms at another place than on his own plantation, under acts 1858, c. 58, § 1, it is

error to instruct the jury that the law presumes that every man is informed of any habitual act of his own slave, unless that presumption is rebutted by proof. *Carter v. State*, 20 Tex. 339.

That Owner Knows What Goes On in Place of Business.—Every man may be presumed to know what is going on in his place of business. *Whitcomb v. State*, 30 Tex. Cr. App. 269, 17 S. W. 258.

L. INSTRUCTIONS.

The court must instruct the jury upon legal presumption and degree of weight in the particular testimony constituting exceptions to the general rule. *Brown v. State*, 23 Tex. 195, 201.

The jury should be instructed as to the law applicable to all deductions which the jury may draw from facts in the evidence. *Lister v. State*, 3 Tex. Cr. App. 17, 26.

Under Code Cr. Proc. 1895, art. 723, as amended by acts 25th Leg., c. 21, which provides that a conviction shall not be reversed unless the error is calculated to injure the rights of the defendant, a failure to give the presumption of innocence and reasonable doubt statute to the jury is not reversible error, unless the court was requested to give it and refused. *Conger v. State* (Cr. App.), 140 S. W. 1112.

Appellant introduced evidence that his reputation as a peaceable law-abiding citizen was good, and there was no contest on this issue. Defendant requested the court to charge the jury: "Evidence of good reputation of the defendant has been introduced before you. You are instructed that where the good reputation of the defendant is established by the evidence it is affirmative evidence for the defendant, and accompanies him throughout the trial as an affirmative fact to be considered by you in determining his guilt or innocence." Every person is presumed to have a good reputation, unless the contrary appears in the evi-

dence. The court charged the jury on the presumption of innocence, and there was no error in refusing this special instruction. *McDaniel v. State* (Cr. App.), 139 S. W. 1154

An instruction in a prosecution for assault with intent to rape that the jury must determine whether defendant was guilty of an assault with intent to rape, aggravated assault, and battery, or not guilty, applying the facts in evidence to the law as given, while improper as requiring the jury to determine whether defendant was not guilty, is harmless where the jury are instructed that defendant is presumed to be innocent until his guilt is established by legal evidence, and that in case of a reasonable doubt they should acquit him. *Conger v. State* (Cr. App.), 140 S. W. 1112.

Presumptions of law which are against defendant should not ordinarily be given in the charge to the jury; and when they are, great care should be observed to properly guard the rights of the defendant. *Shaw v. State*, 34 Tex. Cr. App. 435, 445, 31 S. W. 361.

It is not error to refuse to instruct upon legal presumptions and weight of evidence unless some part of the testimony comes within the exceptions to the general rules. *Chester v. State*, 1 Tex. Cr. App. 702, 707.

Presumption of Innocence.—A charge in a felony case, that defendant is presumed innocent, until his guilt is established to the satisfaction of the jury, is correct. *Griffin v. State*, 32 Tex. 164, 166; *Drake v. State*, 5 Tex. Cr. App. 649, 661; *McMillan v. State*, 7 Tex. Cr. App. 142, 145.

A charge that "defendant is presumed innocent till he is proved guilty, etc.," is not compliance with the statutory provision that defendant "is presumed innocent until his guilt is established, etc.," for the former expression may be misleading. *Fury v. State*, 8 Tex. Cr. App. 471, 473.

An instruction that "defendant is

presumed to be innocent till his guilt is established by legal evidence" is erroneous. *McPhail v. State*, 9 Tex. Cr. App. 164, 165.

An instruction that "defendant is presumed innocent till his guilt is established by legal evidence, and that all facts admitted are legal evidence" is erroneous. *Cohea v. State*, 9 Tex. Cr. App. 173, 174.

It is always error for the court to refuse defendant the benefit of a charge upon the presumption of innocence when he requests it. *Coffee v. State*, 5 Tex. Cr. App. 545, 546; *McMullen v. State*, 5 Tex. Cr. App. 577, 578.

In a trial for murder, where the evidence is circumstantial, refusal to instruct as to the presumption of innocence is error, where no equivalent instruction is given. *Hampton v. State*, 1 Tex. Cr. App. 652, 658.

A charge that defendant is presumed innocent until proved guilty by legal evidence, and that all evidence before them is legal evidence is erroneous. *Fury v. State*, 8 Tex. Cr. App. 471, 474.

Though five witnesses had sworn that they would not believe the state's principal on oath, it is not error for the court to refuse to charge that the jury could receive or reject any evidence on the ground of credibility and could not convict until the presumption of innocence was overthrown by testimony of credible witnesses or by circumstances. *Leverett v. State*, 3 Tex. Cr. App. 213, 218.

Where the charge on reasonable doubt and presumption of innocence, was sufficient under the facts in the case, refusal to charge that presumption of innocence remained throughout the entire case was not error. *Brown v. State*, 41 Tex. Cr. App. 232, 53 S. W. 866, 867.

Omission of Word Legal before Evidence Is Charged.—Where a charge was that "defendant is presumed to be innocent until his guilt is established by evidence beyond reasonable doubt,"

conviction will not be set aside because of the omission of "legal" before "evidence." *Williams v. State*, 35 Tex. Cr. App. 606, 607, 34 S. W. 943.

III. Burden of Proof.

A. IN GENERAL.

"Burden of proof" is a very different thing from the presumption of innocence. The first is a formal rule confined to determining the order in which the proofs are to be brought forward; a rule which ceases to apply as soon as a party has introduced proof sufficient to entitle him to a verdict. The second is a substantial rule, operating during the whole trial, and continuing to operate until the case is finally determined. *Jones v. State*, 13 Tex. Cr. App. 1, 8.

A party on whom the burden of proof rests is bound to prove each circumstance which is essential to the conclusion, in the same manner as if the whole issue had rested on it. *Henderson v. State*, 14 Tex. 503.

B. WHEN BURDEN RESTS ON STATE.

1. General Rule.

The burden is always on the state to overcome the presumption of innocence and establish the guilt of accused beyond a reasonable doubt. *Horn v. State*, 30 Tex. Cr. App. 541, 544, 17 S. W. 1094; *Perry v. State*, 44 Tex. 473, 478; *Phillips v. State*, 26 Tex. Cr. App. 228, 247, 9 S. W. 557; *Jones v. State*, 13 Tex. Cr. App. 1, 7; *Langford v. State*, 17 Tex. Cr. App. 445, 451; *Ex parte Smith*, 23 Tex. Cr. App. 100, 125, 5 S. W. 99; *Black v. State*, 1 Tex. Cr. App. 368, 391; *Hampton v. State*, 1 Tex. Cr. App. 652, 660; *Chapman v. State*, 1 Tex. Cr. App. 728, 729; *Shafer v. State*, 7 Tex. Cr. App. 239, 243; *Leonard v. State*, 7 Tex. Cr. App. 417, 441.

The burden which rests on the state to overthrow the presumption of innocence and establish the guilt of the accused by legal evidence, beyond a

reasonable doubt, never shifts from the prosecution to the defense. *Chapman v. State*, 1 Tex. Cr. App. 728; *Shafer v. State*, 7 Tex. Cr. App. 239; *Jones v. State*, 13 Tex. Cr. App. 1; *Shanks v. State*, 25 Tex. Supp. 326, 340; *Horn v. State*, 30 Tex. Cr. App. 541, 544, 17 S. W. 1094; *Ayres v. State*, 21 Tex. Cr. App. 399, 405, 17 S. W. 253; *Templeton v. State*, 5 Tex. Cr. App. 398, 408.

The presumption of innocence is stronger than any presumption of guilt arising merely from means used to accomplish a guilty purpose, and the burden rests upon the state, in a criminal trial, to overcome the presumption of innocence, and to establish defendant's guilt, by legal evidence, beyond a reasonable doubt. *Black v. State*, 18 Tex. Cr. App. 124, 129.

Defendant is not compelled to plead at all nor make any defense, and the state must prove every allegation constituting the offense. *Field v. State*, 34 Tex. 39, 42.

Contrasted with Civil Cases.—The burden of proof is not on accused in the sense understood in civil cases; the reasonable doubt extends to the entire case, and the presumption of innocence must be overcome before a conviction. *Perry v. State*, 44 Tex. 473.

2. Extent of Burden.

a. In General.

The principle that the burden of proof in criminal cases is always on the state has relation to the establishment of corpus delicti and defendant's complicity. *Ellis v. State*, 30 Tex. Cr. App. 601, 604, 18 S. W. 139; *Gillian v. State*, 3 Tex. Cr. App. 132; *Willard v. State*, 27 Tex. Cr. App. 386, 11 S. W. 453.

All Acts Constituting Offense.—Innocence is presumed until guilt is proven, hence, in all prosecutions, the state must prove the commission of the acts constituting the offense within the state and within the jurisdiction of the court trying the case. *Field v. State*, 34 Tex. 39, 41.

In a prosecution for cutting and carrying away timber from land not defendant's, it devolves on the prosecution to prove that the land was not defendant's. *Belverman v. State*, 16 Tex. 130.

In a trial for the murder of one alleged to be "an adult male white person, whose name is to the grand jury unknown," the prosecution need not prove that the name was unknown to it or to the grand jury; there being no showing that it was known. *Rye v. State*, 8 Tex. Cr. App. 153.

b. Identity.

To sustain a conviction of a criminal offense, there must be legal and competent evidence pertinently identifying the accused with the offense, to degree of certainty greater than mere probability or strong suspicion. *Grant v. State*, 3 Tex. Cr. App. 1, 5.

On the trial of an assault with intent to murder, where the state fails to identify the accused as the person who committed the assault, a conviction can not be sustained. *Garcia v. State*, 23 Tex. Cr. App. 712, 5 S. W. 186.

The court in a criminal case can not assume the identity of a witness and of a person charged with an offense though their names are the same. *Byrd v. State*, 51 Tex. Cr. App. 539, 103 S. W. 863.

c. Time.

A conviction of assault with intent to murder will be reversed, where there is no proof of time. *Stewart v. State*, 31 Tex. Cr. App. 153, 154, 19 S. W. 908.

On the trial of a prisoner for the theft of a cow, the state failed to prove the time when the alleged offense was committed. Held, that the verdict must be set aside, and a new trial ordered. *Jackson v. State*, 34 Tex. 136.

Within Statutory Period of Limitations.—The prosecution in a criminal case has the burden of proving an offense, committed within the statutory

period. *White v. State*, 4 Tex. Cr. App. 488, 490.

In view of the fact that a prosecution for gaming must be brought within one year after the commission of the offense, a conviction of gaming will be set aside where the evidence fails to show the time when the offense was committed. *Manning v. State*, 35 Tex. 723.

d. Venue.

A conviction can not be sustained without proof that the offense, was committed within the county where the venue is laid. *Field v. State*, 34 Tex. 39; *Shadle v. State*, 34 Tex. 572; *Hill v. State*, 34 Tex. 623; *Jenkins v. State*, 36 Tex. 345; *Jack v. State*, 3 Tex. Cr. App. 72; *McReynolds v. State*, 4 Tex. Cr. App. 327; *Turman v. State*, 4 Tex. Cr. App. 586; *Boston v. State*, 5 Tex. Cr. App. 383; *Ellison v. State*, 6 Tex. Cr. App. 248; *Pippin v. State*, 9 Tex. Cr. App. 269; *Bowling v. State*, 13 Tex. Cr. App. 338; *Williamson v. State*, 13 Tex. Cr. App. 514; *Hall v. State*, 15 Tex. Cr. App. 40; *Temple v. State*, 15 Tex. Cr. App. 304; *Gonzales v. State*, 16 Tex. Cr. App. 152; *Briggs v. State*, 20 Tex. Cr. App. 106; *Crawford v. State* (Cr. App.), 5 S. W. 130; *Owens v. State*, 25 Tex. Cr. App. 552, 8 S. W. 658; *Leggett v. State*, 25 Tex. Cr. App. 535, 8 S. W. 660; *Tucker v. State*, 25 Tex. Cr. App. 653, 8 S. W. 813; *Griffin v. State*, 26 Tex. Cr. App. 157, 9 S. W. 459; *Kelley v. State* (Cr. App.), 31 S. W. 659; *Belcher v. State*, 35 Tex. Cr. App. 168, 32 S. W. 770; *Winn v. State*, 15 Tex. Cr. App. 169, 171; *Stone v. State*, 27 Tex. Cr. App. 576, 11 S. W. 637; *Williams v. State*, 11 Tex. Cr. App. 275; *Collins v. State*, 6 Tex. Cr. App. 647; *Moore v. State*, 2 Tex. Cr. App. 350; *Taylor v. State*, 35 Tex. 496, 497; *Henderson v. State*, 14 Tex. 503, 519; *Gage v. State*, 22 Tex. Cr. App. 123, 126, 2 S. W. 638; *West v. State*, 28 Tex. Cr. App. 1, 3, 11 S. W. 635; *Miles v. State*, 23 Tex. Cr. App. 410, 5 S. W. 250.

e. Knowledge of.

See ante. "Presumption of Knowledge of Law," II, C.

Where it is proven that defendant is over nine but under thirteen years of age, the burden of proof is on the state to show that at the time he committed the felony he understood its illegality. *Carr v. State*, 24 Tex. Cr. App. 562, 7 S. W. 328, 5 Am. St. Rep. 905.

If the evidence shows that the person accused of crime was, at the time of its commission, between the ages of nine and thirteen years, the burden of proof would be on the state to show that he had discretion sufficient to understand the nature and illegality of the act constituting the offense. *McDaniel v. State*, 5 Tex. Cr. App. 475, 479; *Linhart v. State*, 33 Tex. Cr. App. 504, 507, 27 S. W. 260.

C. WHEN BURDEN RESTS ON DEFENDANT.**1. General Rule.**

Where defendant in a criminal case relies on no separate, distinct and independent fact, but confines his defense to the original transaction on which the charge is founded, with its accompanying circumstances, the burden of proof continues throughout with the prosecution. *Dubose v. State*, 10 Tex. Cr. App. 230, 253.

When the prosecution has proved the crime charged, the defendant must establish the facts on which he relies to excuse or justify his acts, when such excuse or justification does not arise out of the evidence against him. *Ake v. State*, 6 Tex. Cr. App. 398, 32 Am. Rep. 586; *Hozier v. State*, 6 Tex. Cr. App. 501; *Leonard v. State*, 7 Tex. Cr. App. 417; *Lewis v. State*, 7 Tex. Cr. App. 567; *Zion v. State* (Cr. App.), 61 S. W. 306; *Leache v. State*, 22 Tex. Cr. App. 279, 315, 3 S. W. 539; *Taylor v. State*, 13 Tex. Cr. App. 184, 190; *Jones v. State*, 13 Tex. Cr. App. 1; *Guffee v. State*, 8 Tex. Cr. App. 187;

Powell v. State, 5 Tex. Cr. App. 234; *Stoneham v. State*, 3 Tex. Cr. App. 594; *Donaldson v. State*, 15 Tex. Cr. App. 25, 29; *Ellis v. State*, 30 Tex. Cr. App. 601, 604, 18 S. W. 139; *Black v. State*, 1 Tex. Cr. App. 368; *State v. Crist*, 32 Tex. 99, 101.

The Code of Criminal Procedure provides that "a defendant in a criminal case is presumed to be innocent until his guilt is established by legal evidence, and, in case of reasonable doubt as to his guilt, he is entitled to be acquitted" (Rev. Code Cr. Proc., art. 727); and the Penal Code provides that, "on the trial of any criminal action, when the facts have been proved which constitute the offence, it devolves upon the accused to establish the facts and circumstances on which he relies to excuse or justify the prohibited act or omission" (Rev. Penal Code, art. 51). Held, that there is no inconsistency between these provisions, nor in the many decisions wherein they have been construed. *Leonard v. State*, 7 Tex. Cr. App. 417.

Facts Specially within Knowledge of Defendant.—The principle that the burden of proof never shifts from the state to defendant relates to the establishment of corpus delicti and complicity of defendant in the crime committed, but does not relate to special defenses, nor when facts relied on as a defense are specially within the knowledge of defendant. *Horn v. State*, 30 Tex. Cr. App. 541, 544, 17 S. W. 1094.

Where, in a prosecution for embezzlement, all exculpatory evidence was peculiarly accessible to the defendant, it was proper and requisite to give in charge to the jury the provision of the penal code providing that "on the trial of any criminal action, when the facts have been proved which constitute the offense it devolves upon the accused to establish the facts and circumstances on which he relies to excuse or justify the prohibited act or

omission. *Leonard v. State*, 7 Tex. Cr. App. 417.

2. Illustrations.

Former Acquittal.—Where, in a prosecution for violation of the local option law, defendant sets up a former acquittal alleging that the transaction for which he is prosecuted is the same transaction as that for which he had been acquitted, the burden is on him to prove his plea. *Morton v. State*, 37 Tex. Cr. App. 131, 38 S. W. 1019.

License.—Where accused relies upon a license to do an act, and the license is particularly within his knowledge, the burden of proving such license is upon him. *Jones v. State*, 13 Tex. Cr. App. 1, 15.

When the defenses are so extrinsic as to require in their support a preponderance of proof as distinguished from the defenses as to which it will be sufficient for an acquittal to throw a reasonable doubt on the case of prosecution, the burden is on defendant. The principal illustration of such defenses are licenses or authorizations from the state, and pleas of former acquittal or conviction. *Strong v. State*, 18 Tex. Cr. App. 19, 25.

Insanity.—The burden of proving accused's insanity as a defense to a criminal charge rests on accused. *Thomas v. State*, 55 Tex. Cr. App. 293, 116 S. W. 600.

Where, in a criminal prosecution, insanity of defendant is interposed as a defense, the burden of proving such insanity to the satisfaction of the jury by a preponderance of the evidence is upon the defendant. *Fults v. State*, 50 Tex. Cr. App. 502, 98 S. W. 1057; *Hurst v. State*, 40 Tex. Cr. App. 378, 388, 46 S. W. 635, 50 S. W. 719; *Burt v. State*, 38 Tex. Cr. App. 397, 40 S. W. 1000, 43 S. W. 344; *Boren v. State*, 32 Tex. Cr. App. 637, 25 S. W. 775; *Fisher v. State*, 30 Tex. Cr. App. 502, 18 S. W. 90; *Mendiola v. State*, 18 Tex. Cr. App. 462; *Leache v. State*, 22 Tex. Cr. App. 279, 3 S. W. 539;

Lovegrove v. State, 31 Tex. Cr. App. 491, 21 S. W. 191; *Riley v. State* (Cr. App.), 44 S. W. 498; *Carlisle v. State* (Cr. App.), 56 S. W. 365; *Gray v. State* (Cr. App.), 74 S. W. 552; *Wheatly v. State* (Cr. App.), 39 S. W. 672.

Nonage.—Under Pen. Code, art. 51, providing that after proof of the facts constituting an offense the burden is on defendant to prove the fact he relies on for excuse or justification, defendant must prove nonage where he relies on it to exempt him from capital punishment. *Ellis v. State*, 30 Tex. Cr. App. 601, 18 S. W. 139; *Ake v. State*, 6 Tex. Cr. App. 398, 420; *Hozier v. State*, 6 Tex. Cr. App. 501.

Presumption of Malice.—Since the law presumes malice from the use of violence, the burden is on defendant to rebut the presumption by showing justifying or extenuating circumstances. *Henderson v. State*, 12 Tex. 525, 532.

Alibi.—An alibi is not a defense in a criminal case casting the burden of proof on defendant. *Gallaher v. State*, 28 Tex. Cr. App. 247, 267, 12 S. W. 1087.

If there is evidence, in a criminal case, tending to prove an alibi, the case is to be tried upon all of the evidence, that for the state as well as that for defendant, but in no case is the burden upon defendant. *Humphries v. State*, 18 Tex. Cr. App. 302, 309; *Bennett v. State*, 30 Tex. Cr. App. 341, 342, 17 S. W. 545; *Ayres v. State*, 21 Tex. Cr. App. 399, 17 S. W. 253.

D. INSTRUCTIONS.

It is error to refuse a proper charge as to the burden of proof in establishing defendant's guilt, when specially requested. *Lensing v. State* (Cr. App.), 45 S. W. 572.

The court need not charge that the burden is upon the state to prove the offense, where it charges that defendant is presumed to be innocent till his guilt is established by legal evidence, and in case of a reasonable doubt as

to his guilt, he is entitled to be acquitted. *Day v. State*, 21 Tex. Cr. App. 213, 214, 17 S. W. 262; *Huggins v. State*, 42 Tex. Cr. App. 364, 60 S. W. 52.

An instruction that if defendant did not assault the prosecutrix, or if there was a reasonable doubt as to whether he assaulted her, he must be acquitted, is not objectionable as imposing upon defendant the burden of proving that he did not commit the assault charged. *Conger v. State* (Cr. App.), 140 S. W. 1112.

In a prosecution for an assault with intent to murder, to which self-defense was interposed under the plea of "not guilty," the court charged the jury in the language of art. 51 of the Penal Code, as follows: "You are further instructed that upon the trial of any criminal action, when the facts have been proved which constitute the offense, it devolves on the accused to establish the facts and circumstances on which he relies to excuse or justify the prohibited act." Held, error, for which the conviction must be set aside. *Jones v. State*, 13 Tex. Cr. App. 1.

A charge that when an unlawful act is proved, and it does not appear from the state's evidence that it was done under circumstances of mitigation or justification, it is for defendant to show facts excusing it so that reasonable doubt may arise on the evidence as to his guilt is error. *Branch v. State*, 15 Tex. Cr. App. 96, 102.

On trial of an indictment for passing a forged check as genuine, there was no evidence tending to show that the defendant obtained the check from some other party. The court charged that knowledge of the 'worthlessness of the check was a material element of the offense. Held, that it was not error then to charge that, if defendant got the check from another, it devolved on him to show that fact. *Sherwood v. State*, 42 Tex. 498.

A charge that burden is on defendant to establish facts excusing or justifying acts when the facts constituting the offense have been proved is improper, where the evidence is conflicting. *Ainsworth v. State*, 8 Tex. Cr. App. 532, 536.

An instruction that the plea of alibi merely traverses the issue tendered in the indictment, and is not an independent fact, and therefore the burden of proof is not on the defendant to establish it, was properly refused. *Saenz v. State* (Cr. App.), 63 S. W. 316.

A charge that, if the jury entertain a reasonable doubt as to the presence of the defendant at the time and place of the killing, they should give defendant the benefit of such doubt, and acquit him, is not erroneous, as placing the burden on defendant to prove an alibi beyond a reasonable doubt. *Gutierrez v. State* (Cr. App.), 59 S. W. 274.

An instruction to acquit if the jury have a reasonable doubt of "guilt or innocence" of defendant is erroneous. *McNair v. State*, 14 Tex. Cr. App. 78, 84; *Holland v. State*, 14 Tex. Cr. App. 182, 185; *Thomas v. State*, 14 Tex. Cr. App. 200, 203; *Brinkoeter v. State*, 14 Tex. Cr. App. 67, 69.

In a trial for the theft of a cow, a charge is erroneous which makes defendant's guilt dependent on merely his presence, without participation in the offense, and puts the burden on defendant to prove justification unless justification appears from the evidence. *Chapman v. State*, 1 Tex. Cr. App. 728, 729.

The court, in explaining to the jury the law of assault and battery, instructed that any unlawful violence on the person of another with intent to injure him was a battery, and where violence is actually committed on the person of another, no matter how slight, it rests with the person inflicting the injury to show an innocent intention. Held, that such instruction was erroneous, as it imposed on de-

fendant the burden of proving himself innocent of any unlawful attempt to perpetrate any offense. *Thomas v. State*, 16 Tex. Cr. App. 535.

An instruction that accused should not be found guilty of a higher degree than assault with intent to rape, if

there was a reasonable doubt as to whether he was guilty of rape or was guilty of assault with intent to rape, did not shift the burden of proof from the state to accused. *Russell v. State*, 33 Tex. Cr. App. 424, 26 S. W. 990.

Pretense.

See the titles FALSE PRETENSES, vol. 3, p. 239; FRAUD, vol. 3, p. 349.

Prevailing Parties.

See the title COST, vol. 2, p. 144.

Preventive Justice.

See the title CRIMINAL LAW, vol. 2, p. 168. As to security for good behavior and to keep the peace, see the titles BREACH OF THE PEACE, vol. 1, p. 684; DISORDERLY CONDUCT, vol. 2, p. 229.

Previous Assaults.

See the title ASSAULT AND BATTERY, vol. 1, p. 493.

Previous Marriage.

See the title BIGAMY, vol. 1, p. 659.

Prima Facie Evidence.

See the title EVIDENCE, vol. 2, p. 324.

Primary or Secondary Evidence.

See the title EVIDENCE, vol. 2, p. 324.

Principal and Accessory.

See the titles CRIMINAL LAW, vol. 2, p. 168; INDICTMENT AND INFORMATION, vol. 4, p. 239. And see the specific titles throughout this work.

PRINCIPAL AND AGENT.

CROSS REFERENCES.

See the titles ACCOMPLICES, ACCESSORIES, AIDERS AND ABETTORS, vol. 1, p. 8; CONTRACTS, vol. 2, p. 136; CRIMINAL LAW, vol. 2, p. 168; EMBEZZLEMENT, vol. 2, p. 277; HUSBAND AND WIFE, vol. 4, p. 222; SALES.

As to the ratification of a criminal act, see the title ACCOMPLICES, ACCESSORIES, AIDERS AND ABETTORS, vol. 1, p. 8. As to the relation between attorney and client, see the title ATTORNEY AND CLIENT, vol. 1, p. 570.

Criminal Liability for Act of Agent.
—To render a principal criminally liable for an act of his agent, committed in the absence of the principal, there must be some sort of complicity. *Ollre v. State*, 57 Tex. Cr. App. 520, 123 S. W. 1116.

—“The principal of the common law **qui facit per alium facit per se**” is of universal application, both in criminal and civil cases. *Doss v. State*, 21 Tex. Cr. App. 505, 512, 2 S. W. 814; *Ex parte Rogers*, 10 Tex. Cr. App. 655, 669.

Qui Facit Per Alium Facit Per Se

Principal and Surety.

See the titles BAIL AND RECOGNIZANCE, vol. 1, p. 572; SHERIFFS AND CONSTABLES; WITNESSES. As to liability of principal for performance of particular acts, see the titles APPEAL, ERROR AND CERTIORARI, vol. 1, p. 87; COSTS, vol. 2, p. 144. As to convict's bonds, see the title CONVICTS, vol. 2, p. 136.

Principal Challenge.

See the title JURY, ante, p. 110.

Principals.

See the titles ACCOMPLICES, ACCESSORIES, AIDERS AND ABETTORS, vol. 1, p. 8; PRINCIPAL AND AGENT, ante, p. 683.

Printing.

See the titles LIBEL AND SLANDER, ante, p. 387; OBSCENITY. As to printing briefs, see the title APPEAL, ERROR AND CERTIORARI, vol. 1, p. 87. As to printed forms, see the title INDICTMENT AND INFORMATION, vol. 4, p. 239. As to printing records, see the title APPEAL, ERROR AND CERTIORARI, vol. 1, p. 87.

Prints.

See the title OBSCENITY, ante, p. 558.

Priority.

As to priority of jurisdiction, see the title JURISDICTION AND VENUE, ante, p. 60.

Prior Offense.

See the title CRIMINAL LAW, vol. 2, p. 168.

Prisoners.

See the titles CONVICTS, vol. 2, p. 136; ESCAPE AND RESCUE, vol. 2, p. 315; PRISONS; REFORMATORIES.

PRISONS.

CROSS REFERENCES.

See the titles CRIMINAL LAW, vol. 2, p. 168; ESCAPE AND RESCUE, vol. 2, p. 315; INFANTS, vol. 4, p. 374; INSANE PERSONS, vol. 4, p. 382; PARDON, ante, p. 575; REFORMATORIES; SHERIFFS AND CONSTABLES.

Jail Defined.—The Texas Code defines a "jail" to be "any place of confinement used for detaining a prisoner." Pen. Code, art. 226. A jail is not necessarily a house. It may be a pen, an inclosure of any kind; in fact, any place of confinement used for detaining a prisoner. In the case before us the outside wall which surrounded the house in which was the cell occupied by the prisoner, was, as shown by the evidence, constructed with a view to confining prisoners securely, and constituted in fact a stronger and more reliable safeguard against the escape of prisoners than the house or cell. It was the principal protection; the most important portion of the place of confinement. *Welch v. State*, 25 Tex. Cr. App. 580, 8 S. W. 657.

"Jail," as used in art. 227 of the Penal Code, making it criminal to break into a jail to rescue a person confined, is intended to protect a city jail or calaboose as well as a county jail. *Starks v. State*, 38 Tex. Cr. App. 233, 240, 42 S. W. 379.

It is not necessary that the town should be incorporated, to constitute the structure a jail. *Irvington v. State*, 45 Tex. Cr. App. 559, 78 S. W. 928.

Supervision of Jail.—"Each sheriff is the keeper of the jail of his county, and responsible for the safe keeping of all prisoners committed to his custody; that the sheriff may appoint a jailer to take charge of the jail and supply the wants of prisoners therein confined, and the person so appointed as jailer is responsible for the safety of prisoners, and liable to punishment, as prescribed by law, for negligently or willfully permitting a rescue or escape." And following immediately after the provision last set out, and in the same article, we find this further provision, to wit: "But the sheriff shall in all cases exercise a supervision and control over the jail." Code of Cr. Proc., arts. 37, 40 (Pasc. Dig., arts. 2504, 2507)." *Gordon v. State*, 2 Tex. Cr. App. 154, 156. See the title SHERIFFS AND CONSTABLES.

Indictment.—An indictment is suffi-

ciently specific which, in plain and intelligible words, charges a sheriff with neglect and failure to exercise over the jail of his county such supervision and control as the law requires him to exercise. *Gordon v. State*, 2 Tex. Cr. App. 154. See, generally, the title INDICTMENT AND INFORMATION, vol. 4, p. 239.

Offense.—An indictment against a sheriff charging him with neglect in failing to exercise supervision over the county jail by which he permitted fel-

ons to escape, charged a misdemeanor only and not a felony. *Watson v. State*, 9 Tex. Cr. App. 212.

Punishment for Failure to Exercise Proper Supervision.—"A negligent failure to exercise a proper supervision and control over the jail of his county, by the sheriff of the county, is a misdemeanor for which he is liable under the law to be tried and fined not exceeding \$200." *Gordon v. State*, 2 Tex. Cr. App. 154, 157.

Private Banking.

See the title BANKS AND BANKING, vol. 1, p. 652.

Private Residence.

See the title BURGLARY, vol. 1, p. 703.

Private Writings.

See the title EVIDENCE, vol. 2, p. 324.

Privilege.

See the titles ATTORNEY AND CLIENT, vol. 1, p. 569; CONSTITUTIONAL LAW, vol. 2, p. 9. See, also, the titles ARREST, vol. 1, p. 473; LOTTERIES, ante, p. 427; WITNESSES. As to privilege of counsel in proceedings, see the title ATTORNEY AND CLIENT, vol. 1, p. 570. As to privileged communications, see the title WITNESSES. As to provision as to self-incrimination of witness, see the title WITNESSES. As to constitutional provision as to privileges and immunities, see the title CONSTITUTIONAL LAW, vol. 2, p. 9. As to privileges of jurors, see the title JURY, ante, p. 110. As to exemption from jury duty, see the titles GRAND JURY, vol. 3, p. 414; JURY, ante, p. 110.

PRIVILEGED COMMUNICATIONS.

CROSS REFERENCES.

See the titles ATTORNEY AND CLIENT, vol. 1, p. 569; EVIDENCE, vol. 2, p. 324; LIBEL AND SLANDER, ante, p. 387.

As to privileged communications between husband and wife, see the title WITNESSES.

Communications Made to Physicians.—Communications made to a physician professionally are not privileged, in the absence of a statutory provision making them so. *Steagald v. State*, 22 Tex. Cr. App. 464, 3 S. W. 771.

Communications Made to Attorney—**General Rule.**—Privileged communications in criminal cases are subject to two rules: (1) To be privileged, they must pass between the client and his attorney in professional confidence, and in the legitimate course of the latter's legitimate employment. (2) If the communications are made by the client to the attorney before the commission of the crime, and for the purpose of being guided or helped in the commission, they are not privileged; and this second rule is not affected by the fact that the attorney is wholly without blame. *Orman v. State*, 22 Tex. Cr. App. 604, 3 S. W. 468, 58 Am. Rep. 662.

"No legal adviser is permitted, whether during or after the termination of his employment as such, unless with his client's express consent, to disclose any communication, oral or documentary, made to him as such legal adviser, by or on behalf of his client, during, in the course, and for the purpose of his employment, whether in reference to any matter as to which a dispute has arisen or otherwise, or to disclose any advice given by him to his client, during, in the course, and for the purpose of such employment. It is immaterial whether the client is or is not a party to the action in which the question is put to the legal adviser." *Hernandez v. State*, 18 Tex. Cr. App. 134, 153.

"Mr. Greenleaf says: 'The rule is

clear and well settled that the confidential counselor, solicitor, or attorney of the party can not be compelled to disclose papers delivered, or communications made to him, or letters or entries made by him in that capacity. This protection, said Lord Brougham, is not qualified by any reference to proceedings pending, or in contemplation. If, touching matters that come within the ordinary scope of professional employment, they receive a communication in their professional capacity, either from a client or on his account and for his benefit in the transaction of his business, or, which amounts to the same thing, if they commit to paper in the course of their employment on his behalf matters which they know only through their professional relation to the client, they are not only justified in withholding such matters, but bound to withhold them, and will not be compelled to disclose the information or produce the papers in any court of law or equity, either as party or as witness.' (1 Greenl. Ev., § 237.)" *Hernandez v. State*, 18 Tex. Cr. App. 134, 152.

"It has been the long settled rule of the law, founded upon the ground of public policy, that communications made by a client to his attorney, in the course of their relations as such, and with respect to the business about which the attorney had been employed by the client, should not be disclosed. This rule has been most rigidly, and with great unanimity, adhered to by the courts, and the tendency has been to contract rather than to relax it." *Sutton v. State*, 16 Tex. Cr. App. 490, 495; *Hernandez v. State*, 18 Tex. Cr. App. 134, 153.

In a prosecution for perjury alleged to have been committed in a suit by accused, on certain notes secured by a deed of trust, the state desiring the deed of trust to introduce in evidence called the attorney for accused, and, over his objection and claim of privilege that his knowledge concerning the deed was secured through his relationship as attorney for accused, and under a threat of commitment for contempt for refusing to testify, compelled him to state that the deed was in the possession of the wife of accused. Held, that the court erred in compelling the attorney to testify under Code Cr. Proc. 1895, art. 773, providing that an attorney shall not disclose any fact which came to his knowledge by reason of such relationship, etc. *Downing v. State*, 61 Tex. Cr. App. 519, 136 S. W. 471.

Extent of Privilege.—An attorney at law is not only disabled by the Code of Procedure, art. 733, to disclose any communication made to him by his client during the existence of that relationship, but also “any other fact which came to the knowledge of such attorney by reason of such relationship.” This provision is not restricted to facts communicated to the attorney by his client, but extends to all facts which came to the knowledge of the attorney from any source whatever, because of the relationship. *Hernandez v. State*, 18 Tex. Cr. App. 134.

“Mr. Wharton says this ‘privilege extends to all knowledge possessed by the lawyer which he would not have obtained if he had not been consulted professionally by his client.’ (1 Whart. Ev., § 577.)” *Hernandez v. State*, 18 Tex. Cr. App. 134, 153.

Manner of Obtaining Information.—“The tendency of decisions is to authorize the fullest latitude in order to protect a client against any character of communication between him and his attorney transpiring by virtue of that employment, and which may be

used to his detriment. And it has been expressly held that it does not matter whether the information has been derived from a client's words, actions, or personal appearance.” *Holden v. State*, 44 Tex. Cr. App. 382, 384, 71 S. W. 600.

Waiver of Privilege.—Defendant may waive the privilege of excluding from evidence communications made to his attorney, hence may consent to the attorney's testifying to facts which a third party, present at the interview, would have testified to if called as a witness. *Walker v. State*, 19 Tex. Cr. App. 176, 182.

Statements Made in Presence of Third Person.—The rule rendering communications between attorney and client privileged and inadmissible in evidence extends only to communications made to an attorney acting as a legal adviser, not to communications to an attorney acting merely as a friend, or to a student in an attorney's office, or to third persons present at the conference between the attorney and client, although such persons be related to the attorney. *Walker v. State*, 19 Tex. Cr. App. 176, 181.

An attorney's mother-in-law, being present at a time when professional communications were made to the attorney, overheard them. Held, that she could be required to testify concerning them. *Walker v. State*, 19 Tex. Cr. App. 176.

Where it was shown that defendant had been duly warned by the sheriff, held, a proper predicate was laid for the introduction of the statements made by the defendant to his attorney in the presence and hearing of the sheriff, and such communications to his attorney were not privileged. *Russell v. State*, 38 Tex. Cr. App. 590, 44 S. W. 159.

Written Statement Intended for Counsel.—Where it was alleged, as showing motive, that defendant had slandered a daughter of deceased, and

had threatened the life of deceased for slander suit pending at the time of the homicide, a statement written by defendant as to such matters, which he intended to give his counsel, found on his person after his arrest, was not a privileged communication. *Renfro v. State*, 42 Tex. Cr. App. 393, 56 S. W. 1013.

Requests for Advice as to Commission of Crime.—Communications made by a client to his attorney, before the commission of the crime and for the purpose of being guided or helped in its commission, are not privileged, even though the attorney was wholly without blame in the matter. *Orman v. State*, 22 Tex. Cr. App. 604, 617, 3 S. W. 468.

In a trial for murder it appeared that the deceased had used insulting language concerning defendant's mother and sister. Defendant consulted counsel as to what would be the penalty for killing the deceased. Held not a privileged communication. *Orman v. State*, 24 Tex. Cr. App. 495, 6 S. W. 544.

In a trial for murder, testimony of deceased's attorney that, several days before the killing, deceased asked his advice as to how he could kill defendant and avoid the legal consequences, is not a privileged communication. *Everett v. State*, 30 Tex. Cr. App. 682, 18 S. W. 674.

Threat Made During Conversation.—Where, during a conversation between defendant and his attorney, defendant remarked that if deceased was a wise man he would not do certain things concerning the bringing of a suit against defendant for divorce, such statement was in the nature of a qualified threat, and not a privileged communication between attorney and client, concerning which the attorney was disqualified to testify. *Pearson v. State*, 56 Tex. Cr. App. 607, 120 S. W. 1004.

Testimony of Accused at Former Trial.—It is not reversible error to per-

mit the state to call the attorney of accused to prove what accused testified to on a former trial. *Yardley v. State*, 50 Tex. Cr. App. 644, 100 S. W. 399.

Where Client Turns State Evidence.—The fact that an attorney's client, accused of a crime, turns state evidence, does not entitle the attorney to testify concerning confidential communications. *Sutton v. State*, 16 Tex. Cr. App. 490.

Money Given to Attorney.—On a trial for theft from the person, where the purpose of the state was to show that the amount of money in possession of defendant corresponded with the money taken from the prosecutor, it was not competent, in order to prove this fact, to require her attorney to testify that when defendant employed him she gave him two \$5 bills. The testimony comes within the rule of a privileged communication to her attorney and was inadmissible. *Holden v. State*, 44 Tex. Cr. App. 382, 71 S. W. 600.

Signing Order.—In a prosecution of defendant for perjury in swearing that he did not sign a certain order, the testimony of the attorney who drew the order for defendant to sign, that he did sign it, is not incompetent on behalf of the state on the ground that it is a privileged communication. *Rahm v. State*, 30 Tex. Cr. App. 310, 17 S. W. 416, 28 Am. St. Rep. 911.

Statements Made During Drafting of Affidavit.—An attorney who drafted for a client an affidavit on which perjury was assigned may not testify as to the statements made by his client at the time. *Hernandez v. State*, 18 Tex. Cr. App. 134, 51 Am. St. Rep. 295.

Reading Affidavit and Comments Thereon.—In a prosecution for perjury, where the accused had gone to an attorney on behalf of his client, to aid him in procuring a new trial for the client, the attorney's testimony as to reading to accused his affidavit to be

appended to the motion for new trial, and explaining to him its contents, was inadmissible, as the disclosure of a confidential communication. *Rosebud v. State*, 50 Tex. Cr. App. 475, 98 S. W. 858.

Statements Made in Regard to Case.

—It was error to require defendant, who was on trial for a criminal offense, to relate on cross-examination a confidential communication between him and his attorneys in regard to such case. *Herring v. State* (Cr. App.), 42 S. W. 301.

Privilege of Confidence.

See the titles ATTORNEY AND CLIENT, vol. 1, p. 569; WITNESSES.

Prize.

See the title LOTTERIES, ante, p. 427.

PRIZE FIGHTING.

CROSS REFERENCES.

See the titles AFFRAY, vol. 1, p. 49; ASSAULT AND BATTERY, vol. 1, p. 493; BREACH OF THE PEACE, vol. 1, p. 684; CRIMINAL LAW, vol. 2, p. 168; GAMING, vol. 3, p. 353; UNLAWFUL ASSEMBLY.

Felony.—Act 1889 imposes an occupation tax of \$500 on prize fights. Act March 23, 1891, prohibits prize fighting, and makes it a felony punishable by fine and imprisonment. Held, that the act of 1891 repealed so much of the act of 1889 as permitted an occupation tax to be charged on prize fights, and that a conviction under the act of 1889 for engaging in a prize fight without obtaining a license could not be sustained. *Sullivan v. State*, 32 Tex. Cr. App. 50, 22 S. W. 44.

Probable Cause.

See the titles CRIMINAL LAW, vol. 2, p. 168; FALSE IMPRISONMENT, vol. 3, p. 231; LIBEL AND SLANDER, ante, p. 387; MALICIOUS PROSECUTION, ante, p. 438.

PROCESS.

CROSS REFERENCES.

See the titles CRIMINAL LAW, vol. 2, p. 168; INDICTMENT AND INFORMATION, vol. 4, p. 239; SHERIFFS AND CONSTABLES; TRIAL.

Form of Process.—Section 12, art. 5, Const., requires that "all prosecutions must be in the name and by authority of the state of Texas, and shall con- clude against the peace and dignity of the state." *Ex parte Fagg*, 38 Tex. Cr. App. 573, 587, 44 S. W. 294. See *Ex parte Wilson*, 14 Tex. Cr. App.

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592; *Bautsch v. Galveston*, 27 Tex. Cr. App. 342, 11 S. W. 414; *Brown v. State*, 28 Tex. Cr. App. 65, 11 S. W. 1022; *Leach v. State*, 36 Tex. Cr. App. 248, 36 S. W. 471.

No Reference to Entitling Case.—

The provision of the constitution, which requires all prosecutions for offenses to be conducted in the name of the state of Texas, has no reference to the style of entitling the case on the docket or papers filed. *Shultz v. State*, 13 Tex. 401.

Process Running in Name of City for Violation of State Laws.—

"The charter of [Ft. Worth] requires all process, in cases of violation of state laws cognizable before said city court, to run in the name of the city of Ft. Worth. Its process shall conclude against the peace and dignity of the city, and prosecutions in said court shall be carried on in the name of the city of Ft. Worth. Ft. Worth City Charter, § 28. That the legislature has the authority to provide that writs and process from said city court should run in the name of the city, and the prosecutions to be carried on in its name, may be conceded, in so far as violations of the city ordinances and regulations are concerned; but this could not be done as to state offenses, for the simple reason that art. 5, § 12,

of the state constitution provides that the 'style of all writs and process shall be, "the state of Texas," and all prosecutions shall be carried on in the name and by the authority of the state of Texas; and shall conclude against the peace and dignity of the state.' It has uniformly been held—and could not be otherwise—that all criminal prosecutions for violations of state laws must be carried on 'in the name and by the authority of the state of Texas,' and they shall conclude 'against the peace and dignity of the state,' and that all writs of process issued from any court created by virtue of art. 5, and forming part of the judicial power of this state, must run in the name of the state of Texas. See *Bautsch v. Galveston*, 27 Tex. Cr. App. 342, 11 S. W. 414; *Ex parte Boland*, 11 Tex. Cr. App. 159; *Davenport v. Bird*, 34 Iowa 524." *Leach v. State*, 36 Tex. Cr. App. 248, 36 S. W. 471, 472. See, generally, the title MUNICIPAL CORPORATIONS, ante, p. 456.

Who May Issue.—Process for defendants in an indictment for a misdemeanor is not issuable by district clerks; but the indictments are required to be certified to the county courts for trial, and from them the process issues. *Cassaday v. State*, 4 Tex. Cr. App. 96.

Prosecution.

See the titles ABDUCTION, vol. 1, p. 2; PROSTITUTION.

Production of Documents.

See the titles CONTEMPT, vol. 2, p. 43; EVIDENCE, vol. 2, p. 324.

Profane Language.

See the title BREACH OF THE PEACE, vol. 1, p. 684.

Promise.

As to promise of marriage, see the title SEDUCTION. As to false pretense, see the title FALSE PRETENSES, vol. 3, p. 239.

Promise of Marriage.

See the title SEDUCTION.

Proof.

See the titles CONSTITUTIONAL LAW, vol. 2, p. 9; CRIMINAL LAW, vol. 2, p. 168; DEPOSITIONS, vol. 2, p. 224; EVIDENCE, vol. 2, p. 324; INSTRUCTIONS, vol. 4, p. 385; PRESUMPTIONS AND BURDEN OF PROOF, ante, p. 669. As to order of proof, see the title TRIAL.

Proper Names.

See the title NAMES, ante, p. 469.

Property.

As to offenses involving property, see the specific titles, such as ARSON, vol. 1, p. 484; BURGLARY, vol. 1, p. 703; LARCENY, ante, p. 195, etc. As to conspiracy to injure, see the title CONSPIRACY, vol. 2, p. 1. As to cruelty to animals, see the title ANIMALS, vol. 1, p. 55. As to railroad ticket as property, see the title CARRIERS, vol. 1, p. 759.

Propositions of Law.

See the titles APPEAL, ERROR AND CERTIORARI, vol. 1, p. 87; INSTRUCTIONS, vol. 4, p. 385; TRIAL.

Prosecuting Attorneys.

See the title DISTRICT AND PROSECUTING ATTORNEYS, vol. 2, p. 253. See, also, the title TRIAL.

Prosecutions.

See the titles CRIMINAL LAW, vol. 2, p. 168; TRIAL.

Prosecutors.

See the titles CRIMINAL LAW, vol. 2, p. 168; INDICTMENT AND INFORMATION, vol. 4, p. 239. See, also, the titles COSTS, vol. 2, p. 144; INTOXICATING LIQUORS, vol. 4, p. 633; WITNESSES.

Prosecutrix.

See the title RAPE.

Prospective Laws.

See the titles CONSTITUTIONAL LAW, vol. 2, p. 9. STATUTES.

PROSTITUTION.

CROSS REFERENCES.

See the titles ABDUCTION, vol. 1, p. 2; ADULTERY, vol. 1, p. 35; CRIMINAL LAW, vol. 2, p. 168; DISORDERLY HOUSES, vol. 2, p. 230; EVIDENCE, vol. 2, p. 324; FORNICATION, vol. 3, p. 345; INCEST, vol. 4, p. 227; LEWDNESS, ante, p. 386; MISCEGENATION, ante, p. 451; OBSCENITY, ante, p. 558; RAPE; VAGRANCY.

Nature and Elements of Offenses.—Acts 30th Leg., c. 132, art. 359a, making it unlawful for any person to solicit or procure any female to visit any particular house for the purpose of having unlawful intercourse with any male person, etc., creates the offense of alluring any female to go to a certain place for immoral conduct, and where a female is allured or invited, and she starts to the place of assignation, the offense is complete. *Sanders v. State*, 60 Tex. Cr. App. 34, 129 S. W. 605.

In the common acceptance of the terms, all prostitutes are not common prostitutes. A common prostitute is a public prostitute, who makes a business of selling the use of her person to the male sex for the purpose of illicit intercourse. A woman may be a prostitute, and yet have illicit connection with one man only; but, to be a common prostitute, her lewdness must be more general and indiscriminate. *Springer v. State*, 16 Tex. Cr. App. 591, 593. See the title DISORDERLY HOUSES, vol. 2, p. 230.

The term "prostitute" and "vagabond" are not synonymous. As the words are used in the statute art. 339, Penal Code, defining a disorderly house as one kept for the purpose of public prostitution, or as a common resort

for prostitutes and vagabonds, it is not every prostitute that is a vagabond, and vice versa; and while the Code declares that every common prostitute is a vagrant, which means the same as vagabond, it does not mean that every prostitute is a vagrant. The word "vagabond," as used in the statute, applies only to the common prostitute, the female who publicly sells her person indiscriminately to illicit intercourse with males, and not the female who surrenders her person to private prostitution. *Springer v. State*, 16 Tex. Cr. App. 591. See the title DISORDERLY HOUSES, vol. 2, p. 230.

Indictment or Information.—Under Acts 30th Leg., c. 132, art. 359a, making it unlawful for any person to solicit or procure any female to visit any particular house for the purpose of having unlawful intercourse with any male person, etc., where a female is allured or invited, and she starts to the place of assignation, the information need not give the names of those she was to meet at such place. *Sanders v. State*, 60 Tex. Cr. App. 34, 129 S. W. 605.

An information charging that accused procured and allured a female to be at a certain place, a designated town, for the purpose of meeting and

having unlawful intercourse with men, is sufficiently definite to charge a violation of Acts 30th Leg., c. 132, art. 359a. *Sanders v. State*, 60 Tex. Cr. App. 34, 129 S. W. 605.

Such information was sufficient without stating any particular house or room in such town. *Sanders v. State*, 60 Tex. Cr. App. 34, 129 S. W. 605.

Evidence.—Where the information, in general terms, charges defendant with being a vagrant, to wit, a com-

mon prostitute, the offense must be proven by evidence of the particular facts showing it, and it is error to admit evidence of defendant's general reputation. *Arnold v. State*, 28 Tex. Cr. App. 480, 13 S. W. 774.

Evidence of the bad character of the women who lived near defendant's residence, and with whom she sometimes associated, is incompetent. *Arnold v. State*, 28 Tex. Cr. App. 480, 13 S. W. 774.

Protection.

See the title CONSTITUTIONAL LAW, vol. 2, p. 9. As to protection of persons or property as excuse or justification for assault or homicide, see the titles ASSAULT AND BATTERY, vol. 1, p. 493; HOMICIDE, vol. 3, p. 477.

Province of Court or Jury.

See the titles CRIMINAL LAW, vol. 2, p. 168; INSTRUCTIONS, vol. 4, p. 385; TRIAL.

Provisional Remedy.

See the title BAIL AND RECOGNIZANCE, vol. 1, p. 572. As to review of decisions, see the title APPEAL, ERROR AND CERTIORARI, vol. 1, p. 87.

Provisos.

See the titles CONSTITUTIONAL LAW, vol. 2, p. 9; STATUTES.

Provocation.

See the specific titles throughout this work, such as ASSAULT AND BATTERY, vol. 1, p. 493; HOMICIDE, vol. 3, p. 477; etc.

Proximate Cause.

See the title HOMICIDE, vol. 3, p. 477.

Public Acts.

See the title STATUTES.

Public Amusements.

See the title THEATERS AND SHOWS.

Public Assemblage.

See the titles BREACH OF THE PEACE, vol. 1, p. 684; DISTURBANCE OF PUBLIC ASSEMBLAGE, vol. 2, p. 258.

Publication.

See the title LIBEL AND SLANDER, ante, p. 387. See, also, the titles EVIDENCE, vol. 2, p. 324; FORGERY, vol. 3, p. 301.

Public Criticism.

See the title LIBEL AND SLANDER, ante, p. 387.

Public Documents.

See the title EVIDENCE, vol. 2, p. 324.

Public Health.

See the title HEALTH, vol. 3, p. 475.

Public Indecency.

See the title OBSCENITY, ante, p. 558.

Public Lands.

See the title TREES AND TIMBER.

Public Laws.

See the title STATUTES.

Public Meetings.

See the titles DISTURBANCE OF PUBLIC ASSEMBLAGE, vol. 2, p. 258; UNLAWFUL ASSEMBLY.

Public Morals.

See the titles GAMING, vol. 3, p. 353; MUNICIPAL CORPORATIONS, ante, p. 456. As to offenses against public morals, see the titles ADULTERY, vol. 1, p. 35; BIGAMY, vol. 1, p. 659; DISORDERLY HOUSES, vol. 2, p. 230; FORNICATION, vol. 3, p. 345; INCEST, vol. 4, p. 227; LEWDNESS, ante, p. 386; MISCEGENATION, ante, p. 451; OBSCENITY, ante, p. 558; PROSTITUTION, ante, p. 692; RAPE; SODOMY.

Public Nuisance.

See the title NUISANCE, ante, p. 556.

Public Offense.

See the title CRIMINAL LAW, vol. 2, p. 168. And see the specific titles.

Public Officers.

See the particular titles, such as CLERK OF COURT, vol. 1, p. 773; JUDGES, ante, p. 40; SHERIFFS AND CONSTABLES; etc.

Public Peace.

As to offenses against the public peace, see the titles AFFRAY, vol. 1, p. 49; BREACH OF THE PEACE, vol. 1, p. 684; DISORDERLY HOUSES, vol. 2, p. 230; DISTURBANCE OF PUBLIC ASSEMBLAGE, vol. 2, p. 258; DUELING, vol. 2, p. 269; MALICIOUS MISCHIEF, ante, p. 431; PRIZE FIGHTING, ante, p. 689; RIOT; UNLAWFUL ASSEMBLY. As to regulations and ordinances, see the title MUNICIPAL CORPORATIONS, ante, p. 456. As to peace officers, see the titles JUSTICES OF THE PEACE, ante, p. 189; SHERIFFS AND CONSTABLES. See, also, the title MUNICIPAL CORPORATIONS, ante, p. 456. As to homicide and assaults while making arrests and preserving the peace, see the titles ASSAULT AND BATTERY, vol. 1, p. 493; HOMICIDE, vol. 3, p. 477.

Public Place.

See the titles AFFRAY, vol. 1, p. 49; BREACH OF THE PEACE, vol. 1, p. 684; DISTURBANCE OF PUBLIC ASSEMBLAGE, vol. 2, p. 258; GAMING, vol. 3, p. 353; OBSCENITY, ante, p. 558. WEAPONS. As to drunkenness in public place, see the title DRUNKARDS, vol. 2, p. 267.

Public Policy.

See the titles CONSPIRACY, vol. 2, p. 1; HEALTH, vol. 3, p. 475; MONOPOLIES, ante, p. 454.

Public Prosecutor.

See the title DISTRICT AND PROSECUTING ATTORNEYS, vol. 2, p. 253.

Public Records.

See the titles EVIDENCE, vol. 2, p. 324; RECORDS.

Public Safety.

See the titles ADULTERATION, vol. 1, p. 33; CARRIERS, vol. 1, p. 759; HEALTH, vol. 3, p. 475; RAILROADS.

Public Schools.

See the title SCHOOLS AND SCHOOL DISTRICTS.

Public Service Corporations.

See the titles CARRIERS, vol. 1, p. 759; COMMERCE, vol. 1, p. 777; CORPORATIONS, vol. 2, p. 144; FERRIES, vol. 3, p. 287; MONOPOLIES, ante, p. 454; RAILROADS.

Public Statutes.

See the title STATUTES.

Public Trial.

See the titles CONSTITUTIONAL LAW, vol. 2, p. 9; CRIMINAL LAW, vol. 2, p. 168; TRIAL.

Public Utilities.

See cross references under PUBLIC SERVICE CORPORATIONS, ante, p. 696.

Public Worship.

See the title DISTURBANCE OF PUBLIC ASSEMBLAGE, vol. 2, p. 258.

Publishing

See cross references under PUBLICATION, ante, p. 694.

Punishment.

See the titles CONVICTS, vol. 2, p. 136; CRIMINAL LAW, vol. 2, p. 168; FINES, vol. 3, p. 288; PARDON, ante, p. 575; PRISONS, ante, p. 684; REFORMATORIES; SENTENCE, JUDGMENT, COMMITMENT AND PUNISHMENT. And see the title CONSTITUTIONAL LAW, vol. 2, p. 9. As to punishment for particular crimes and offenses, see the particular titles throughout this work. As to punishment for contempt, see the title CONTEMPT, vol. 2, p. 43.

Pure Food Laws.

See the title ADULTERATION, vol. 1, p. 33.

Purging Contempt.

See the title CONTEMPT, vol. 2, p. 43.

Purport.

See the titles INDICTMENT AND INFORMATION, vol. 4, p. 239; LIBEL AND SLANDER, ante, p. 387.

Pursuit.

See the titles ARREST, vol. 1, p. 473; ASSAULT AND BATTERY, vol. 1, p. 493; HOMICIDE, vol. 3, p. 477.

Putting in Fear.

See the titles HOMICIDE, vol. 3, p. 477; RAPE; ROBBERY.

Qualification.

See the titles GRAND JURY, vol. 3, p. 414; JUDGES, ante, p. 40; JURY, ante, p. 110; JUSTICES OF THE PEACE, ante, p. 189; SHERIFFS AND CONSTABLES; WITNESSES. As to expert and opinion evidence, see the title EXPERT AND OPINION EVIDENCE, vol. 3, p. 175.

Quarantine.

See the titles ANIMALS, vol. 1, p. 55; HEALTH, vol. 3, p. 475.

Quashing.

See the titles APPEAL, ERROR AND CERTIORARI, vol. 1, p. 87; INDICTMENT AND INFORMATION, vol. 4, p. 239.

Questions.

See the titles APPEAL, ERROR AND CERTIORARI, vol. 1, p. 87; CRIMINAL LAW, vol. 2, p. 168; EVIDENCE, vol. 2, p. 324; WITNESSES.

Questions for Jury.

See the titles CRIMINAL LAW, vol. 2, p. 168; INSTRUCTIONS, vol. 4, p. 385; TRIAL.

Questions of Law and Fact.

See cross references under QUESTIONS FOR JURY, ante, p. 110.

Quotient Verdict.

See the titles NEW TRIAL AND ARREST OF JUDGMENT, ante, p. 477; VERDICT.

Race.

See the titles CONSTITUTIONAL LAW, vol. 2, p. 9; EVIDENCE, vol. 2, p. 324; JURY, ante, p. 110; LIBEL AND SLANDER, ante, p. 387; MARRIAGE, ante, p. 441.

Race Prejudice.

See the title ARGUMENT AND CONDUCT OF COUNSEL, vol. 1, p. 397.
And see cross references under RACE, ante, p. 698.

Racing.

See the title GAMING, vol. 3, p. 353.

Raffles.

See the titles GAMING, vol. 3, p. 353; LOTTERIES, ante, p. 427.

RAILROADS.

BY WARREN LEE KINDER.

I. Control and Regulation, 699.

II. Offenses in Operation of Railroads, 699.

- A. Sale of Tickets by Unauthorized Persons, 699.
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CROSS REFERENCES.

See the title CARRIERS, vol. 1, p. 759; CONSTITUTIONAL LAW, vol. 2, p. 9; TRESPASS.

As to attempt to rob a railway car, see the title BURGLARY, vol. 1, p. 703. As to liability of carrier for theft, see the title CARRIERS, vol. 1, p. 759.

I. Control and Regulation.

See the title CARRIERS, vol. 1, p. 759; CONSTITUTIONAL LAW, vol. 2, p. 9.

II. Offenses in Operation of Railroads.

A. SALE OF TICKETS BY UNAUTHORIZED PERSONS.

See the title CARRIERS, vol. 1, p. 761.

B. STOPPAGE OF TRAINS AT WAYSIDE STATIONS.

In General.—As to statutory provisions as to failure to stop trains at wayside stations, and general consideration of subject, see the title CARRIERS, vol. 1, p. 760.

Constitutionality of Provision.—The act of 1866, which, under penalties upon conductors, requires that a stoppage of five minutes at every way station be made by every train of passenger cars, is constitutional. *Davidson v. State*, 4 Tex. Cr. App. 545.

C. UNLAWFULLY BOARDING RAILWAY TRAINS.

See the title CARRIERS, vol. 1, p. 760.

D. WRECKING OR OBSTRUCTING TRAINS.

In General.—That human life was endangered is the gist of the offense of placing an obstruction on a railroad track. To support a conviction, the evidence must show the obstruction was such as might have endangered human life. Mere proof that the accused placed across a railroad track a piece of railroad iron, six or eight feet long, which a man could and did remove with his hands before a train came along, without proof whether it was at a level or an embankment, or on a main track or a switch, or at a point where trains usually went swiftly, held not sufficiently to show the obstruction to be one "whereby the life of any person might be endangered," to warrant a conviction under Rev. Pen. Code, art. 678. *Bullion v. State*, 7 Tex. Cr. App. 462.

Unnecessary That Obstruction "Must" Endanger Human Life.—Under Pen. Code, art. 785, making it criminal to place an obstruction on a railroad track which might endanger life, a conviction is warranted by evidence that iron placed on a railroad track in a certain manner was for the purpose of

wrecking a train, and that it might have accomplished such purpose. *Cox v. State* (Cr. App.), 59 S. W. 903.

E. INDICTMENT, INFORMATION OR COMPLAINT.

Failure to Stop Train at Wayside Stations.—See the title CARRIERS, vol. 1, p. 760.

Placing Obstructions on Track.—An indictment following the language of Pen. Code, art. 678, and charging that defendant did willfully place an obstruction upon the track of a railroad, "whereby the lives of persons were endangered," is sufficient, without specifying the persons whose lives were endangered. *Barton v. State*, 28 Tex. Cr. App. 483, 13 S. W. 783.

An indictment which charged that defendants did unlawfully and willfully place an obstruction on the track of a railroad, "to wit, the tract the Ft. Worth & Denver City Railroad," was not fatally indefinite because of the omission of the word "of" between the expression "the track" and "the Ft. Worth & Denver City Railroad." *Stanfield v. State*, 43 Tex. Cr. App. 10, 62 S. W. 917.

Issues, Proof and Variance.—Where an indictment charges a defendant with willfully and maliciously placing obstructions on the track of a particular railroad company, naming it, this becomes descriptive of the track, and must be proved alleged. *Blocker v. State* (Cr. App.), 73 S. W. 955.

F. EVIDENCE.

Admissibility.—To show that human life was endangered by an obstruction placed on the track, the prosecution could and should have proved the condition and grade of the track, whether it was the main or a switch track and the usual speed of the trains over such track. *Bullion v. State*, 7 Tex. Cr. App. 462, 464.

Where defendants were charged with having placed an obstruction on a

railroad track, and they introduced evidence to show that it was done inadvertently, evidence that they placed another similar obstruction on the same track at a short distance from the first one, on the same evening, was admissible to negative the idea of inadvertence. *Stanfield v. State*, 43 Tex. Cr. App. 10, 62 S. W. 917.

Testimony was admitted that defendant placed another obstruction on the track about three-fourths of a mile from the one charged in the indictment, and very soon after the first. Held that, though they were separate and distinct offenses, still, having been contemporaneous, the commission of the second was admissible to show the motive or intent of the first, and also as a part of the *res gestæ*. The effect of such evidence to the purpose for which it was introduced is fundamental error. *Barton v. State*, 28 Tex. Cr. App. 483, 13 S. W. 783.

Weight and Sufficiency.—Obstructions were placed on a railroad track, and the defendant was shown to have gone along the railroad at the point where such obstructions were found on the morning they were discovered, as also did an unknown boy. There had been rain on the preceding evening, and the only tracks along the railroad track were those of defendant and the boy. It was not shown when the obstructions were placed on the track, or that any train had passed over the road since the rain. Held not sufficient to show defendant's connection with the crime. *Cox v. State* (Cr. App.), 59 S. W. 903.

In a prosecution of a boy fifteen years of age for alleged obstruction of a railroad track, evidence that he was of weak mind and below the average in intelligence was insufficient to justify the court in submitting the issue of insanity. *Kirby v. State*, 49 Tex. Cr. App. 517, 93 S. W. 1030.

G. TRIAL.

Charge as Burden of Proof.—Where

defendants were accused of having placed an obstruction on a railroad track, a charge that, "if the obstruction was placed there by any person other than defendants, or was placed there by defendants, but was not such as to endanger life, or was not willfully done," defendants should be acquitted, was erroneous, because tending to place the burden of proving their innocence on defendants. *Stanfield v. State*, 43 Tex. Cr. App. 10, 62 S. W. 917.

Instructions as to Evidence of Attempt to Prevent Offense.—Where defendants were on trial for placing an obstruction on a railroad track, and one testified that he was two hundred or three hundred yards distant at the time the obstruction was placed on the track, and was urging the other to keep away, he was entitled to a charge that, if the jury should find this to be true, he should be acquitted. *Stanfield v. State*, 43 Tex. Cr. App. 10, 62 S. W. 917.

Instruction Tending to Show Opinion of Court.—Where defendants were accused of willfully placing an obstruction on a railroad track, and the court charged that "the meaning of the term 'willfully' is that the obstruction was, by defendants, placed upon said railroad track with an evil intent," such

instruction was erroneous, because apt to lead the jury to believe that the court thought defendants did place the obstruction on the track. *Stanfield v. State*, 43 Tex. Cr. App. 10, 62 S. W. 917.

Charge as to Effect of Commission of Offense by Others Where Evidence Is Weak as to Defendant's Guilt.—Ac-

cused, a negro boy, fifteen years of age, of weak mind, and below the average in strength, was charged with placing certain oak railroad ties, weighing from one hundred and fifty to two hundred pounds each on a railroad track. There was little evidence against him, except his confession, which was obtained by officers after they had charged him with not telling the truth about the matter. Defendant denied having any connection with placing the ties on the track, and denied the confession. There was no evidence of any motive on his part; his theory being that one of three men who passed along the track a short time before, who was a discharged porter of the railway company, had taken umbrage at the discharge and committed the offense. Held, that it was error for the court to omit to charge that, if the jury found that parties other than defendant committed the offense, they should acquit. *Kirby v. State*, 93 S. W. 1030, 49 Tex. Cr. App. 517.

Rank.

See the title ARMY AND NAVY, vol. 1, p. 472.

RAPE.

BY MINOR BRONAUGH.

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CROSS REFERENCES.

See the titles ADULTERY, vol. 1, p. 35; APPEAL, ERROR AND CERTIORARI, vol. 1, p. 87; BURGLARY, vol. 1, p. 703; CRIMINAL LAW, vol. 2, p. 168; EVIDENCE, vol. 2, p. 324; INCEST, vol. 4, p. 227; SENTENCE, JUDGMENT, COMMITMENT AND PUNISHMENT; TRIAL; WITNESSES.

As to prosecutrix in a prosecution for rape being an accomplice, see the title ACCOMPLICES, ACCESSORIES, AIDERS AND ABETTORS, vol. 1, p. 8. As to right of one accused of rape on female under the age of 15 years to bail, see the title BAIL AND RECOGNIZANCE, vol. 1, p. 586. As to intercourse accomplished by means of promises and persuasion, see the title SEDUCTION. As to competency of insane prosecutrix in a prosecution for rape, see the title WITNESSES.

I. Offenses and Responsibility Therefor.

A. NATURE AND ELEMENTS IN GENERAL.

Rape is the carnal knowledge of a woman without her consent, obtained by force or threats. The force employed to obtain such carnal knowledge must be such as might reasonably be supposed sufficient to overcome resistance, taking into consideration the relative strength of the parties and other circumstances of the case. The threats employed must be such as might reasonably create a just fear of

death or great bodily harm, in view of the relative conditions of the parties, as to health, strength and all other circumstances of the case. *Fitzgerald v. State*, 20 Tex. Cr. App. 281.

Although the statute (Penal Code, art. 528) contains but one general definition of rape, it embraces two separate offenses; 1, rape when committed upon "a woman," and, 2, rape when committed upon "a female under the age of ten years." *Nicholas v. State*, 23 Tex. Cr. App. 317, 5 S. W. 239; *Walton v. State*, 29 Tex. Cr. App. 163, 166, 15 S. W. 646; *Gibson v. State*, 17 Tex. Cr. App. 574, 576.

Rape upon a woman, not a child, is carnal knowledge of her without her consent, obtained by force, threats or fraud. *Jones v. State*, 18 Tex. Cr. App. 485, 488.

Either of three modes named in the statute of obtaining carnal knowledge of a female without her consent constitutes rape, and rape may be accomplished by all three modes combined. *Lawson v. State*, 17 Tex. Cr. App. 292, 302.

In order to constitute a rape of "a woman" it is essential that the offense was committed by the means of "force, threats, or fraud, and without the consent" of the woman. It is not necessary in such case to allege or prove that the woman raped was over the age of ten years, and if such an allegation be contained in the indictment, it need not be proved, inasmuch as the offense would be complete without the words "over the age of ten years." *Nicholas v. State*, 23 Tex. Cr. App. 317, 5 S. W. 239. See post, "Age of Female," II, A, 3.

Penetration alone is not only proof necessary to complete the offense of rape; the lack of the woman's consent and that the act was accomplished by force, threats or fraud must be proved. *Johnson v. State*, 27 Tex. Cr. App. 163, 176, 11 S. W. 106.

Female under Age of Consent.—Rape of "a female under the age of ten years," comprehends none of the elements of rape of the first class, e. i., force, threats, fraud, or nonconsent; but carnal knowledge is, in itself, ipso facto rape. *Nicholas v. State*, 23 Tex. Cr. App. 317, 5 S. W. 239. See post, "Female under Age of Consent," I, G, 5.

Between rape perpetrated upon a child under the age of ten years and rape upon a female over that age there is a material difference in the elements of the crime. In the former instance neither force, fraud, threats, nor want of consent is an element of the crime; whereas in the latter case they are. *Craig v. State*, 18 Tex. Cr. App. 321.

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Carnal knowledge of a woman without her consent, by means of force, threats, or fraud, though called "rape," is not the same crime as carnally knowing a female under the age of consent, with or without her consent. *Hardin v. State*, 39 Tex. Cr. App. 426, 431, 46 S. W. 803.

The law increasing the age of consent to fifteen years went into effect July 30, 1895, Pen. Code 1895, Act 633. *Hamilton v. State*, 36 Tex. Cr. App. 372, 37 S. W. 431.

One having intercourse, with or without her consent, with a girl a few days over fourteen years of age, is guilty of rape under the statute prohibiting intercourse with a girl under fifteen years of age. *Robertson v. State*, 51 Tex. Cr. App. 493, 102 S. W. 1130.

An instruction is correct which states that, if any person shall carnally know any female under the age of fifteen years, or have carnal knowledge of such female, unless such female is the wife of that person, he is guilty of rape. *Gonzales v. State* (Cr. App.), 62 S. W. 1060.

On a prosecution for having had carnal knowledge of a female under twelve years of age, it was not necessary to show that defendant used force or threats. *Exon v. State* (Cr. App.), 33 S. W. 336.

Each act of criminal intercourse with a female under fifteen years of age constitutes a separate offense of rape and the fact that the acts may be continuous does not change the offense to that of adultery. *Donley v. State*, 44 Tex. Cr. App. 428, 71 S. W. 958.

The statute makes every act of intercourse with a female under the age of fifteen years a case of rape. *Griffey v. State* (Cr. App.), 56 S. W. 52.

B. CAPACITY TO COMMIT.

Male Over Fourteen Years Old.—Under arts. 533-535 of Penal Code, a male who has attained the age of fourteen years can be tried and con-

victed for rape or an assault with intent to commit rape. *George v. State*, 11 Tex. Cr. App. 95, 97.

Persons Intoxicated.—Defendant can not be convicted of an assault with intent to rape if at the time he was too drunk to entertain specific intent. *Reagan v. State*, 28 Tex. Cr. App. 227, 234, 12 S. W. 601.

C. PERSONS ON WHOM OFFENSE MAY BE COMMITTED.

Prostitutes.—Rape may be committed on a most notorious prostitute. If physical facts and personal violence are proved, proof of want of chastity is futile. *Steinke v. State*, 33 Tex. Cr. App. 65, 66, 24 S. W. 909, 25 S. W. 287.

In a prosecution for rape on a girl under fifteen years of age, it is no defense that she had had intercourse with other men. *Shoemaker v. State*, 58 Tex. Cr. App. 518, 126 S. W. 887.

Married Woman under Fifteen Years of Age.—Pen. Code 1895, art. 633, defines rape to be "the carnal knowledge of a female under the age of fifteen years, other than the wife of the person, with or without her consent, and with or without the use of force, threats or fraud." Held, that the offense may be committed on a female under fifteen, though she is a married woman, if she is not the wife of the accused. *Smith v. State (Cr. App.)*, 74 S. W. 556.

D. INTENT.

To a conviction for rape it is essential that the accused intended to have intercourse with the woman by using all necessary force to overcome any resistance that she might make, and that she withheld her consent. *Freeman v. State*, 52 Tex. Cr. App. 500, 107 S. W. 1127.

In order to constitute rape, there must be the specific intent to have intercourse with the female without her consent and by force, and to overcome all resistance. *Mason v. State*, 83 S. W. 689, 47 Tex. Cr. App. 403.

The specific intent to rape must accompany the means used to effect rape. *Reagan v. State*, 28 Tex. Cr. App. 227, 233, 12 S. W. 601.

Defendant was in humble circumstances, and living alone, until the prosecuting witness, a widow and old acquaintance, went to live in his house, and to be supported by him. On the third night after her arrival, defendant told her that he was coming to her room, and they talked about it for half an hour; she telling him that if he came she would cut him. After she retired, he went to her room, which was so close to a neighbor's house that any noise could be heard, and, after, some struggle, she called out, whereupon defendant, without attempting to prevent her outcry, went out, and sat on the porch until arrested. Held, that these facts did not show an intention to commit rape. *Steinke v. State*, 33 Tex. Cr. App. 65, 25 S. W. 287.

When Prosecutrix under Age of Consent.—An instruction that, to constitute the crime of rape, it was necessary that defendant had the criminal intent to violate the law and to commit the crime of rape, was properly refused. Where the prosecutrix was under fifteen years of age. *Smith v. State (Cr. App.)*, 73 S. W. 401.

E. FORCE.

Force is not a necessary element in rape on a female under the age of consent, but it is a necessary element where the female is above that age. *Cromeans v. State*, 59 Tex. Cr. App. 611, 129 S. W. 1129.

"In order to constitute rape by force, the two things must concur: First, force; second, want of consent. In reference to the question of necessary force, the statute provides, art. 634 of the penal Code: 'The definition of "force," as applicable to assault and battery, applies also to the crime of rape, and it must have been such as

might reasonably be supposed sufficient to overcome resistance, taking into consideration the relative strength of the parties, and other circumstances of the case.' " *Smith v. State*, 56 Tex. Cr. App. 316, 323, 120 S. W. 188; *Conger v. State* (Cr. App.), 140 S. W. 1112; *Lemons v. State*, 59 Tex. Cr. App. 299, 128 S. W. 416; *Kennon v. State* (Cr. App.), 42 S. W. 376; *Price v. State*, 36 Tex. Cr. App. 143, 146, 35 S. W. 988; *Jenkins v. State*, 34 Tex. Cr. App. 201, 29 S. W. 1078; *Rhea v. State*, 30 Tex. Cr. App. 483, 17 S. W. 931; *Mooney v. State*, 29 Tex. Cr. App. 257, 262, 15 S. W. 724; *Walton v. State*, 29 Tex. Cr. App. 163, 166, 15 S. W. 646; *Favors v. State*, 20 Tex. Cr. App. 155; *Bass v. State*, 16 Tex. Cr. App. 62, 68; *Ans-chicks v. State*, 6 Tex. Cr. App. 524; *Jenkins v. State*, 1 Tex. Cr. App. 346, 355.

In the definition of rape, force is the test of consent. *Mooney v. State*, 29 Tex. Cr. App. 257, 261, 15 S. W. 724.

The "force" to constitute rape, where force is a necessary element, is that by which the dissenting woman is subjected to and put under the power of the assailant so that he is able notwithstanding her opposition to have intercourse with her. *Cromeans v. State*, 59 Tex. Cr. App. 611, 129 S. W. 1129.

To constitute rape, there must be an assault. The use of any unlawful violence upon the person of another, with intent to injure him, whatever be the means or degree of violence used, is an assault and battery. Any attempt to commit a battery, or any threatening gesture, showing in itself, or by words accompanying it, an immediate intention coupled with an ability to commit a battery is an assault. The injury intended may be either bodily pain, constraint, or sense of shame, or other disagreeable emotion of the mind. *Fitzgerald v. State*, 20 Tex. Cr. App. 281.

Evidence that the accused overtook

the prosecutrix on the highway, threw her down, and had carnal knowledge of her by force, is sufficient to justify a conviction and the assessment of the death penalty. *Johnson v. State*, 26 Tex. Cr. App. 399, 9 S. W. 762.

Evidence that defendant went to the house of a woman in the night time, and with a pistol in hand forced himself into her house, and by violence and threats accomplished his purpose, and had carnal intercourse with her, without her consent, establishes the commission of the offense of rape. *Rodgers v. State*, 34 Tex. Cr. App. 612, 613, 31 S. W. 650.

Force Exerted in Consummating Act.

—Whatever may have been the common-law rule, the Penal Code of this state does not, in its definition of rape, employ the word "force" with reference to the mere muscular force necessarily exerted by the male in every act of copulation. Nevertheless, in estimating the efficiency of the resistance made by the female, the mental capacity of the female is a proper consideration. *Baldwin v. State*, 15 Tex. Cr. App. 275.

Where Woman Is Asleep.—The act of copulation of a male person with a woman, she being asleep at the time, and not consenting, is sufficient force to constitute rape. *Payne v. State*, 49 S. W. 604, 40 Tex. Cr. App. 202, 76 Am. St. Rep. 712.

On indictment for rape the prosecutrix testified that while she was sleeping with her husband, defendant got into the bed and had carnal knowledge of her; that, being partially asleep, she thought it was her husband. Held, that the evidence, even though the woman may have been asleep, does not show any use of force within the meaning of Pen. Code, art. 529, which requires that "the force must be such as might reasonably be supposed sufficient to overcome resistance, taking into consideration the relative strength of the parties and other circumstances

of the case." *Mooney v. State*, 29 Tex. Cr. App. 257, 15 S. W. 724.

Where a female is insane to such an extent as to be incapable of assent or dissent to sexual intercourse, force required in the carnal act is sufficient to constitute rape. *Baldwin v. State*, 15 Tex. Cr. App. 275, 282.

F. CARNAL KNOWLEDGE.

"Carnal knowledge" is convertible with the words "sexual intercourse," and comprehends the completed act of coition. *Lujano v. State*, 32 Tex. Cr. App. 414, 419, 24 S. W. 97.

Degree of Penetration.—To constitute the crime of rape, it is necessary that penetration be shown, but, if penetration be shown, to have actually taken place as a matter of fact, the degree of penetration is immaterial. *Fitzgerald v. State*, 20 Tex. Cr. App. 281; *Rodgers v. State*, 30 Tex. Cr. App. 510, 528, 17 S. W. 1077.

The word "penetration" as used in art. 532, Penal Code, is limitation upon "carnal knowledge" as used in art. 528, and the former article was enacted for the benefit of the state. Failure to charge same can not be complained of by defendant. *Lujano v. State*, 32 Tex. Cr. App. 414, 419, 24 S. W. 97.

Perfect penetration is unnecessary to constitute rape. *Kenney v. State* (Cr. App.), 79 S. W. 817, 65 L. R. A. 316.

Penetration, whether with or without injection or emission, is sufficient if proved, on trials for rape. *Rodgers v. State*, 30 Tex. Cr. App. 510, 528, 17 S. W. 1077; *Johnson v. State*, 27 Tex. Cr. App. 163, 11 S. W. 106.

G. WANT OF CONSENT OF FEMALE.

1. In General.

Nonconsent is an essential element in rape of a woman over the age of consent. *Cromeans v. State*, 59 Tex. Cr. App. 611, 129 S. W. 1129.

To support a conviction for rape it

must appear that the prosecutrix did not consent to the act of copulation, but put forth all resistance in her power under the circumstances, and influence of threats may be considered. *Sawyer v. State*, 39 Tex. Cr. App. 557, 564, 47 S. W. 650.

It is not rape for a male to have carnal intercourse with a female over ten years of age, with her consent. To constitute rape, her want of consent must be shown, no matter what may be her stature, constitution or development. *Craig v. State*, 18 Tex. Cr. App. 321, 325; *Anschicks v. State*, 6 Tex. Cr. App. 524, 535; *Taylor v. State*, 24 Tex. Cr. App. 299, 6 S. W. 42; *Ledbetter v. State*, 33 Tex. Cr. App. 400, 26 S. W. 725; *Smith v. State*, 44 Tex. Cr. App. 137, 68 S. W. 995.

2. Fraud or Other Deception.

Pen. Code 1895, art. 636, makes it essential that defendant charged with rape by fraud, use some stratagem by which the woman is induced to believe that he is her husband. Held, according to this statute, it becomes absolutely necessary, in order to constitute this offense, that the defendant resort to some device or stratagem, some artifice or trick, intending to deceive the prosecutrix, and make her believe that he is her husband; and not only so, but the effect of his stratagem must be to deceive and impose on her, and make her believe that he is her husband at the time the act is committed, and by this means gain her consent to the copulation. *Payne v. State*, 38 Tex. Cr. App. 494, 43 S. W. 515; *Ledbetter v. State*, 33 Tex. Cr. App. 400, 405, 26 S. W. 725.

"Stratagem," as used in art. 636 of the Penal Code defining rape by personation of the woman's husband is any artifice or trick by which some advantage is intended to be obtained. *Payne v. State*, 38 Tex. Cr. App. 494, 498, 43 S. W. 515.

Under the statute, fraud, to constitute the offense of rape by fraud must

consist in the use of some stratagem by which the woman is induced to believe that the offender is her husband, or in administering without her knowledge or consent some substance producing unnatural sexual desire. *Franklin v. State*, 34 Tex. Cr. App. 203, 210, 29 S. W. 1088.

Knowledge of Woman's Married State.—Conviction for rape by fraud can not be sustained where it is not proved that defendant knew that the woman was married. *Mooney v. State*, 29 Tex. Cr. App. 257, 261, 15 S. W. 724.

Sham Marriage.—Pen. Code 1895, art. 633, defines rape as the carnal knowledge of a woman without her consent, obtained by force, threats, or fraud, etc. Article 636 reads: "The fraud must consist in the use of some stratagem by which the woman is induced to believe the offender is her husband." Held, that the statute includes rape by fraud upon a single as well as a married woman, and therefore includes carnal knowledge obtained by means of a sham marriage. *Lee v. State*, 72 S. W. 4005, 44 Tex. Cr. App. 354, 61 L. R. A. 904.

Where Woman Is Asleep.—Where defendant went to the bed on which the prosecuting witness was sleeping with her husband, and committed upon her the crime of rape, and she, awaking, and believing him to be her husband, made no resistance, defendant not having used any stratagem to induce her to believe that he was her husband, the crime so committed is rape by force, and not rape by fraud. *Payne v. State*, 43 S. W. 515, 38 Tex. Cr. App. 494, 70 Am. St. Rep. 757.

Article 531 of the Penal Code, declaring carnal intercourse with a woman obtained by means of fraud to be rape, was enacted for the protection of married women, applies to them only, and provides that the fraud must consist in the use of some stratagem by which the woman is induced

to believe that the offender is her husband. A charge of the court, therefore, which announces, in effect, that an attempt to have carnal intercourse with a woman when she is asleep, constitutes fraud within the meaning of the statute, is erroneous. *King v. State*, 22 Tex. Cr. App. 650, 3 S. W. 342.

Use of Chloroform.—Rape accomplished through the use of chloroform upon a sleeping woman is rape by fraud, not by force. *Milton v. State*, 23 Tex. Cr. App. 204, 209, 4 S. W. 574.

3. Intimidation and Fear.

Where, in a prosecution for rape, there is evidence of force used and threats made by accused, it is proper, in determining the sufficiency of the force or the effect of the threats, to consider the cogency which the threats may have contributed to the force to intensify the influence imparted by the latter to the threats. *Perez v. State*, 94 S. W. 1036, 50 Tex. Cr. App. 34.

Force, not sufficient to overcome resistance, and threats, not in themselves likely to create just fear of death or great bodily harm, may, if combined, be sufficient to sustain conviction for rape effected by force and threats. *Sharp v. State*, 15 Tex. Cr. App. 171, 186.

A man standing in loco parentis to a motherless girl aged thirteen ordered her to sleep with him, and then had connection with her. She did not resist him, as she was afraid to do so. He had previously subjugated her will to his by means of threats and violence. Held sufficient to support a conviction of rape. *Sharp v. State*, 15 Tex. Cr. App. 171.

4. Incapacity to Consent.

In rape cases, females under ten years of age are, in contemplation of law, incapable of consent, or of resisting fraud, force, or threats, but, even after that age, the court may be justified in saying that sexual intercourse

with one who was still a child in stature, constitution, and physical and mental development, was had without her consent. *Anschicks v. State*, 6 Tex. Cr. App. 524, 536.

Insane Persons.—Insanity or idiocy does not, under the Texas law, render a female incapable of consent to sexual intercourse, hence actual nonconsent must be proven in order to sustain a conviction for rape. *Rodriguiz v. State*, 20 Tex. Cr. App. 542, 546.

Where the statute makes rape consist of carnal knowledge had by force and without the consent of the female, although she is insane, and not competent mentally to consent, force must be shown. Her status is not similar to that of a girl under ten, who is presumed incapable of giving consent. *Baldwin v. State*, 15 Tex. Cr. App. 275.

It was suggested by the court in *Baldwin's* case, *supra*, that the legislature pass an act making it safe for a man to have carnal knowledge of a woman so mentally diseased as to have no will to oppose the act, such fact being known to him at the time, and such provision was subsequently embodied in the statute defining rape. See Pen. Code, Art. 633.

Woman Asleep.—Carnal knowledge of a woman, by force, and "without" or "against" her consent, may be had while she is asleep, though no greater force is used than is involved in the act of copulation. *Payne v. State*, 49 S. W. 604, 40 Tex. Cr. App. 202, 76 Am. St. Rep. 712.

5. Female under Age of Consent.

"This prosecution was for rape committed upon a girl not fourteen years old at the time it occurred. The question of consent can have no effect whatever upon the defendant's guilt. Even if she had testified in the most positive way that she had consented, and that she was as much instrumental or more so than the appellant was in the commission of the act, he would nevertheless have been guilty." *White-*

head v. State, 61 Tex. Cr. App. 558, 137 S. W. 356.

Carnal knowledge of a female under the age of consent is rape, whether committed with or without her consent. *Cromeans v. State*, 59 Tex. Cr. App. 611, 129 S. W. 1129; *Buchanan v. State*, 41 Tex. Cr. App. 127, 52 S. W. 769; *Forrester v. State*, 38 Tex. Cr. App. 245, 248, 42 S. W. 400; *Hamilton v. State*, 36 Tex. Cr. App. 372, 374, 37 S. W. 431; *Rodgers v. State*, 30 Tex. Cr. App. 510, 528, 17 S. W. 1077; *Moore v. State*, 20 Tex. Cr. App. 275, 278; *Gibson v. State*, 17 Tex. Cr. App. 574, 577; *Mayo v. State*, 7 Tex. Cr. App. 342; *Anschicks v. State*, 6 Tex. Cr. App. 524.

Pen. Code 1895, art. 634, defining force in rape, does not apply to the part of art. 633 which relates to rape on a female under the age of consent, since, to constitute rape on a female under that age, her consent and the absence of force are immaterial. *Cromeans v. State*, 59 Tex. Cr. App. 611, 129 S. W. 1129.

H. RESISTANCE OF FEMALE.

Mere copulation, coupled with passive acquiescence, is not rape, as there must be resistance by the female, depending in amount on the circumstances surrounding her at the time and the relative strength of herself and the accused. *Perez v. State*, 94 S. W. 1036, 50 Tex. Cr. App. 34.

"It has been held that unfeigned, positive resistance, will show want of consent, and feigned resistance will not. Threats apart, every exertion in her power, under the circumstances of the particular case, must be made to prevent the crime, or consent will be presumed. *Mooney v. State*, 29 Tex. Cr. App. 257, 15 S. W. 724; *Rhea v. State*, 30 Tex. Cr. App. 483, 17 S. W. 931." *Smith v. State*, 56 Tex. Cr. App. 316, 323, 120 S. W. 188; *Perez v. State*, 50 Tex. Cr. App. 34, 94 S. W. 1036; *Anschicks v. State*, 6 Tex. Cr.

App. 524, 534; *Jenkins v. State*, 1 Tex. Cr. App. 346; *Brown v. State*, 27 Tex. Cr. App. 330, 337, 11 S. W. 412.

In a prosecution for rape, an instruction that the jury must believe beyond a reasonable doubt that the force used by the defendant was such as might reasonably be supposed to be sufficient to overcome all resistance of prosecutrix within her power, and that she actually resisted such carnal knowledge of her person by defendant, if any, to the utmost of her strength, and that she was overcome by superior force of defendant, in which question they must consider the relative strength of the parties and all other facts and circumstances of the case, was a proper and sufficient charge on the question of the quantum of resistance. *Salazar v. State*, 55 Tex. Cr. App. 307, 116 S. W. 819.

I. ATTEMPTS.

Pen. Code, art. 535, provides that "if it appears on the trial of an indictment for rape that the offense, though not committed, was attempted, by the use of means not such as to bring the offense within the definition of an assault with intent to commit rape, the jury may find the defendant guilty of an attempt to commit rape." Held, that an attempt to commit rape is an offense distinct from rape, or assault with intent to commit rape, and an indictment therefor is good. *Melton v. State*, 24 Tex. Cr. App. 284, 6 S. W. 39.

An attempt to rape is committed when at the time of making it was the intent of the party to use the same force as would make him guilty of rape, or of assault with intent to rape, but in actual attempt he fell short of the use of such force as would constitute an assault with intent to rape. *McAdoo v. State*, 35 Tex. Cr. App. 603, 605, 34 S. W. 955; *Williams v. State*, 1 Tex. Cr. App. 90; *Moore v. State*, 20 Tex. Cr. App. 275;

Burney v. State, 21 Tex. Cr. App. 565, 1 S. W. 458; *Taylor v. State*, 22 Tex. Cr. App. 529, 3 S. W. 753; *Milton v. State*, 23 Tex. Cr. App. 204, 4 S. W. 574.

Specific Intent to Rape.—To constitute an attempt to commit rape, nothing short of the determined attempt to have carnal knowledge of the alleged injured female will suffice. *Bozeman v. State*, 34 Tex. Cr. App. 503, 507, 31 S. W. 389; *Reagan v. State*, 28 Tex. Cr. App. 227, 12 S. W. 601.

By Means of Force.—Under Pen. Code 1895, art. 640, providing that if it appears, on a trial for rape, that the offense, though not committed, was attempted by the use of any of the means stated in art. 634, 635, and 636, but not so as to make it an assault to commit rape, the jury may find accused guilty of an attempt to commit rape, and art. 634, making the definition of "force" in assault and battery applicable to the crime of rape, in which case it must be sufficient to overcome resistance, considering the relative strength of the parties, etc., in order to constitute an "attempt to commit rape," there must have been an intent to use such force as would constitute rape or an assault to commit rape, but the attempt to apply the force must have failed, so that it did not amount to rape or an assault to commit rape. *Holloway v. State*, 54 Tex. Cr. App. 465, 113 S. W. 928.

Character of Force Intended.—In Texas an attempt to rape by force requires the same character of force as in an assault, but goes beyond the mere preparation and stops short of an assault itself. *Byas v. State*, 41 Tex. Cr. App. 51, 51 S. W. 923; *Moon v. State* (Cr. App.), 45 S. W. 806.

No person in this state can be guilty of an attempt to commit rape, unless the proof shows that an attempt was made by the use of force, and the force intended to be used must be rea-

sonably calculated to overcome resistance, taking into consideration the relative strength of the parties and other circumstances of the case. It must appear that it was reasonably sufficient to overcome resistance. A reasonable construction of Pen. Code, art. 634, in connection with art. 640, is that at the time of the alleged attempt it was the intention of the party to use the same force as would make him guilty of rape, or of an assault to commit rape, for, when the force used amounts to an assault, then it ceases to be a mere attempt, but would be an assault to commit rape; thus the two offenses come together; when the attempt ceases, the assault begins and takes its place. And if the force actually used is such as to constitute the offense an assault with intent to commit rape, then it is no longer a mere attempt. *Warren v. State*, 38 Tex. Cr. App. 152, 41 S. W. 635.

In a prosecution on counts for assault with intent to rape and attempt to rape, where it appeared defendant had made threats, and laid hands on prosecutrix, a verdict of guilty of attempt to rape, but not guilty of assault with intent, will be reversed, since, if defendant had entertained the specific intent to rape, necessary to convict of an attempt—he was guilty of an assault with intent to rape. *Moon v. State* (Cr. App.), 45 S. W. 806.

By Fraud or Threats.—The offense of an attempt to commit rape may be committed by means of either fraud or threats. *Milton v. State*, 23 Tex. Cr. App. 204, 209, 4 S. W. 574.

An indictment for an attempt to commit rape by fraud will lie. *Franklin v. State*, 34 Tex. Cr. App. 203, 29 S. W. 1088.

Proof of threats, unaccompanied by force do not authorize a conviction for an assault with intent to rape, but only for an attempt to rape. *Taylor v. State*, 22 Tex. Cr. App. 529, 547, 3 S. W. 753.

By Use of Chloroform.—On a trial for an assault to commit rape by force, threats and fraud where it appeared defendant went to prosecutrix's house at night and when she awoke she detected the odor of chloroform and defendant was at her bedside, with his hand on her privates, her body having been exposed, that she screamed, and engaged in a struggle with defendant who escaped after striking her several times, held shows an attempt to rape by fraud and would not sustain conviction for rape by force. *Ford v. State*, 41 Tex. Cr. App. 270, 53 S. W. 846.

Attempt on Married Woman.—The gravamen of the offense of attempting to commit rape on a married woman by fraud in personating her husband is the fraudulent acts comprising such personation, and it is not necessary that the woman should believe the offender to be her husband. *Franklin v. State*, 34 Tex. Cr. App. 203, 29 S. W. 1088.

Attempt on Female under Age of Consent.—In a prosecution for rape on a female under the age of consent, the court charged that the constituent elements of the offense were that accused, with or without the consent of the female, and without the use of force, threats, or fraud, had carnal knowledge of her, that she was under the age of fifteen years and was not his wife, and that the proof must show beyond reasonable doubt that the sexual organ of the female was penetrated by the male organ of accused, and charged that if the jury believed beyond a reasonable doubt that accused did, as charged in the indictment, at the time and place alleged, have carnal knowledge of prosecutrix, and that she was under the age of fifteen years, he should be found guilty, and if they did not so believe he should be acquitted. After instructing with reference to the penalty to be assessed in the event he were found

guilty, the court further charged that if the jury believe that accused did not not have carnal knowledge of prosecutrix on or about the date and at the place alleged, or if they had a reasonable doubt thereof, accused should be acquitted, and that accused is presumed to be innocent until his guilt is established by legal evidence beyond a reasonable doubt. Held, that the charge was not improper, as authorizing a conviction if prosecutrix was over fifteen years old at the time, or if there was a reasonable doubt that she was under fifteen years old. *Banton v. State*, 53 Tex. Cr. App. 251, 109 S. W. 159.

Under Pen. Code 1895, art. 640, providing that if it appear that rape was attempted by the use of force, threats, or fraud, but no actual assault was made, the offense of attempt to commit rape has been committed, one can not be guilty of an attempt to commit a rape on a female under the age of fifteen years, who might be raped without the use of force, threats, or fraud, unless he intended to use force, threats, or fraud. *Warren v. State*, 41 S. W. 635, 38 Tex. Cr. App. 152.

In an attempt to rape, the fact that the female was under fifteen years of age has nothing to do with the question. To constitute this offense, the attempt must be made, and the intention to use the character of force described in Pen. Code, art. 634, must be established. The Texas statute does not stop by stating that you can punish an attempt to commit rape, but it specifically points out the manner, method, and means which must be intended to be used by the accused in order to constitute this offense. Our statute is particular in this matter, and requires that the proof must show that defendant intended to use that particular force defined in art. 634. The law presupposes that the female was not consenting. *Warren v. State*, 38 Tex. Cr. App. 152, 41 S. W. 635.

Under the Code of this state, the offence of an attempt to commit rape on a female under ten years of age may be perpetrated with her consent, and without force, threats, or fraud. *Mayo v. State*, 7 Tex. Cr. App. 342.

Attempt to Commit Assault with Intent to Commit Rape.—There is no such offense under the Penal Code as an attempt to commit an assault with intent to rape. *Brown v. State*, 7 Tex. Cr. App. 569.

J. ASSAULTS WITH INTENT TO RAPE.

1. In General.

The word "assault," in Pen. Code 1895, arts. 608, 611, punishing an assault with intent to rape, but declaring that an assault to commit any other offense is constituted by facts which bring it within the definition of an assault coupled with an intention to commit such other offense, means the commission of unlawful violence with an intent to injure, and any violence except that permitted by art. 490, defining violence not amounting to an assault, is unlawful, and an "assault with intent to rape" is the use of violence forbidden by law, coupled with an immediate intent to have present carnal intercourse forbidden by law. *Cromeans v. State*, 59 Tex. Cr. App. 611, 129 S. W. 1129.

To constitute the crime of assault to commit rape, the assault must be made with the specific intention to have carnal knowledge of a woman without her consent by the use of sufficient force to overcome her resistance. *Shields v. State*, 32 Tex. Cr. App. 498, 23 S. W. 893.

An assault with intent to rape includes aggravated assault and simple assault, or assault and battery, but not an attempt. *Brown v. State*, 7 Tex. Cr. App. 569.

Specific Intent to Have Carnal Knowledge.—There is a distinction between an assault with intent to

commit rape and an assault with intent to have improper connection. *Pefferling v. State*, 40 Tex. 486.

The establishment by the evidence of a specific intent to commit rape by force is essential to constitute assault with intent to rape. *Collins v. State*, 52 Tex. Cr. App. 455, 107 S. W. 852.

To establish an assault with intent to rape by force, a specific intent to rape must be established, and the evidence must show more than the possibility of such intent. *Cotton v. State*, 52 Tex. Cr. App. 55, 105 S. W. 185; *Railsback v. State*, 53 Tex. Cr. App. 542, 110 S. W. 916; *Bawcom v. State*, 49 Tex. Cr. App. 417, 94 S. W. 462; *Dina v. State*, 46 Tex. Cr. App. 402, 78 S. W. 229; *Davis v. State* (Cr. App.), 69 S. W. 502; *O'Brien v. State* (Cr. App.), 40 S. W. 969; *Pefferling v. State*, 40 Tex. 486, 487; *Marshall v. State*, 34 Tex. Cr. App. 22, 26, 36 S. W. 1062; *Robertson v. State*, 30 Tex. Cr. App. 498, 502, 17 S. W. 1068; *Porter v. State*, 33 Tex. Cr. App. 385, 387, 26 S. W. 626; *Passmore v. State*, 29 Tex. Cr. App. 241, 242, 15 S. W. 286; *Brown v. State*, 27 Tex. Cr. App. 330, 337, 11 S. W. 412; *McGee v. State*, 21 Tex. Cr. App. 670, 671, 2 S. W. 890; *Jones v. State*, 18 Tex. Cr. App. 485; *Sanford v. State*, 12 Tex. Cr. App. 196, 198; *Dibrell v. State*, 3 Tex. Cr. App. 456, 457.

Cases Illustrating Presence or Lack of Intent to Rape.—An assault with intent to rape a child of tender years is made out by proof that defendant intending to have intercourse with her, having placed their sexual organs in juxtaposition, attempted to penetrate her. *Allen v. State*, 36 Tex. Cr. App. 381, 382, 37 S. W. 429.

Causing Sense of Shame or Constraint.—That a man may have produced in the mind of a female a sense of shame, or other disagreeable emotion, or constraint, or bodily pain, is not sufficient to constitute an assault with intent to rape. *Fewox v. State*, 90 S. W. 178, 49 Tex. Cr. App. 172.

Request for Intercourse.—Accused,

sixteen years of age, met prosecutrix, fourteen years of age and solicited her to have intercourse with him. She refused. He then placed his hand on her hand, and she jerked it away. He then took hold of her arm; she again jerked loose and left him. He made no attempt to pursue her. The parties had known each other for years. Held not to constitute an assault with intent to rape. *Cromeans v. State*, 59 Tex. Cr. App. 611, 129 S. W. 1129.

Evidence that defendant, while on horseback, struck the prosecutrix with a whip, and made an insulting proposition to her, but did not get off the horse, though he might have done so, or use any other force, will not sustain a conviction of assault with intent to rape. *Mathews v. State*, 34 Tex. Cr. App. 479, 31 S. W. 381.

A conviction of an assault with intent to commit rape can not be sustained where defendant solicited the girl and afterwards chased her, probably, with a view to repeating his solicitations. *Thomas v. State*, 16 Tex. Cr. App. 535.

Chasing a Woman Alone in a Private Place.—The chasing by a man of a woman who is alone in a private place does not necessarily raise the inference of intent to rape. *Marshall v. State*, 34 Tex. Cr. App. 22, 26, 36 S. W. 1062.

Unwarranted Liberties with Person of Female.—An unwarranted liberty with the person of a female, however gross, not showing an attempt to commit rape by force, fraud or threats, does not constitute the offense of an assault with intent to commit rape. *Thompson v. State*, 43 Tex. 583, 584.

Striking a Woman and Then Running Away.—Facts that defendant entered prosecutrix's house choked and hit her, and ran away, do not support a conviction for an assault with intent to commit rape. *Peterson v. State*, 14 Tex. Cr. App. 162, 163.

2. Capacity to Commit.

Under art. 489, Penal Code, to con-

stitute, an assault with intent to commit rape, defendant must have been within such distance of prosecutrix as to place it within his power to commit battery upon her by the use of means with which he had attempted it. *Marshall v. State*, 34 Tex. Cr. App. 22, 25, 36 S. W. 1062; *Jones v. State*, 18 Tex. Cr. App. 485.

3. Force.

a. Character of Force.

The offense of an assault with intent to commit rape is not established unless such force be shown as might reasonably be supposed sufficient to overcome resistance, taking into consideration the relative strength of the parties and circumstances of the case. *Passmore v. State*, 29 Tex. Cr. App. 241, 242, 15 S. W. 286; *McCullough v. State* (Cr. App.), 47 S. W. 990; *Clark v. State*, 39 Tex. Cr. App. 152, 45 S. W. 696; *Dockery v. State*, 35 Tex. Cr. App. 487, 490, 34 S. W. 281; *Robertson v. State*, 30 Tex. Cr. App. 498, 502, 17 S. W. 1068; *Brown v. State*, 27 Tex. Cr. App. 330, 335, 11 S. W. 412.

The offense of an assault with intent to rape is consummated when the assault is made upon a woman with intent to commit rape, though the force used as may not equal that required for the commission of the offense. *Thompson v. State*, 43 Tex. 583, 584.

One assaulting a female without using all the force necessary to overcome her resistance to an act of sexual intercourse is guilty of aggravated assault only. *Fewox v. State*, 90 S. W. 178, 49 Tex. Cr. App. 172; *Outlaw v. State*, 35 Tex. 481.

Fraud or Threats.—An assault with intent to commit rape can only be shown by evidence of force or attempted force, and not by fraud. *Ford v. State*, 41 Tex. Cr. App. 270, 53 S. W. 846; *Milton v. State*, 23 Tex. Cr. App. 204, 209, 4 S. W. 574; *Hardin v. State*, 39 Tex. Cr. App. 426, 428, 46 S. W. 803; *Burney v. State*, 21 Tex. Cr. App. 565,

1 S. W. 458; *Carroll v. State*, 24 Tex. Cr. App. 366, 6 S. W. 190.

An assault with intent to rape can not be made by threats. *Cox v. State* (Cr. App.), 44 S. W. 157.

b. Illustrations.

Insufficient Force.—Evidence that defendant assaulted K. in the dark, threw her down, choked and beat her and proceeded in the purpose until persons came to her relief, when he fled, is sufficient to support a conviction of an assault with intent to rape. *Schroeder v. State* (Cr. App.), 36 S. W. 94, 95; *McCleavland v. State*, 24 Tex. Cr. App. 202, 5 S. W. 664.

Under Pen. Code 1895, art. 21, providing that the word "woman" includes a female of any age, and art. 608, punishing a person assaulting a woman with intent to rape, and art. 611, providing that an assault to commit any other offense is constituted by the existence of facts which bring the offense within the definition of an assault coupled with an intention to commit such other offense, solicitation accompanied by the expectation of consent and laying on of hands without the use of such force as indicates a purpose to obtain intercourse at the very time is not an assault with intent to rape a female under the age of consent, but where a man puts his hand on a female child and at the time intends instantly to have intercourse with her without suspension of action, and without waiting to ascertain whether or not she will consent, and thereby places her in such attitude that the final act may be performed, whether the purpose is to place her in such attitude by force alone or by her free co-operation, he has gone far enough to commit an assault with intent to rape. *Cromeans v. State*, 59 Tex. Cr. App. 611, 129 S. W. 1129.

Where an adult male person takes hold of a female child, and lays her down, pulls up her clothes, gets on her, and makes preparation to have

sexual intercourse with her; and is interrupted before accomplishment of his purpose, he is guilty of an assault with intent to rape. *Croomes v. State*, 40 Tex. Cr. App. 672, 51 S. W. 924, 53 S. W. 882.

Under Pen. Code 1895, § 633, providing that "rape is constituted by the carnal knowledge of a woman without her consent, obtained by force, threats or fraud," and § 634, providing that the force "must have been such as might reasonably be supposed sufficient to overcome resistance, taking into consideration the relative strength of the parties and other circumstances of the case," where prosecutrix was a passenger in a sleeping car occupied by eighteen white people, and during the night had arisen and was sitting in her berth, awaiting transfer to another car, acts of the porter of the car in catching hold of a watch pinned on her breast and laying his hand on her wrist and asking her to follow him to the ladies' dressing room would not constitute force sufficient to authorize conviction of assault with intent to commit rape. *Collins v. State*, 52 Tex. Cr. App. 455, 107 S. W. 832.

On a trial for assault with intent to rape by force a female at night while in bed in a room with her sister and three brothers with an open doorway into a room where her parents were within ten feet of her, proof that accused placed his hand on the calf of her leg, and fled on being discovered, did not establish an assault sufficient to overcome resistance within Pen. Code 1895, art. 634, essential to a conviction. *Cotton v. State*, 52 Tex. Cr. App. 55, 105 S. W. 185.

The force used by one requesting intercourse, with a threat to injure if it be refused, he at the time having hold of her hand, but doing nothing on her refusal, though he had opportunity, is not sufficient to show intent to use sufficient force to overcome all resistance, necessary for a conviction of

assault with intent to rape. *Ross v. State* (Cr. App.), 78 S. W. 503.

Defendant entered a woman's bedroom at night and pulled up her clothes. She awoke and ordered him away, and he went. Held, that he could not be convicted of an assault with intent to commit rape; the element of force being lacking. *Saddler v. State*, 12 Tex. Cr. App. 194.

Evidence by the prosecutrix that, while she was sleeping in the same room with defendant and his wife, defendant came to her bed, unbuttoned her drawers, and was performing the act, when she asked who he was, and that he then desisted, is insufficient to sustain a conviction of assault with intent to rape, under Pen. Code, art. 529, requiring the force to be such as might reasonably be supposed sufficient to overcome resistance, taking into consideration the circumstances of the case and strength of the parties. *Passmore v. State*, 29 Tex. Cr. App. 241, 15 S. W. 286. See, also, *Carson v. State* (Cr. App.), 24 S. W. 409; *Carroll v. State*, 24 Tex. Cr. App. 366, 6 S. W. 190.

Attempt by Persuasion.—A conviction of an assault with intent to commit rape is not supported by proof of an indecent assault, and endeavor to have intercourse with the prosecutrix by persuasion and not by force. *Ellenberg v. State*, 36 Tex. Cr. App. 139, 140, 35 S. W. 989.

Defendant, against a woman's will, indecently fondled and embraced her, but had no connection with her, and used no force in attempting connection. Held, that the essential element of force was lacking, and that a conviction of an assault with intent to commit rape could not be sustained. *Sanford v. State*, 12 Tex. Cr. App. 196.

4. Want of Consent of Female.

a. In General.

To constitute an assault with intent to rape by force, the consent of the female must be wanting, and the as-

sault by accused must be such as to show a purpose to have intercourse with the female despite her resistance. *Cotton v. State*, 52 Tex. Cr. App. 55, 105 S. W. 185.

b. Female under Age of Consent.

Where an assault is committed on a female child under fifteen, proof that defendant laid violent hands on the child and made all necessary preparations for intercourse with her was sufficient to establish assault with intent to ravish; the female being incapable of consent. *Alexander v. State*, 58 Tex. Cr. App. 621, 127 S. W. 189.

In a prosecution for assault with intent to commit rape on a female child under fifteen years of age incapable of giving consent, the court did not err in omitting to give the statutory definition of force as an element of assault; it not being essential to an assault that injury be inflicted without the consent of the injured party. *Alexander v. State*, 58 Tex. Cr. App. 621, 127 S. W. 189; *Sanders v. State*, 54 Tex. Cr. App. 171, 112 S. W. 938; *Blair v. State* (Cr. App.), 60 S. W. 879; *McAvoy v. State*, 41 Tex. Cr. App. 56, 51 S. W. 928; *Callison v. State*, 37 Tex. Cr. App. 211, 217, 39 S. W. 300; *Allen v. State*, 36 Tex. Cr. App. 381, 37 S. W. 429; *Comer v. State* (Cr. App.), 20 S. W. 547.

Under Pen. Code, art. 608, providing that, "if any person shall assault a woman with the intent to commit the offense of rape, he shall be punished," one may be convicted of assault with intent to rape a child under fifteen years old, though she consented to sexual intercourse, and no force was used, in view of art. 633, making it rape to have carnal knowledge of a child under fifteen years old, though she consents, and art. 634, making the definition of force required for an assault and battery applicable to rape, and the Code defining an assault as any unlawful violence on the person of another. *Croomes v. State*, 51 S.

W. 924, 40 Tex. Cr. App. 672, overruling *Hardin v. State*, 39 Tex. Cr. App. 426, 427, 46 S. W. 803; *Welch v. State* (Cr. App.), 46 S. W. 812; *Jones v. State* (Cr. App.), 46 S. W. 813; *Tarver v. State* (Cr. App.), 46 S. W. 813.

Producing Sense of Shame Insufficient.—To constitute assault with intent to rape a girl under fifteen, there must be a taking hold of the girl in such manner as to indicate the specific intent to have carnal knowledge of her, and the mere fact that an accused may have produced in the girl's mind a sense of shame or other disagreeable emotion or constraint is not sufficient. *Carter v. State*, 70 S. W. 971, 44 Tex. Cr. App. 312.

To constitute an assault with intent to rape a girl under fifteen years of age, there must be a taking hold of her for the purpose of having sexual intercourse with her. *Hudson v. State*, 90 S. W. 177, 49 Tex. Cr. App. 24.

Assault and Intent Must Concur as to Time.—To constitute an assault with intent to rape a girl under fifteen years of age, the assault and the intent to have intercourse with her must concur as to time. *Hudson v. State*, 90 S. W. 177, 49 Tex. Cr. App. 24.

5. Resistance.

The prosecutrix in a prosecution for assault with intent to commit rape must show a resistance to the full extent in her power. *Barnett v. State*, 62 S. W. 765, 42 Tex. Cr. App. 302.

To constitute an assault with intent to rape by force, the accused must have intended to overcome all resistance, but it is immaterial whether or not the resistance was in fact overcome. *Brown v. State*, 27 Tex. Cr. App. 330, 337, 11 S. W. 412.

6. Abandonment of Purpose.

If accused seized and assaulted prosecutrix with intent to have sexual intercourse with her, the crime of assault with intent to rape became complete

the moment the assault was actually made, though accused afterwards abandoned the intent to have intercourse with prosecutrix. *Ross v. State*, 60 Tex. Cr. App. 547, 132 S. W. 793; *Stewart v. State*, 61 Tex. Cr. App. 90, 133 S. W. 1051; *Burris v. State*, 34 Tex. Cr. App. 387, 30 S. W. 785; *Watts v. State*, 30 Tex. Cr. App. 533, 17 S. W. 1092; *Wood v. State*, 27 Tex. Cr. App. 393, 11 S. W. 449; *Peter v. State*, 23 Tex. Cr. App. 684, 5 S. W. 228; *Carter v. State*, 30 Tex. Cr. App. 551, 17 S. W. 1102.

A conviction of an assault with intent to commit rape is not sustained by evidence merely that defendant threw the woman down, choked her, and ran away. *Jones v. State*, 18 Tex. Cr. App. 485.

If an assault to commit rape was made with the unlawful intent as defined by the code, the offense is complete though the intent may have been abandoned without resort to the force intended to be used if necessary to effect purpose, but to maintain indictment for the offense under art. 530, Penal Code, an attempt to commit rape by force, threats or fraud must be shown. *Curry v. State*, 4 Tex. Cr. App. 574, 579.

If defendant entered the room in which the woman assaulted was sleeping, for the purpose of having carnal knowledge of her without her consent, by force, and, in attempting to uncover her to accomplish his purpose, she awoke and gave the alarm, and he, through fear, desisted and ran off, the offense of an assault with intent to commit rape is committed. *Dibrell v. State*, 3 Tex. Cr. App. 456, 457.

K. DEFENSES.

Common-Law Marriage with Female under Age of Consent.—Under Pen. Code 1895, arts. 967, 969, making it a felony for one by promise to marry to seduce an unmarried female under the age of twenty-five years, and that if the parties marry each other at any

time before the conviction of accused or if accused in good faith offer to marry the female no prosecution shall take place, one on trial for rape of a female under the age of fifteen years may not rely on the presumption of a common-law marriage arising from evidence of cohabitation following their engagement to marry at some future time. *Wofford v. State*, 60 Tex. Cr. App. 624, 132 S. W. 929; *Hardy v. State*, 37 Tex. Cr. App. 55, 38 S. W. 615.

Belief of Defendant That Female Was Above Age of Consent.—One accused of rape on a girl under fifteen years of age can not justify his act by proof that he believed that the girl was over fifteen years of age. *Robertson v. State*, 51 Tex. Cr. App. 493, 102 S. W. 1130.

Carnal knowledge of a child under the age of consent, being itself criminal, in a prosecution therefor, representations of the child to accused as to her age are immaterial. *Zachary v. State*, 57 Tex. Cr. App. 179, 122 S. W. 263; *Smith v. State* (Cr. App.), 73 S. W. 401; S. C., 44 Tex. Cr. App. 137, 68 S. W. 995; *Manning v. State*, 43 Tex. Cr. App. 302, 65 S. W. 920; *Edens v. State* (Cr. App.), 43 S. W. 89.

Belief of over Age as Mitigation of Punishment.—The jury can not take into consideration the fact that a party having intercourse with a girl under fifteen years of age believed her to be over that age, even in mitigation of his punishment. *Smith v. State*, 68 S. W. 995, 44 Tex. Cr. App. 137, 100 Am. St. Rep. 849.

Previous Acts of Intercourse with Other Men Where Female under Age of Consent.—A person having intercourse with a girl under fifteen years of age can not justify himself because she may have had intercourse with other men. *Foreman v. State*, 61 Tex. Cr. App. 56, 134 S. W. 229.

Reputation and Condition in Life of Parties as Mitigation of Punishment.—On a prosecution for rape it is not er-

ror to refuse to instruct that the reputation and condition in life of the prosecutrix and defendant should be viewed by the jury in the light of mitigating the punishment. *Thomas v. State* (Cr. App.), 70 S. W. 93.

Intention to Procure Divorce and Marry Prosecutrix.—It is no defense or mitigation of the crime of rape that accused intended to procure a divorce from his wife and marry prosecutrix. *Smith v. State* (Cr. App.), 73 S. W. 401.

L. PERSONS LIABLE.

See ante, "Capacity to Commit," I, B.

A husband can not himself be guilty of a rape upon, or of an assault with intent to rape, his wife. *Frazier v. State*, 86 S. W. 754, 48 Tex. Cr. App. 142, 122 Am. St. Rep. 738.

M. PRINCIPALS AND ACCESSORIES.

See, generally, the title ACCOMPLICES, ACCESSORIES, AIDERS AND ABETTORS, vol. 1, p. 8.

Parties Present and Co-Operating in Offense.—Three persons who were present and co-operated in assaulting a girl with intent to rape her were guilty as principals. *White v. State*, 60 Tex. Cr. App. 559, 132 S. W. 790.

If accused took any part in the stopping of prosecutrix's buggy and the assault of her with intent to rape, and did anything in furtherance of the criminal acts of others, in that respect he would be a principal whether he had agreed with the others before he came to the place of assault to do anything or not. *Ross v. State*, 60 Tex. Cr. App. 547, 132 S. W. 793.

Aiding Others to Rape Insane Woman.—One who knows that a woman is too insane to consent to sexual intercourse, but who nevertheless aids others to have such intercourse with her, is guilty of rape, though the others are unaware of her

mental condition. *Caruth v. State* (Cr. App.), 25 S. W. 778.

Concealing and Aiding Principal.—A conviction in a prosecution under an indictment for concealing or giving aid to another guilty of the crime of rape, in order that he might evade arrest and trial for the offense, can not be sustained without evidence of some aid rendered to the principal direct. *Caylor v. State*, 68 S. W. 982, 44 Tex. Cr. App. 118.

Prosecutrix as Accomplice.—The prosecutrix in a rape case could not be guilty of the offense as an accomplice. In this, rape differs from incest or adultery, where both parties may be guilty. *Hamilton v. State*, 36 Tex. Cr. App. 372, 37 S. W. 431.

Prosecution under Age Consenting to Offense.—In a prosecution for rape on a female under the age of consent, prosecutrix, though having consented, was not an accomplice. *Battles v. State* (Cr. App.), 140 S. W. 783.

Prosecutrix Concealing Fact to Shield Defendant.—In a prosecutrix for rape, evidence that prosecutrix agreed with defendant not to disclose the facts constituting the offense, in order to shield defendant from prosecution, was insufficient to make her an accomplice. *Miller v. State* (Cr. App.), 72 S. W. 996.

II. Prosecution and Punishment.

A. INDICTMENT AND INFORMATION.

1. Requisites and Sufficiency in General.

Charging Offense in Language of Statute.—An indictment for an assault with intent to commit rape, which charges the offense substantially in the language of the statute defining it, is sufficient. *Curry v. State*, 4 Tex. Cr. App. 574, 577; *Williams v. State*, 1 Tex. Cr. App. 90; *Smith v. State*, 41 Tex. 352.

An indictment which charges that "J. B., an adult male, did rape Mrs. M.

McL. D., a female," fails to charge a single ingredient of the offense of rape, and is invalid, notwithstanding it conforms to Act March 26, 1881, known as the "Common Sense Indictment Act," which provides for such form of indictment. *Brinster v. State*, 12 Tex. Cr. App. 612.

Indictment Held Sufficient.—An indictment for rape, charging that the person named on the given day did violently and feloniously make an assault upon the female named and did, then and there, violently and by force and threats, and against her will, ravish and carnally know such female, sufficiently charges rape. *Cornelius v. State*, 13 Tex. Cr. App. 349, 353.

Charging All Three Means in One Count.—Carnal intercourse obtained without the consent of the female, in either of the three modes named in the statute, i. e., force, threats and fraud, constitutes rape, and the rape may be accomplished by all three modes combined. It is not, therefore, a valid objection that the indictment, in the same count, charges the commission of the rape by the three several means. *Lawson v. State*, 17 Tex. Cr. App. 292.

Charging Both Classes of Rape in Same Count.—An indictment intended to charge both classes of rape, i. e., rape upon "a woman" and rape upon a female under ten, each class should be presented in a separate count. *Nicholas v. State*, 23 Tex. Cr. App. 317, 326, 5 S. W. 239.

Age of Accused.—An indictment for rape need not allege that the accused is an adult male, nor that he was over fourteen years old when the crime was committed. *Word v. State*, 12 Tex. Cr. App. 174.

An indictment for rape need not allege that the accused was over fourteen years of age. If under that age, the fact is a matter of defense. *Davis v. State*, 42 Tex. 226.

Surplusage.—An indictment for rape, after laying time and place, charged

that the accused, "with force and arms, in and upon one Z. T., a female, violently and feloniously, did make an assault, and her, the said Z. T., then and there, violently and by force, and against "he" will, did ravish and carnally know," etc. Held, that the indictment is good. The words "against he will" are surplusage, and the remaining allegations sufficiently charge the offense. *Williams v. State*, 1 Tex. Cr. App. 90.

Indictment of one Eli Mayo for rape of a female under ten years of age alleged that he, the said Eli Mayo, did make an assault, etc., and that he, by force, threats, and fraud "by him, the said Eli May," used, etc., and without her consent, did ravish, etc. Defendant moved to quash for the reason, substantially, that the rape was not charged against him, but against a different man, to wit, Eli May. But held, that the allegation excepted to is immaterial and surplusage, and the indictment, eliminating that allegation, remains sufficient to charge the defendant with rape of a female under ten years of age. *Mayo v. State*, 7 Tex. Cr. App. 342.

2. Designation and Description of Female.

a. In General.

In an indictment for rape under the statute (*Paschal's Digest*, art. 163, p. 398), the words "female" and "woman" are convertible. *Robertson v. State*, 31 Tex. 36, 38.

An indictment for an assault to commit rape describing the party assaulted as "a female" and alleging that the assault was made without her consent and against her will, but failing to charge that the assaulted person was "a woman" or "a female under the age of ten years," is sufficient to charge an assault to rape a woman but not to rape a female under the age of ten years. *Gibson v. State*, 17 Tex. Cr. App. 574, 576.

An indictment for rape need not allege that the person ravished was a woman. *State v. Williams*, 41 Tex. 98, 100.

In an indictment for rape, the words, after the name of the assaulted person, "a female reasonable creature then and there being under the age of ten years," held to be a sufficient description. *O'Rourke v. State*, 8 Tex. Cr. App. 70.

b. Negative Allegations as to Prosecutrix Being Wife of Accused.

Where Prosecutrix under Age of Consent.—An indictment for rape on a female over fifteen years of age need not allege that she was not defendant's wife. *Caidenas v. State* (Cr. App.), 40 S. W. 980.

Where Prosecutrix under Age of Consent.—An indictment for rape or assault with intent to rape, under Code Cr. Proc. 1895, art. 633, providing that "rape is the carnal knowledge of a female under the age of fifteen years, other than the wife of the person," is fatally defective if it fails to negative the fact that the female was the wife of defendant. *Rice v. State*, 38 S. W. 801, 37 Tex. Cr. App. 36; *Bice v. State*, 38 S. W. 803, 37 Tex. Cr. App. 38; *Edwards v. State*, 39 S. W. 368, 37 Tex. Cr. App. 242; *Dudley v. State*, 40 S. W. 269, 37 Tex. Cr. App. 543.

The statute requires indictments for rape to charge that the prosecutrix was not the wife of defendant only where the woman was mentally diseased or where she was under fifteen years of age. *Belcher v. State* (Cr. App.), 44 S. W. 519.

The fact that an indictment for the rape of a female under the age of fifteen alleges another name for her than that borne by accused, does not negative the idea that she was his wife. *Rice v. State*, 37 Tex. Cr. App. 36, 38, 38 S. W. 801.

In Case of Rape by Fraud.—An indictment which charges a rape by fraud, by personating the husband, must allege that the injured female, is a

married woman, and not the wife of the defendant. *Payne v. State*, 43 S. W. 515, 38 Tex. Cr. App. 494, 70 Am. St. Rep. 757.

3. Age of Female.

If the indictment charges that carnal knowledge was obtained by means of force, threats, or fraud, it charges a rape, whether perpetrated upon a female under or over the age of ten years, and if the indictment also contains an averment of nonage, the same may be treated as surplusage and eliminated. In this case the proof showed the female alleged to have been raped to be over the age of ten years, and the defendant requested the trial court to charge the jury, in substance, that, the indictment charging the nonage of the prosecutrix at the time of the offense, the defendant was entitled to an acquittal if the jury believed from the evidence that she was over ten years old. The trial judge refused the special charge "because the indictment alleges that the offense was committed by means of 'force and threats' on the part of defendant, and the allegation of age of the prosecutrix or injured female is not of that descriptive character which requires corresponding proof, the state having proved force and threats." Held, that the ruling was correct, and the special charge was properly refused. *Nicholas v. State*, 23 Tex. Cr. App. 317, 5 S. W. 239.

4. Force.

Character of Force.—An indictment charging rape by force and threats need not allege the character of the force or specify the threats used. *Cooper v. State*, 22 Tex. Cr. App. 419, 429, 3 S. W. 334.

Word "Ravish" As Implying Force and Violence.—Indictment for rape, though it does not allege that defendant had carnal knowledge of prosecutrix, is sufficient if it charge that he ravished her, the word ravish being

equivalent to carnal knowledge of a woman by force and against her consent. *Fields v. State*, 39 Tex. Cr. App. 488, 490, 46 S. W. 814. See, also, *Davis v. State*, 42 Tex. 226; *Elschlep v. State*, 11 Tex. Cr. App. 301; *Gibson v. State*, 17 Tex. Cr. App. 574; *Walling v. State*, 7 Tx. Cr. App. 625, 627; *Williams v. State*, 1 Tex. Cr. App. 90; *Gutierrez v. State*, 44 Tex. 587. See post, "Matters to Be Proved," II, A, 8, b.

Allegation that the accused "did ravish," has been held to imply force and violence as well as want of the female's consent, but those implications can not be deduced from an allegation that he "did rape." *Hewitt v. State*, 15 Tex. Cr. App. 80.

At common law, an indictment for rape must charge that the accused "did ravish." The use of the noun "rape," instead of the verb "ravish," is insufficient. *Davis v. State*, 42 Tex. 226.

An indictment charging E. with an assault on S., a female, with intent to ravish and carnally know, and that E., "in the manner and by the means aforesaid, did have and obtain carnal knowledge of the said S.," held insufficient to charge a rape by force or a ravishment. *Elschlep v. State*, 11 Tex. Cr. App. 301.

Female under Age of Consent.—An indictment for the rape of a female under ten years of age should not allege the use of force, threats, or fraud. *Moore v. State*, 20 Tex. Cr. App. 275, 278.

5. Want of Consent of Female.

Female Incapable of Consent.—An indictment under art. 528, Penal Code, as amended by the Act of 1887, page 7, for rape of an insane woman need not charge that it was with or without her consent, consent being immaterial. *Caruth v. State* (Cr. App.), 25 S. W. 778.

Female under Age of Consent.—An indictment alleging that accused made an assault on a person named, a female under the age of fifteen years and

not the wife of accused, and that accused had carnal knowledge of the female, is not defective for failing to allege that accused is a male person, and for failing to aver whether the rape was committed with or without the female's consent. *Taylor v. State*, 50 Tex. Cr. App. 362, 97 S. W. 94.

6. Attempt.

In order to maintain a prosecution for an attempt to commit rape, the indictment need not charge rape, but may charge directly an attempt only. *West v. State* (Cr. App.), 21 S. W. 686.

White's Ann. Pen. Code, art. 640, enacts that if, on a prosecution for rape, it appears that the offense, though not committed, was attempted, by force, fraud, or threat, but not such as to bring the offense within the definition of an assault with intent to commit rape, the jury may find defendant guilty of an attempt to rape. An indictment alleged that defendant did make an assault on, and attempt to ravish, N. Held, that the indictment was insufficient to charge an attempt to rape; § 640 excluding the question of assault in an attempt to rape. *Taylor v. State*, 69 S. W. 149, 44 Tex. Cr. App. 153.

Attempt by Fraud.—Though it would be better practice to set out enough in the indictment for an attempt to rape by fraud to indicate the particular kind of fraud relied on by the prosecution, a general indictment charging an attempt to rape by fraud would authorize proof of other means. *Franklin v. State*, 34 Tex. Cr. App. 203, 210, 29 S. W. 1088.

An indictment charging an attempt to commit rape by fraud on a married woman by personating her husband need not set out the name of her husband. *Franklin v. State*, 34 Tex. Cr. App. 203, 29 S. W. 1088.

Attempt by Threats.—An indictment for attempt to commit rape, which charges the alleged rape was attempted

alone by threats, is sufficient, though it fails to allege that the threats were directed against the person of the prosecutrix. *Reagan v. State*, 28 Tex. Cr. App. 227, 12 S. W. 601.

7. Assault with Intent to Rape.

a. In General.

All Elements of Offense Should Be Alleged.—The word "rape" in an indictment for an assault with intent to commit rape is insufficient to describe the offense; all the elements thereof should be alleged. *Hewitt v. State*, 15 Tex. Cr. App. 80, 81.

An indictment, alleging the time and place, charged that the accused, "in and upon the body of E. G., then and there being a woman, did make an assault, and her, the said E. G., then and there did beat, wound, and illtreat, with the intent then and there her, the said E. G., against her will and without her consent, then and there feloniously to rape and carnally know," etc. Held, sufficient in substance to charge an assault with intent to commit rape. *Greenlee v. State*, 4 Tex. Cr. App. 345.

An indictment charging that accused unlawfully assaulted a woman not his wife with intent to commit rape, by attempting by force, threats, and fraud to ravish and have carnal knowledge of her without her consent, sufficiently charges aggravated assault. *Westerman v. State*, 53 Tex. Cr. App. 109, 111 S. W. 655.

Correct Forms of Indictment Suggested.—Indictment conforming to No. 358 of Willson's Criminal Forms is sufficient to charge an assault with intent to commit rape. *Lights v. State*, 21 Tex. Cr. App. 308, 17 S. W. 428.

The correct and safe form of an indictment for an assault to rape suggested by the court. *Jones v. State*, 18 Tex. Cr. App. 485, 488.

Allegation of Time—Limitations.—An indictment for assault to rape, which alleges that the offense was committed "on or about the 8th day of

December, one thousand eight hundred and nine," is substantially defective, under Code Crim. Proc. Tex., art. 420, subd. 6, providing that the date alleged must not be so remote that the prosecution of the offense is barred by limitation. *Reed v. State* (Cr. App.), 13 S. W. 865.

b. Intent.

An indictment for an assault with intent to commit rape must allege the intent to commit the crime by force, threats, or fraud. A charge that defendant feloniously intended, etc., "to rape and carnally know," is not sufficient. *Hewitt v. State*, 15 Tex. Cr. App. 80.

A charge that "accused unlawfully assaulted a female, with intent to ravish" charges felonious intent. *Robertson v. State*, 31 Tex. 36, 39.

Where an indictment for an assault with intent to rape so particularly describes the offense that the intent with which the assault was made clearly appears, it is not invalidated by failure to use the word "intent" in describing the offense. *Curry v. State*, 4 Tex. Cr. App. 574, 577.

"Attempt" Equivalent to "Intent."—An indictment averring that defendant did make an assault on and attempt to ravish N. charges an assault with intent to rape; the word "attempt" being equivalent to charging an intent. *Taylor v. State*, 69 S. W. 149, 44 Tex. Cr. App. 153.

c. Designation and Description of Parties.

An indictment which charges that the defendant did unlawfully make an assault with intent to commit rape upon one K., a woman, by then and there attempting to have carnal knowledge of the said K., is not insufficient in failing to charge an assault upon any particular person. *Myers v. State*, 51 Tex. Cr. App. 463, 103 S. W. 859.

Though, it is better that an indictment for rape, or for assault with in-

tent to commit rape, should expressly aver that the injured party is a female, yet the omission of such an averment will not vitiate, if that allegation appears from all that is stated in the indictment. *Battle v. State*, 4 Tex. Cr. App. 595.

Where the indictment charged the defendant with an "assault upon a female, with intent," etc., "to ravish her," etc., held, that such indictment was in due form and sufficient, though in defining the offense of rape the statute of the state uses the term "woman," instead of "female." *Robertson v. State*, 31 Tex. 36.

In an indictment for an assault with intent to commit a rape, a designation of the injured person by the name "Theresa," and also by the word "her," held to disclose with sufficient certainty that the assault was upon "a female." *Battle v. State*, 4 Tex. Cr. App. 595, 30 Am. Rep. 169.

Under Pasch. Dig., art. 2863, requiring only such certainty in an indictment "as will enable the accused to plead the judgment that may be given upon it in bar of another prosecution for the same offense," an indictment for assault with intent to commit rape need not allege that the accused is a male, or that the assaulted female is a person in being. *Greenlee v. State*, 4 Tex. Cr. App. 345.

d. Force.

See ante, "Force," I, J, 3; "Force," II, A, 4.

An indictment fails to charge an assault with intent to rape, if it does not allege that defendant intended to commit the act without or against the consent of the woman. *Langan v. State*, 27 Tex. Cr. App. 498, 11 S. W. 521.

An indictment in a prosecution for an assault to rape charged defendant in two counts. 1. Upon a woman under fifteen, by force. 2. Upon a child under fifteen with and without force. Held, the indictment was good.

McAvoy v. State, 41 Tex. Cr. App. 56, 51 S. W. 928.

Female under Age of Consent.—In a prosecution for an assault with intent to rape a child, the allegation of assault is a sufficient charge of force, and sufficient proof of this force consists in the force used to copulate. *Croomes v. State*, 40 Tex. Cr. App. 672, 684, 51 S. W. 924, 53 S. W. 882.

Use of Word Ravish.—Where an indictment charged that defendant made an assault on B., a female not his wife, under fifteen years of age, with intent to ravish, it was not defective for failure to allege her want of consent and that he intended to commit rape by force, since the word "ravish" implies both force and want of consent. *Alexander v. State*, 58 Tex. Cr. App. 621, 127 S. W. 189.

8. Issues, Proof, and Variance.

a. In General.

Under an indictment for an assault with intent to rape a female named, but whose age is not alleged, defendant can not be legally tried and convicted for an assault with intent to have carnal intercourse with a female under ten years of age. *Craig v. State*, 18 Tex. Cr. App. 321, 325.

It is not necessary to a conviction for attempt to rape that the indictment be for rape. *Reagan v. State*, 28 Tex. Cr. App. 227, 12 S. W. 601.

Conviction of Offense by Use of Means Other than Alleged.—Under an indictment charging rape by frauds, there can be no conviction for rape by force. *Payne v. State*, 38 Tex. Cr. App. 494, 498, 43 S. W. 515.

Where accused is indicted for rape alleged to have been committed by force only, he can not be convicted of a rape committed by threats or fraud. The two offenses are made distinct by the Penal Code. *Williams v. State*, 1 Tex. Cr. App. 90, 28 Am. Rep. 399.

Conviction of Attempt under Indictment for Assault with Intent to Rape.—Under an indictment charging an as-

sault with intent to rape, an accused can not be convicted of an attempt to rape. *Taylor v. State*, 44 Tex. Cr. App. 153, 69 S. W. 149.

An indictment for assault with intent to commit rape will not support a conviction for an attempt to commit rape. *Burney v. State*, 21 Tex. Cr. App. 565, 1 S. W. 458.

An indictment for an assault with intent to rape by force will not support a conviction for an attempt to commit rape by fraud. *Milton v. State*, 23 Tex. Cr. App. 204, 209, 4 S. W. 574.

b. Matters to Be Proved.

Force Where Alleged in Rape of Female under Age of Consent.—While an indictment for rape on a female under the age of consent need not allege force, where force is alleged it must be proved. *Cromans v. State*, 59 Tex. Cr. App. 611, 129 S. W. 1129; *Munoz v. State*, 47 Tex. Cr. App. 577, 85 S. W. 11; *Jenkins v. State*, 34 Tex. Cr. App. 201, 29 S. W. 1078; *Moore v. State*, 20 Tex. Cr. App. 275; *Nicholas v. State*, 23 Tex. Cr. App. 317, 5 S. W. 239; *Davis v. State*, 42 Tex. 226, holding a contrary doctrine is apparently overruled by these later cases.

Word "Ravish" as Supplying Force.—Appellant requested the court to instruct the jury to acquit, upon the theory that it was necessary to prove force under the allegation in the indictment that the defendant "did then and there ravish and have carnal knowledge" of prosecutrix. This contention is not well taken. While in a certain way the allegation "did ravish" carries with it the idea of the element of force, yet this character of indictment has been held sufficient to charge the offense on a girl under fifteen years of age without requiring proof of force, or a charge upon the theory of force. *Vaughn v. State*, 62 Tex. Cr. App. 24, 136 S. W. 476. See ante, "Age of Female," II, A, 3; "Force," II, A, 4.

Where an indictment alleges that defendant assaulted a child under fifteen

years of age, to "ravish and carnally know," defendant may be convicted by proof of force or without such proof. *McAvoy v. State*, 51 S. W. 928, 41 Tex. Cr. App. 56.

Actual Presence of Female.—Where a person is charged with an assault with intent to rape, no conviction can be had unless the actual presence of the female, intended to be ravished is proved at the time and place charged. *Burke v. State*, 5 Tex. Cr. App. 74, 77.

Age of Female under Age of Consent.—On a trial for an assault with intent to commit rape on a female under the age of ten years, the allegation of her age is material, and must be proved. *Mosely v. State*, 9 Tex. Cr. App. 137.

Need Not Prove Definite Part of Plantation Alleged as Place Offense Committed.—In a prosecution for rape, alleged to have been committed on a certain plantation, the state need not show on what particular part thereof it was committed. *Roberson v. State* (Cr. App.), 49 S. W. 398.

Proof That Insanity Existed at Very Time of Act.—Where the state relies on insanity of a female to prove non-consent in a prosecution for rape, its existence at the very time of the act must be proved; hence, proof of occasional epileptic fits is insufficient. *Baldwin v. State*, 15 Tex. Cr. App. 273, 283.

c. Evidence Admissible under Pleadings.

In a trial for raping a child under fourteen years of age, the state could show all the facts attending the offense, including force used, though the indictment did not charge force. *Hutcherson v. State*, 62 Tex. Cr. App. 1, 136 S. W. 53.

Where the indictment merely charges an assault with intent to commit rape on a child under the age of consent, it is error to permit the state to prove that prosecutrix was subject to fits. *Johnson v. State*, 59 S. W. 898, 42 Tex. Cr. App. 298.

Though an indictment for rape does not charge the rape of a woman mentally incapable of yielding consent, evidence of her mental condition is admissible as bearing on the question of consent. *Segrest v. State* (Cr. App.), 57 S. W. 845.

d. Variance between Allegation and Proof.

Where an indictment charges an assault with intent to commit a rape forcibly, there can be no conviction on proof of an assault with intent to have intercourse with prosecutrix with her consent, though she is under the age of consent, and is not defendant's wife. *Morgan v. State* (Cr. App.), 50 S. W. 718.

Alleging Name of Prosecutrix Different from That Shown to Be Her Husband's.—There was no variance between an indictment for rape referring to prosecutrix by the name by which she was known, and proof that she was married to a man bearing a different name. *Perez v. State*, 94 S. W. 1036, 50 Tex. Cr. App. 34.

Allegation of Time of Offense Supported Proof of Offense at Any Time within Year Past.—Where, on a trial for rape on a female under the age of consent, alleged to have been committed on or about May 10, 1906, the state's evidence showed but one act of intercourse, and the testimony did not disclose the finding of another indictment charging accused with committing a rape on the same prosecutrix on or about May 11, 1906, the court did not err in charging that if the jury believed that, at any time within one year before the presentment of the indictment, September 21, 1906, the accused had carnal knowledge of prosecutrix, they should find him guilty. *Robertson v. State*, 51 Tex. Cr. App. 493, 102 S. W. 1130.

B. EVIDENCE.

1. Presumptions and Burden of Proof.

a. Presumptions.

Of Common Law Marriage.—Where,

on a trial for rape of a female under the age of fifteen years, accused relied on a common-law marriage with prosecutrix, the testimony of prosecutrix that she was not his wife, and that accused had stated that they would be married as soon as he could arrange for a marriage, rebutted the presumption, if any, of their consent to be married arising from their cohabitation following their engagement to marry at some future time. *Wofford v. State*, 60 Tex. Cr. App. 624, 132 S. W. 929.

Of Consent from Failure to Resist.

—Consent will be presumed, unless the woman about to be raped makes every exertion in her power under the circumstances to prevent the act. *Mooney v. State*, 29 Tex. Cr. App. 257, 262, 15 S. W. 724. See ante, "Resistance of Female," I, H.

Knowledge of Defendant of Bad Character of Female.—On a trial for an assault with intent to rape, it will be presumed that defendant knew the bad character of prosecutrix for chastity. *Shields v. State*, 32 Tex. Cr. App. 498, 502, 23 S. W. 893.

From Fact Prosecutrix Afflicted with Venereal Disease.—No presumption in favor of defendant's innocence "of an assault with intent to commit rape" can be drawn from the facts that the prosecuting witness was shown to have a venereal disease prior to and at the time of the alleged assault, and that defendant was shown by examination of a physician not to have it. *Comer v. State* (Cr. App.), 20 S. W. 547.

b. Burden of Proof.

Matters Descriptive of Offense.—An indictment for an assault to rape, containing no allegation of nonage, and charging that the assault was committed upon the female with the intent to carnally know her, etc., by force, and without her consent and against her wish, charges an attempt to rape a female over the age of ten years.

and whatever be the proof as to the age of the female, imposes upon the state the burden of proving that the assault was made to carnally know the female by force, without her consent and against her wish—such allegations being descriptive of the offense, and, therefore, necessary to be proved. *Moore v. State*, 20 Tex. Cr. App. 275.

Criminal Intent.—Criminal intent on a trial for an assault to commit rape must be shown by the state beyond a reasonable doubt. *House v. State*, 9 Tex. Cr. App. 567, 568.

In a prosecution for an assault with intent to rape, instruction held error, because, though couched in the language of the code, and correct in the abstract, it erroneously imposes upon the defendant the burden of proving himself innocent of any unlawful intent to perpetrate any offense. *Burney v. State*, 21 Tex. Cr. App. 565, 1 S. W. 458.

The burden being on the state, in a prosecution for an assault with intent to rape, to show specific intent, the charge that one who has assaulted another must show his innocent intention, is error. *Thomas v. State*, 16 Tex. Cr. App. 535, 540.

Nonage of Defendant.—In a trial for rape, the burden of proving nonage of defendant is on defendant, as it is a distinct substantive matter relied upon by him to exempt him from capital punishment. *Wilcox v. State*, 33 Tex. Cr. App. 392, 394, 26 S. W. 989.

2. Admissibility.

a. In General.

No evidence tending to even remotely throw light upon the truth should be rejected in a trial for rape. *Pless v. State*, 23 Tex. Cr. App. 73, 76, 3 S. W. 576.

Evidence of Force Where Female under Age of Consent—Res Gestæ.—Under an indictment good for rape on a woman under the age of consent, proof of force is a part of the res

gestæ. *Fields v. State*, 46 S. W. 814, 39 Tex. Cr. App. 488.

Motive of Prosecutrix in Making Charge.—In a prosecution for assault to rape upon a little girl by a grown man, where there was evidence that, when defendant brought the girl home on the evening of the alleged assault, her mother noticed nothing wrong, and when questioned three weeks later she at first denied that there was any assault, it was error to refuse to allow defendant to show by the testimony of the girl that a niece of his wife, who the testimony showed was very unfriendly toward defendant, and who exercised considerable influence over the girl, went to her house just before the prosecution was instituted, and prior to the trial told the girl when she went on the witness stand to swear to enough to put defendant in the penitentiary. *Liles v. State*, 58 Tex. Cr. App. 310, 125 S. W. 921.

Exhibiting Child to Jury.—On a trial for the rape of a girl under fifteen years of age, it is error to permit the child, which is claimed to be the result of the intercourse charged, to be exhibited to the jury. *Gray v. State*, 43 Tex. Cr. App. 300, 65 S. W. 375.

Imputing Crime to Third Party.—In a prosecution for rape, where it became a question in the case whether the father of the prosecutrix's child was defendant or the son of a witness who testified that her son was fourteen years old, she should have been permitted, on cross-examination, to state any fact tending to show that he was, in fact, fifteen years old. *Shults v. State*, 91 S. W. 786, 49 Tex. Cr. App. 351.

Character of Place Where Crime Committed.—On a prosecution for assault with intent to rape, it was not error to permit a witness to testify that the house of witness where the crime was committed was closed when witness left it in the morning, though such testimony might suggest that the

accused had committed burglary. *Turman v. State*, 95 S. W. 533, 50 Tex. Cr. App. 7.

Testimony of witnesses who examined the place of the commission of the alleged rape five days afterward is too remote and uncertain and should be excluded. *Lawson v. State*, 17 Tex. Cr. App. 292, 304.

Pleading in Prior Suit for Damages.

—In a prosecution for rape, the original petition in a prior civil action against the accused by prosecutrix, through her next friend, for damages from the alleged intercourse, was inadmissible. *Eckermann v. State*, 57 Tex. Cr. App. 287, 123 S. W. 424.

For Sole Purpose of Prejudicing Jury against Defendant.—Where the state showed statements by accused to prosecutrix as to his owning property, evidence that his claim of ownership was untrue was inadmissible because merely prejudicing the jury against him. *Wilkerson v. State*, 60 Tex. Cr. App. 388, 131 S. W. 1108.

Effect of Former Conflicting Statement of Prosecutrix as to Time of Offense.—In a prosecution for rape, the testimony of prosecutrix that defendant had intercourse with her during the month of August, 1904, was not rendered inadmissible by the fact that on a former trial she testified that the alleged offense was committed in the latter part of April, 1904. *Alcorn v. State* (Cr. App.), 94 S. W. 468.

Assault on Party Defending Prosecutrix.—When defendant is charged with rape, evidence as to an assault upon the father-in-law of the prosecutrix, who was defending her, is admissible at *res gestæ*. *Thompson v. State*, 11 Tex. Cr. App. 51, 55.

b. Consent.

Failure to Make Outcry.—On a trial for assault with intent to rape, failure of prosecutrix to make outcry is a circumstance against the state's case. *Warren v. State*, 54 Tex. Cr. App. 443, 114 S. W. 380.

On a trial for assault with intent to rape, the state may show why prosecutrix made no outcry. *Warren v. State*, 54 Tex. Cr. App. 443, 114 S. W. 380.

Evidence of Threats.—Where an indictment alleges rape by means of force, evidence of threats is admissible as part of *res gestæ*; as bearing on the question of consent, as showing intent; and as a fact to be considered in passing upon the character and degree of force used. *Bass v. State*, 16 Tex. Cr. App. 62, 68.

Antecedent threats and former violence by accused toward prosecutrix calculated to subjugate her will to his are admissible in a prosecution for rape. *Sharp v. State*, 15 Tex. Cr. App. 171.

Stature and Physical Development of Prosecutrix.—The "stature, constitution and development" of a female may, upon a charge of rape, be shown and considered in determining issue as to whether or not she consented. *Craig v. State*, 18 Tex. Cr. App. 321, 325.

c. Corroboration of Female.

Actions and Statements of Parties after Offense.—Testimony of the prosecutrix in a trial for rape may be corroborated by actions and statements of herself and defendant after the alleged commission of the crime. *Sawyer v. State*, 39 Tex. Cr. App. 557, 565, 47 S. W. 650.

As to Place Offense Committed.—Where, in a prosecution for rape, prosecutrix testified that it occurred at a specified place on the road in a buggy, the court properly permitted a witness to testify that about the date alleged he saw defendant and a woman in a buggy standing still at a point about where prosecutrix testified the offense was committed. *Battles v. State* (Cr. App.), 140 S. W. 783.

Testimony of prosecutrix's father that on the night of the alleged rape he searched for her in town, and could not find her, is admissible to corroborate.

rate her testimony, she locating the place of the crime outside of the town. *Knowles v. State*, 72 S. W. 398, 44 Tex. Cr. App. 322.

As to Existence of Engagement to Marry.—Where, on a trial for assault with intent to rape, the theory of the state was that accused and prosecutrix were engaged to be married, and prosecutrix testified that she left home with accused on the night of the assault believing that he would take her to a designated town, and there marry her, and accused claimed that the prosecutrix left home with him for an immoral purpose, and sought to cover up her immoral conduct, a letter written by accused to prosecutrix some months before indicating the existence of an engagement to marry was admissible as corroborative of prosecutrix. *Warren v. State*, 54 Tex. Cr. App. 443, 114 S. W. 380.

Insanity of Prosecutrix.—Testimony of insanity of a prosecuting witness may be introduced in a trial for rape for the purpose of affecting her testimony. *Ellis v. State*, 33 Tex. Cr. App. 86, 87, 24 S. W. 894.

d. Intent.

Intention to Gain Consent of Female.—On a trial for an assault to rape, the witness may testify that he intended to have sexual intercourse with prosecutrix with her consent, and not by force and against her consent. *Lewallen v. State*, 33 Tex. Cr. App. 412, 414, 26 S. W. 832.

Impersonal Threats by Accused That He Would Have Intercourse That Night.—On a trial for rape, evidence that defendant, on the day before the offense was committed, used obscene language, indicating a determination to have intercourse with girls that night, if he had to kill the girls, is competent, since the intended victim need not be named, if subsequent facts show with reasonable probability to whom he referred, or the threat was such as to evidence a determination to rape some

person—not a particular one—that night. *Massey v. State*, 31 Tex. Cr. App. 371, 20 S. W. 758.

Representations of Accused That He Was Not Married.—In a prosecution for rape on a female under the age of fifteen years, it was proper to prove that defendant had promised to marry prosecutrix, and had assured her that he was not a married man, as showing the purpose and intent of defendant, and giving a reason for consent on the part of prosecutrix. *Simpson v. State*, 77 S. W. 819, 45 Tex. Cr. App. 320.

Subsequent Marriage of Accused to Another.—In a trial for rape by means of a sham marriage, the fact that nine months later the defendant married another woman is admissible as showing that he had no purpose or motive at the time of the alleged rape to consummate the marriage. *Lee v. State*, 72 S. W. 1005, 44 Tex. Cr. App. 354, 61 L. R. A. 904.

Conversations between Defendant and Prosecutrix.—In a trial for rape, evidence of conversations between defendant and prosecutrix previous to the alleged rape is admissible, when in view of the other evidence. Such evidence tends to show bent of defendant's mind and to explain his acts and statements. *Wood v. State*, 28 Tex. Cr. App. 61, 64, 12 S. W. 405.

e. Character and Habits of Female.

(1) In General.

To Prove Reputation for Chastity Bad as Being on Consent.—“Generally, in case of rape and assault to rape, it is held competent evidence to prove that the reputation of the prosecutrix for chastity is bad, not as an excuse for the offense or justification for the same, but as raising the presumption that she may have yielded her consent and was not in fact forced.” *Ross v. State*, 60 Tex. Cr. App. 547, 132 S. W. 793. See, also, *Freeman v. State*, 52 Tex. Cr. App. 500, 107 S. W. 1127; *Shields v. State*, 32 Tex. Cr. App. 498, 23 S. W. 893; *Favors v. State*, 20 Tex.

Cr. App. 155; *Jenkins v. State*, 1 Tex. Cr. App. 346; *Rogers v. State*, 1 Tex. Cr. App. 187.

On a trial for assault with intent to rape, where there is no question as to the force used and prosecutrix's want of consent, evidence as to her want of chastity is not admissible. *Steinke v. State*, 33 Tex. Cr. App. 65, 24 S. W. 909.

Female under Age of Consent.—In a prosecution for rape on a female under the age of consent, the refusal to admit evidence showing a lack of chastity on the part of the prosecutrix was not error. *Price v. State*, 70 S. W. 966, 44 Tex. Cr. App. 304; *Hall v. State*, 43 Tex. Cr. App. 479, 66 S. W. 783.

Birth of Illegitimate Child before Offense Committed.—That the prosecutrix had, previous to the alleged rape, given birth to an illegitimate child, was competent evidence to prove general reputation for chastity, and it was error, in the first instance, to exclude such evidence. *Wilson v. State*, 17 Tex. Cr. App. 525.

That Witness Kissed Prosecutrix.—On a prosecution for assault with intent to rape, there was no error in refusing to permit a witness to testify to having kissed prosecutrix. *Kearse v. State* (Cr. App.), 88 S. W. 363.

Proof by State of Good Reputation for Chastity.—Prosecutrix's reputation for virtue and chastity can be shown by the state only when it is assailed by accused or she is a stranger in the county. *Holland v. State*, 60 Tex. Cr. App. 117, 131 S. W. 563; *Zysman v. State*, 42 Tex. Cr. App. 432, 60 S. W. 669; *Rushing v. State*, 25 Tex. Cr. App. 607, 613, 8 S. W. 807; *Farmer v. State*, 35 Tex. Cr. App. 270, 33 S. W. 232; *Murphy v. State* (Cr. App.), 40 S. W. 978; *Payne v. State*, 40 Tex. Cr. App. 290, 50 S. W. 363; *Wilson v. State*, 17 Tex. Cr. App. 525, 536; *S. C.*, 67 S. W. 106; *Tyler v. State*, 46 Tex. Cr. App. 10, 79 S. W. 558; *Warren v. State*, 54 Tex. Cr. App. 443, 114 S. W. 260.

Where, in a prosecution for assault with intent to rape, all the evidence showed that prosecutrix did not assent to the attempted act, and there was nothing to justify accused in believing that she would consent, evidence as to her general reputation for chastity was not admissible. *Ross v. State*, 60 Tex. Cr. App. 547, 132 S. W. 793.

On a trial for rape, evidence that, subsequent to the offense, husband of prosecutrix proposed to her to charge men for coming to her, and that she refused, was inadmissible, though there was evidence that the husband had conspired to destroy her reputation and chastity. *Williams v. State*, 55 Tex. Cr. App. 65, 115 S. W. 35.

Conclusions of Witness.—A question to prosecutrix in a rape case if she did not recognize the fact that her conduct and conversation with strange men was calculated to produce a wrong impression on their minds, the answer to which it is claimed would have been that she recognized that her conduct was likely to make men believe that she was not what a lady should be, was properly excluded. *Lemons v. State*, 59 Tex. Cr. App. 299, 128 S. W. 416.

Where Evidence of Prosecutrix Contradicted.—Where the testimony of the prosecutrix was contradicted and the cross-examination was strongly calculated to induce the jury to believe that she had willingly left home with accused to engage in criminal acts with him, evidence of her good reputation as to chastity and truthfulness was admissible to support her testimony that she believed that she and accused were married. *Wilkerson v. State*, 60 Tex. Cr. App. 388, 131 S. W. 1108.

(2) Previous Acts of Incontinence in General.

Where Prosecutrix under Age of Consent.—All acts and conduct that can be considered and were intended as an inducement to render the accomplishment of his purpose possible are

admissible in evidence, and where the facts show that a father or person standing in loco parentis, or who, by any tie would cause a child to look to him for guidance, or person who stands in such relation that the child would be susceptible to his wiles, and such person or persons shall, after the acts of inducement, have sexual intercourse with such child at available opportunities, all such acts of intercourse are admissible in testimony, and this we think is supported, not only by the great weight of authority, but by practically all the decisions of the higher courts in the different states in the union, and the adverse holdings of this court in the case of *Ball v. State*, 44 Tex. Cr. App. 489, 72 S. W. 384; *Smith v. State* (Cr. App.), 73 S. W. 401; *Barnett v. State*, 44 Tex. Cr. App. 592, 73 S. W. 399; *Hackney v. State* (Cr. App.), 74 S. W. 554; *Henard v. State*, 46 Tex. Cr. App. 90, 79 S. W. 810, and *Smith v. State* (Cr. App.), 74 S. W. 556, are not believed by a great majority of the trial judges of this state to be the law, as applicable to this offense, and in so far as the opinions in these cases, or any other case, conflict with this opinion, they are expressly overruled. *Battles v. State* (Cr. App.), 140 S. W. 783, 797. See, also, *Hamilton v. State*, 36 Tex. Cr. App. 372, 37 S. W. 431; *Callison v. State*, 37 Tex. Cr. App. 211, 216, 39 S. W. 300; *Manning v. State*, 43 Tex. Cr. App. 302, 65 S. W. 920; *Stone v. State*, 45 Tex. Cr. App. 91, 73 S. W. 956; *Henard v. State*, 47 Tex. Cr. App. 168, 82 S. W. 655; *Blackwell v. State*, 51 Tex. Cr. App. 24, 100 S. W. 774; *Innocente v. State*, 53 Tex. Cr. App. 390, 110 S. W. 61; *Zachary v. State*, 57 Tex. Cr. App. 179, 122 S. W. 263; *Eckermann v. State*, 57 Tex. Cr. App. 287, 123 S. W. 424; *Bader v. State*, 57 Tex. Cr. App. 293, 122 S. W. 555; *Hanks v. State* (Cr. App.), 38 S. W. 173; *Cooksey v. State* (Cr. App.), 58 S. W. 103; *Wofford v. State*, 60 Tex. Cr. App. 624, 132 S. W. 929; *Foreman v. State*, 61 Tex. Cr. App. 56, 134 S. W. 229.

To Disprove Intent.—On a trial for assault and battery on a married woman, it was charged that defendant took hold of her, and attempted to have carnal knowledge of her against her consent, with intent to wound her feelings. Held that, to disprove the intent charged, the prosecutrix could be required to state whether there had been previous acts of illicit intercourse between herself and defendant. *Donaldson v. State*, 10 Tex. Cr. App. 307.

(3) Previous Acts of Incontinence with Others than Accused.

(a) In General.

"It has often been decided and is well settled in this state that previous acts of intercourse with the appellant are admissible, when offered by the appellant only for the purpose of tending to show the consent of the woman at the time when the rape is charged to have been committed, and the authority uniformly restrict such testimony to acts of intercourse with the appellant alone. *Lawson v. State*, 17 Tex. Cr. App. 292, 302; *Pefferling v. State*, 40 Tex. 486; *Dorsey v. State*, 1 Tex. Cr. App. 33; *Rogers v. State*, 1 Tex. Cr. App. 187; *Jenkins v. State*, 1 Tex. Cr. App. 346; *Mayo v. State*, 7 Tex. Cr. App. 342, 349." *Whitehead v. State*, 61 Tex. Cr. App. 558, 137 S. W. 356; *Ross v. State*, 60 Tex. Cr. App. 547, 132 S. W. 793; *Wilson v. State*, 17 Tex. Cr. App. 525, 533.

On a prosecution for rape, defendant was not entitled to prove that before the alleged offense he had been informed by a certain person that he was keeping the prosecutrix. *Hoyle v. State* (Cr. App.), 70 S. W. 94.

Husband's Testimony That Prosecutrix Was Not a Virgin When Married.

—On a prosecution for rape, it was proper to permit a witness who had married her after the alleged crime to testify that he had discovered that she was not a virgin. *Smith v. State*, 52 Tex. Cr. App. 344, 106 S. W. 1161.

Confession of Previous Acts of Intercourse Made to Defendant before Offense Committed.—

In a prosecution for an indecent assault by fondling the person of prosecutrix without her consent, it was error to refuse defendant's evidence that the prosecutrix before the time of the assault confessed to him that she had had carnal intercourse with three different men. *Wilson v. State* (Cr. App.), 67 S. W. 106.

(b) When Given in Rebuttal.

In a prosecution for rape, circumstances of lewdness, familiarity, etc., indicating that prosecutrix might have been guilty of intercourse with others than accused, was admissible to rebut her testimony that she had never had intercourse with any other person than accused and to account for her general condition, the condition of her vagina, and the destruction of her hymen, as testified to by physicians, and to prove that others than accused had in fact had intercourse with her. *Bader v. State*, 57 Tex. Cr. App. 293, 122 S. W. 555.

One accused of raping a female under age with her consent could show that about nine months before her child was born she was seen in compromising relations with another man, to rebut her testimony of exclusive intercourse with accused, and to support his denial of the offense. *Parker v. State*, 62 Tex. Cr. App. 64, 136 S. W. 453.

On a prosecution for statutory rape, the question of consent vel non not being relied on by defendant, prosecutrix having testified that she had no previous intercourse with any one but defendant, and that he was the father of her child, defendant may show that she had had intercourse with others at a time when they could have been the father of the child. *Knowles v. State*, 72 S. W. 398, 44 Tex. Cr. App. 322.

In a prosecution for rape upon a female under the age of consent, other acts of intercourse of the prosecutrix

are not admissible in evidence unless the fact of intercourse at all be questioned, or the evidence shows that another may be the father of the child, and hence, in the prosecution for rape, where the fact of intercourse is proven by the birth of a child, evidence of acts recurring more than two years before the birth of the child is inadmissible. *Whitehead v. State*, 61 Tex. Cr. App. 558, 137 S. W. 356.

In a prosecution for rape, cross-examination of prosecutrix to show that she had had intercourse with one B., other than defendant, and that on being upbraided by her sisters for her conduct, she asserted that if they didn't let her alone, she would charge defendant, a husband of her sister with whom she lived, with having intercourse with her, is proper to be considered by the jury as a circumstance showing that defendant did not commit the crime, especially in view of the fact that the prosecution was inspired by the mother of B., and it was to her that prosecutrix made complaint. *Shoemaker v. State*, 58 Tex. Cr. App. 518, 126 S. W. 887.

(4) Character of Domicile, Family, or Associations of Female.

That Mother Kept House of Ill Fame.—Evidence that the mother of the prosecuting witness was keeping a house of ill fame at the time of the alleged rape is inadmissible in a prosecution therefor. *Manning v. State*, 65 S. W. 920, 43 Tex. Cr. App. 302, 96 Am. St. Rep. 873.

In a prosecution for rape, evidence that prosecutrix's mother kept in the house with her an unchaste woman was inadmissible. *Smith v. State* (Cr. App.), 73 S. W. 401.

That Mother Was Opium Fiend.—On a prosecution for rape, evidence that prosecutrix's mother was an opium fiend was inadmissible, in the absence of anything to show the connection of such fact with the case. *Neill v. State*, 91 S. W. 791, 49 Tex. Cr. App. 219.

Chastity of Mother as Bearing on Disease of Daughter.—Where, in a prosecution for rape on a female under the age of consent, she testified that she had voluntarily had intercourse with accused and had copulated with many persons since she was nine years old, defendant claimed she was a nymphomaniac, and physicians testified that it was necessary, in order to diagnose nymphomania, to know the history of the ancestry of the girl, to wit, her mother and blood female relatives, and that if they were people of lewd character and of strong passion this would predispose the girl to nymphomania, such proof did not authorize accused to show the general reputation for chastity of prosecutrix's mother and sister; defendant's expert having testified that such general reputation would throw no light on whether or not prosecutrix had such disease. *Jenkins v. State*, 60 Tex. Cr. App. 236, 131 S. W. 542.

f. Age of Female.

Testimony on a trial for the rape of a fourteen and a half year old girl, that prosecutrix was over fifteen years of age is original evidence, and not impeaching testimony. *Tull v. State* (Cr. App.), 55 S. W. 61.

Family Bible—Entry of Date of Birth.—On a trial for rape, where the court permitted the family Bible of the father of the prosecutrix to be introduced in evidence to show the date of the birth of prosecutrix, the father having testified, as a predicate therefor, that he made the entry in this Bible within the year of her birth, and that it was correct, and that the same had not been out of his possession at all during the time; held, the evidence was admissible. *Simpson v. State*, 45 Tex. Cr. App. 320, 77 S. W. 819.

Witnesses to Birth—Collateral Circumstances.—Where, on a trial for rape of a female under the age of fifteen, inquiry is as to the date of the birth of prosecutrix, witnesses to such

fact may testify to collateral circumstances which tended to fix the main fact upon his mind. *Bice v. State*, 37 Tex. Cr. App. 38, 42, 38 S. W. 803.

Where a party attempts to prove age he can do so by collateral facts which occurred at the time of the birth of the child, or if he proposes any other date he may cite contemporaneous events with the date sought to be proved. *Danley v. State*, 44 Tex. Cr. App. 428, 71 S. W. 958.

Opinion Derived from Appearance of Prosecutrix.—In a trial for rape, where the age of prosecutrix was in issue, the opinion of witnesses and evidence as to the appearance of prosecutrix held admissible. *Danley v. State*, 44 Tex. Cr. App. 428, 71 S. W. 958.

Evidence of Physicians.—On a prosecution for rape, the physicians who attended prosecutrix's mother at the time of prosecutrix's birth may testify as to her age as shown by his memorandum in medical accounts made at the time. *Neill v. State*, 91 S. W. 791, 49 Tex. Cr. App. 219.

On a trial for rape of a female under the age of fifteen, testimony is admissible on behalf of the defense on the part of a physician that at the time of the alleged intercourse, prosecutrix appeared to be seventeen or eighteen years of age. *Bice v. State*, 37 Tex. Cr. App. 38, 43, 38 S. W. 803.

Evidence of Prosecutrix—Must Be From Her Own Knowledge.—Where, in a prosecution for rape, the prosecutrix states that she knows her age, it is competent for her to testify thereto. *Lewis v. State* (Cr. App.), 64 S. W. 240.

On a trial for rape, the prosecutrix must testify from her own knowledge as to her age, not as to what her mother may have said, when the mother is a witness and is present. *Johnson v. State*, 59 S. W. 898, 42 Tex. Cr. App. 298.

On a trial for rape, where the question is as to the age of prosecutrix, it

is permissible for a witness to state that at a certain time when she was an infant, comparing her with another infant whose age she knew, she could not have been more than five months old. *Bice v. State*, 37 Tex. Cr. App. 38, 42, 38 S. W. 803.

Hearsay.—Defendant in a statutory rape case can not prove that prosecutrix told defendant's brother that she was over the age of consent, and that the brother told this to him. This is hearsay. *Knowles v. State*, 44 Tex. Cr. App. 322, 72 S. W. 398.

g. Character and Habits of Accused.

The rule is that "in all criminal cases, whenever a criminal intent is necessary to constitute the offense, evidence of the general character of the defendant is admissible in his behalf." The crime, as charged in this case, carries with it as an essential element a criminal intent to do the act by assault with force, and without the consent of the female and such evidence is admissible. *Lincecum v. State*, 29 Tex. Cr. App. 328, 15 S. W. 818.

On a trial for rape, it is error to admit evidence, unconnected with the crime charged, showing that defendant had a brutish mind and was willing to see his daughter prostituted. *Owens v. State*, 39 Tex. Cr. App. 391, 398, 46 S. W. 240.

On a trial for rape of defendant's daughter, evidence is inadmissible of defendant's specific acts of brutality toward his children not shown to be in prosecutrix's presence or known to her. *Owens v. State*, 39 Tex. Cr. App. 391, 398, 46 S. W. 240.

Former Indictment for Similar Offense.—On a trial for assault with intent to rape, where defendant has testified as a witness in his behalf, he may on cross-examination, be asked if he has not been previously indicted for a similar offense. *Clark v. State*, 38 Tex. Cr. App. 30, 40 S. W. 992.

In a prosecution for statutory rape, where the defense claimed the father

of the prosecutrix was the guilty party, evidence that four years before he raped another daughter is not admissible to show the father guilty. *Whitehead v. State*, 61 Tex. Cr. App. 558, 137 S. W. 356.

Evidence Too Remote.—Admission of evidence on a trial for rape to the effect that defendant had said five years previously that he had a drug which would cause any woman to yield to him is error. *Tomlin v. State*, 25 Tex. Cr. App. 676, 685, 8 S. W. 931.

Cursing and Abusing Wife.—In a prosecution for rape, testimony that on a certain morning before the alleged crime, witness heard defendant call his (defendant's) wife a "damn pot-gutted bitch," held inadmissible. *Hefner v. State* (Cr. App.), 66 S. W. 841.

Where Prosecutrix under Age of Consent.—Evidence that defendant was always quarreling with and slapping the witness was inadmissible; the witness being under the age of consent, and such evidence having a tendency to prejudice defendant with the jury. *Smith v. State*, 51 Tex. Cr. App. 137, 100 S. W. 924.

h. Physical and Mental Condition of Parties.

(1) Of Defendant.

That Defendant Was Afflicted with Disease.—On a trial for an assault with intent to rape a child of tender years, where evidence shows communication to her of a venereal disease, evidence is admissible that a few days before the offense defendant was afflicted with the same disease. *Allen v. State*, 36 Tex. Cr. App. 381, 383, 37 S. W. 429.

(2) Of Female Subsequent to Offense.

Recent complaint by a person injured, her state and appearance, marks of violence and condition of her dress, shortly after the alleged rape, may be proved in a trial for rape as original evidence. *Lawson v. State*, 17 Tex. Cr. App. 292, 303.

In a prosecution for an assault with intent to rape it was competent for the state to show the appearance, condition, and statements of the prosecutrix soon after the occurrence. *Lights v. State*, 21 Tex. Cr. App. 308, 17 S. W. 428.

On a prosecution for assault with intent to rape, it was proper for the state to show the condition of prosecutrix on the night of the day on which the crime was committed. *Turman v. State*, 95 S. W. 533, 50 Tex. Cr. App. 7.

That Prosecutrix Was Crying When She Made Complaint.—Evidence that the prosecutrix was crying when she made complaint is admissible in a prosecution for assault with intent to commit rape, and especially when the appellant undertakes to show that nothing was wrong as to her condition, her appearance, and her clothing, and that she did not cry, and had not been crying, as testified to by her and others. *Conger v. State (Cr. App.)*, 140 S. W. 1112.

Condition of Underclothing.—On an indictment for rape, testimony as to the condition of an undergarment of the alleged injured female on the first evening and second morning after the alleged rape was properly admitted in evidence. An objection that the examination of the garment was too remote in point of time goes to the weight rather than the competency of the evidence. *Grimmett v. State*, 22 Tex. Cr. App. 36, 2 S. W. 631, 58 Am. Rep. 630.

The bloody clothes of the prosecutrix, worn at the time of the alleged attempt to rape, are admissible in evidence. *Long v. State (Cr. App.)*, 46 S. W. 640.

Testimony as to the condition of clothes of prosecutrix which witness assisted her to wash the day after the alleged rape was properly excluded; no offer being made to show that they were the ones she wore at the time of the alleged rape. *Gonzales v. State*, 32 Tex. Cr. App. 611, 25 S. W. 781.

Evidence of Physician as to Condition of Prosecutrix.—In a rape trial, a physician who examined prosecutrix five days after the offense could testify to the conditions disclosed. *Hutcherson v. State*, 62 Tex. Cr. App. 1, 136 S. W. 53; *Gonzales v. State*, 32 Tex. Cr. App. 611, 25 S. W. 781; *Pless v. State*, 23 Tex. Cr. App. 73, 3 S. W. 576.

On a trial for rape, testimony of a physician is admissible that two months after the rape occurred, he examined prosecutrix and found that the vagina had been penetrated. *Gonzales v. State*, 32 Tex. Cr. App. 611, 620, 25 S. W. 781.

Mental Condition.—On a prosecution for assault with intent to rape, evidence as to the mental condition of prosecutrix on her return home from the drive during which the offense was alleged to have been committed was admissible. *Kearse v. State (Cr. App.)*, 88 S. W. 363.

i. Personal Relations of Parties.

Evidence of Gifts and Attentions Showing Friendly Relations.—In a prosecution for rape committed on defendant's niece, a child under the age of consent, evidence that prior to the commission of the offense he had been assiduous in his attentions to her, had purchased her various articles of clothing, taken her to places of amusement, and had written her a number of letters, only consistent with the idea of an affection for her, was admissible. *Battles v. State (Cr. App.)*, 140 S. W. 783; *Conger v. State (Cr. App.)*, 140 S. W. 1112.

In a prosecution for rape on a female under the age of consent, evidence that defendant made her presents of candies and a ring, in answer to a question whether prior to the intercourse defendant had made her presents, was admissible as showing intimate relations between prosecutrix and accused, it appearing that the intercourse was had with her consent, and to show willingness on her part. *Rowan*

v. State, 57 Tex. Cr. App. 625, 124 S. W. 668.

In a prosecution for rape, evidence that the defendant was a married man and uncle of prosecutrix by marriage; that he took prosecutrix buggy riding several times, returning usually late; that one night he returned before sundown, that prosecutrix, as defendant at one time was trying to hug and kiss her, saw a certain person who was a witness for the state; and that a few days thereafter defendant and prosecutrix were again riding together—were admissible as showing intimacy, continued association, and undue familiarity between the parties. *Battles v. State*, 53 Tex. Cr. App. 202, 109 S. W. 195.

A conviction for statutory rape will not be reversed for refusal to strike out evidence tending to show familiarity between the parties at a time other than when the offense is alleged to have occurred. *Henard v. State*, 82 S. W. 655, 47 Tex. Cr. App. 168.

Friendly Feeling Toward Accused—Desire Not to Prosecute.—On a prosecution for rape, it was competent for the state to attempt to prove by prosecutrix that she felt friendly towards accused, and did not wish to have him indicted. *Denton v. State*, 79 S. W. 560, 46 Tex. Cr. App. 193.

Conduct of Prosecutrix When Leaving Home with Defendant.—Where, on a trial for assault with intent to rape, the theory of the state was that prosecutrix left home with accused, believing that they would go to a designated town and there marry, while accused claimed that the prosecutrix consented to go with him for an immoral purpose, evidence of the conduct of the prosecutrix on leaving home with accused was admissible. *Warren v. State*, 54 Tex. Cr. App. 443, 114 S. W. 380.

Declarations to Prosecutrix as to Ownership of Property.—The state, on a trial for rape by means of a sham marriage, may show declarations of

accused to prosecutrix as to his possessing property, to show the reasonableness of the testimony of the prosecutrix that she believed that she married accused, and as effecting the probability of her consenting to marry. *Wilkerson v. State*, 60 Tex. Cr. App. 388, 131 S. W. 1108.

Evidence Showing Resentment or Dislike.—On a trial for assault with intent to rape, the testimony of prosecutrix that on accused coming to her house after the commission of the offense, and inviting her to a party, she asked him to leave, was admissible. *Warren v. State*, 54 Tex. Cr. App. 443, 114 S. W. 380.

Declarations of Prosecutrix Showing Belief That She Was Married to Accused.—Evidence of declarations of prosecutrix, while living with accused apparently as his wife, that she and accused were married, and evidence of letters written by her during that time stating that she and accused were married, and evidence of her declarations to the same effect when accused was arrested and it was first brought to her attention that the marriage was a nullity, was admissible. *Wilkerson v. State*, 60 Tex. Cr. App. 388, 131 S. W. 1108.

That Defendant Was a Married Man.—In a prosecution for rape committed on a female under the age of consent, evidence that accused at the time the offense was committed was a married man was admissible. It was a circumstance tending to show the nature and character of his relations, and that by the attentions, gifts and general conduct it was his purpose to seduce the prosecutrix. In *Smith v. State*, 44 Tex. Cr. App. 137, 68 S. W. 995, and *Jenkins v. State*, 60 Tex. Cr. App. 236, 131 S. W. 542, it was held that such evidence was inadmissible. The court, however, distinguishes these cases on the ground that in both of those cases the fact of the intercourse was abundantly proven by positive evidence in fact was ad-

mitted, while in this case the fact of intercourse rested upon the testimony of the prosecutrix, and was positively denied by appellant. *Battles v. State* (Cr. App.), 140 S. W. 783.

The state may show that accused was at the time of his courtship with prosecutrix, and at the time of the alleged marriage, married to another woman, as bearing on his desire to have the marriage with prosecutrix kept secret, and to explain her conduct in leaving home to marry accused without notifying her parents. *Wilkerson v. State*, 60 Tex. Cr. App. 388, 131 S. W. 1108.

That Accused Was Stepfather of Prosecutrix.—On a prosecution for rape on a female under fifteen years of age it was competent to show that defendant was her stepfather. *Barra v. State*, 50 Tex. Cr. App. 359, 97 S. W. 94.

That Accused Had Children and His Conduct Toward Them.—The state, on a trial for rape by means of a sham marriage, may not show that accused, who had a legal wife, had children with his legal wife, and his conduct toward them, because serving only to incense the jury against him. *Wilkerson v. State*, 60 Tex. Cr. App. 388, 131 S. W. 1108.

j. Identity, Presence and Acts of Accused.

Evidence of Third Party That Prosecutrix Picked Out and Identified Accused.—On a trial for assault with intent to rape, it is not competent to prove by a third party witness, as original evidence, that on the day of the assault the prosecutrix had picked out and identified the defendant from a party of four men who were made to stand in a row, that she might examine and select the guilty one. Such evidence is not admissible as original evidence, and it is only competent in rebuttal, after there has been an attempt to impeach the prosecutrix by showing that she had charged some other person

than defendant with the crime, or that her testimony was recently fabricated, or that she had testified under the influence of improper motives. Such evidence does not become admissible on account of the fact that, on cross-examination, it was attempted to be proved by the prosecutrix that she was mistaken as to the identity of the party, nor does it become admissible from the fact that defendant had attempted to show by his evidence that the prosecutrix was assaulted by some other party. *Clark v. State*, 39 Tex. Cr. App. 152, 45 S. W. 696, following *Reddick v. State*, 35 Tex. Cr. App. 463, 34 S. W. 274, which overrules *Bruce v. State*, 31 Tex. Cr. App. 590, 21 S. W. 681, in so far as the contrary doctrine is expressed.

Clothes Worn by Accused.—In a prosecution for attempt to commit rape, where the evidence showed that accused had on a white hat at the time, the state could prove the color of the hat he had on at the examining trial, and that during that trial he exchanged the white hat for a black one. *Holloway v. State*, 54 Tex. Cr. App. 465, 113 S. W. 928.

In a prosecution for attempt to commit rape, where the evidence showed accused had on a white hat at the time, testimony that the witness noticed accused had on a white hat on the day of the examining trial, and that when he alighted from the train witness remarked, "There he is now, with the same white hat he had on the night of the offense," was highly prejudicial and inadmissible, as *res inter alios acta*. *Holloway v. State*, 54 Tex. Cr. App. 465, 113 S. W. 928.

Circumstances Fixing Identity in Mind of Prosecutrix.—A prosecutrix was properly allowed to testify that when she saw accused, a negro, as she was walking through a lane where the offense was alleged to have been committed, he was stooping down as though at work on the fence. Held,

that it was not error to admit her testimony to the effect that she thought he was working on the fence. *Oxsheer v. State*, 38 Tex. Cr. App. 499, 43 S. W. 335.

Absence of Strangers as Fixing Identity.—Where the prosecutrix had stated that she was assaulted by a negro, but had been unable to identify defendant, evidence that there was no strange negro in the county was not admissible as tending to identify defendant as the guilty person. *Oxsheer v. State*, 43 S. W. 335, 38 Tex. Cr. App. 499.

Assault by Husband of Prosecutrix on Accused.—On a prosecution for rape, evidence that the husband of the prosecutrix assaulted defendant shortly after the alleged outrage was not admissible as tending to show that the husband believed that he had found the man who committed the offense. *Wells v. State*, 67 S. W. 1020, 43 Tex. Cr. App. 451.

Explanation of Why Witness Failed to Identify Accused in Jail.—In a trial for rape, there is no error in permitting a witness to testify why he told the sheriff he did not identify defendant as the guilty party while in jail for the purpose of doing so. *Bruce v. State*, 31 Tex. Cr. App. 590, 593, 21 S. W. 681.

Proof of Identity by Complaints and Statements of Prosecutrix.—In cases of rape, the identity of the accused can not be proved by a statement of the prosecutrix, nor can it by this means be shown who committed the offense. *Castillo v. State*, 31 Tex. Cr. App. 145, 150, 19 S. W. 892.

When Statements Res Gestæ.—In a trial for an assault with intent to rape, the name of the assailant may be proved by complaints of the injured female only when such complaints constitute part of the *res gestæ*. *Sentell v. State*, 34 Tex. Cr. App. 260, 263, 30 S. W. 226. See post, "Complaints and Declarations of Female," II, B, 2, 1.

k. Incriminating Circumstances.

Flight of Accused on Appearance of Father of Prosecutrix.—In a prosecution for attempt to commit rape, evidence that the morning after the alleged attempt accused and another were approaching the house of prosecutrix's father, and when they saw him come out in the yard with a gun they turned and rapidly rode away, was admissible to show guilty knowledge, though it had not been shown that accused or his companion knew the person with the gun, or that he was prosecutrix's father. *Holloway v. State*, 54 Tex. Cr. App. 465, 113 S. W. 928.

That accused and his companion did not know the relationship between the person with the gun and prosecutrix only went to the weight of the evidence, and not to its admissibility. *Holloway v. State*, 54 Tex. Cr. App. 465, 113 S. W. 928.

Cause of Flight.—Where the state on a trial for an assault to rape, proved the flight of defendant as a circumstance against him, it was error to exclude testimony that the flight was due to another cause. *Lewallen v. State*, 33 Tex. Cr. App. 412, 414, 26 S. W. 832.

Condition of Ground Where Offense Committed.—On a prosecution for rape, where there was evidence that there had been a struggle between prosecutrix and accused, it was proper to admit evidence as to the condition of the ground at the scene of the alleged crime on the next day. *Tyler v. State*, 79 S. W. 558, 46 Tex. Cr. App. 10.

Remarks of Accused Concerning Probability of Offense at Place Alleged.

—Where, on a prosecution for rape, prosecutrix testified that the offense was committed under a certain tree, it was not error to admit the testimony of a witness that while he and accused were passing the tree accused pointed to it, and said, "Do you suppose any girl was ever f—d under that tree?"

Ricks v. State, 87 S. W. 345, 48 Tex. Cr. App. 229.

That Accused Is Father of the Child.—The prosecutrix may testify that the defendant is the father of the baby which she claims is the fruit of the transaction. *Whitehead v. State*, 61 Tex. Cr. App. 558, 137 S. W. 356.

Actions of Others with Defendant Immediately before Offense.—In a prosecution for rape, where it was shown that defendant and another man had been together, talking to each other, before defendant went to the room of prosecutrix, evidence of the actions of the other man and the woman that he was with at that time was admissible. *Simpson v. State*, 77 S. W. 819, 45 Tex. Cr. App. 320.

Promise of Gift by Defendant to Third Party Wishing to Marry Prosecutrix.—In a prosecution for rape, testimony of the prosecutrix that H. made her a proposition of marriage without having made love to her, and that defendant had made a statement in her presence that when H. married defendant would give him the best span of mules he had, was inadmissible; no connection being shown between defendant and H. in regard to the matter. *Shults v. State*, 91 S. W. 786, 49 Tex. Cr. App. 351.

Conversation Relative to Marriage Subsequent to Offense.—In a prosecution for rape, it was error to admit a conversation relative to marriage, had between prosecutrix and defendant subsequent to the commission of the alleged crime. *Smith v. State* (Cr. App.), 73 S. W. 401.

Directions by Accused as to Means to Prevent Conception.—It was proper to permit the state to prove what defendant said to her after the completion of the offense as to the means that she should take to prevent conception. *Smith v. State*, 52 Tex. Cr. App. 344, 106 S. W. 1161.

Going Together to Room in Hotel.—In an appeal from a conviction of a

trial for rape by means of a sham marriage, a bill of exceptions showed that a witness stated that he knew defendant, and that he saw "them" going to a certain hotel, and that later he saw defendant there in a room with a woman. The court refused to allow defendant to show that witness did not recognize the woman. Held not error, since there was nothing therein to show that "them" included the prosecutrix. *Lee v. State*, 72 S. W. 1005, 61 L. R. A. 904, 44 Tex. Cr. App. 354.

Endeavor to Seduce Others to Have Intercourse with Prosecutrix.—In a prosecution for rape, evidence that, in the winter or spring preceding the birth of prosecutrix's baby, accused proposed to furnish witness a woman with whom he could have intercourse, but refused to divulge her name unless the witness would have intercourse with her, was inadmissible. *Shults v. State*, 91 S. W. 786, 49 Tex. Cr. App. 351.

Where Prosecutrix under Age of Consent.—In a prosecution for rape on a girl under fifteen years with her consent, the state's testimony that about August 2d after the act of intercourse alleged, and which occurred about June 1st, the prosecuting witness and a third party were married pursuant to an agreement between herself and defendant, and after such marriage the third party abandoned her pursuant to the agreement and turned her over to defendant, and thereafter for some time and in different counties she and defendant lived together as man and wife, was inadmissible where the act of intercourse alleged was admitted by defendant. *Smith v. State*, 68 S. W. 995, 44 Tex. Cr. App. 137, 100 Am. St. Rep. 849.

1. Complaints and Declarations of Female.

(1) General Rule.

In a trial for an assault with intent to rape, the fact that complaint of the

outrage was made by the injured female, is admissible in evidence, and the length of time intervening between the assault and complaints affects the weight, but not the admissibility, of such evidence. *Sentell v. State*, 34 Tex. Cr. App. 260, 262, 30 S. W. 226; *Adams v. State*, 52 Tex. Cr. App. 13, 105 S. W. 197; *Roberson v. State* (Cr. App.), 49 S. W. 398; *Reddick v. State*, 35 Tex. Cr. App. 463, 468, 34 S. W. 274; *Thompson v. State*, 33 Tex. Cr. App. 472, 475, 26 S. W. 987.

When the appearance of prosecutrix's clothes and her person excite remark, if she is merely asked what is the matter and then makes her complaint, it would be admissible; and the fact that she was asked the question and made the statement in reply thereto would go to the weight, and not to the admissibility, of the testimony. *Conger v. State* (Cr. App.), 140 S. W. 1112.

On a trial for an assault with intent to rape, it is not error to admit proof that on the day after defendant was put in jail prosecuting witness signed a statement written by the county attorney, where such statement was not introduced. *Callison v. State*, 37 Tex. Cr. App. 211, 216, 39 S. W. 300.

(2) Particulars and Details.

See ante, "Identity, Presence and Acts of Accused," II. B, 2, j.

Proof of particulars of recent complaint by the injured female, and a detailed statement of the alleged facts and circumstances connected with it, can not be admitted as the original evidence to prove the truth of the statements testified to by the injured party, or to establish the charge made against accused party, but their admissibility on behalf of the state is limited to the purpose, in rebuttal, of supporting the veracity and accuracy of testimony of the prosecuting witness. *Lawson v. State*, 17 Tex. Cr. App. 292, 303; *Castillo v. State*, 31 Tex. Cr. App. 145, 19 S. W. 892; *Johnson v. State*, 21 Tex.

Cr. App. 366, 17 S. W. 252; *Kearse v. State* (Cr. App.), 88 S. W. 363.

In a prosecution for rape, evidence of the details of the statement made by prosecutrix to her mother, to the effect that accused had done her very wrong, no further details being given, and the circumstances and reasons for the disclosure, which had been for some time withheld, was admissible. *Bader v. State*, 57 Tex. Cr. App. 293, 122 S. W. 555.

A witness for the state on a prosecution for assault with intent to rape can testify that shortly after the assault he saw the prosecutrix, and that she appeared to have been crying, and was greatly excited, and told him that defendant had insulted her; and that defendant, upon discovering them passing, followed, and demanded that she be left at his house, where she had been previously living with his family. *Sentell v. State*, 34 Tex. Cr. App. 260, 30 S. W. 226.

In a rape case, original evidence by the state of complaint by the prosecutrix must be strictly limited to the facts that complaint was made, when, where, and to whom it was made, and that she accused some one, who must not be named, of the offense, excluding all evidence of the particulars of such complaint. *Reddick v. State*, 35 Tex. Cr. App. 463, 34 S. W. 274, 60 Am. St. Rep. 56, overruling *Bruce v. State*, 31 Tex. Cr. App. 590, 21 S. W. 681.

Evidence That Prosecutrix Stated Accused Was Innocent.—Where accused's witness had testified that prosecutrix had said that accused had never attempted to rape her, a witness for the state could give a detailed account of the supposed assault, as related to him by prosecutrix. *Cox v. State* (Cr. App.), 44 S. W. 157.

On Cross-Examination.—A person to whom complaint has been made by the victim of a rape or of an attempt to ravish can not repeat at the trial all the details of the outrage as reported,

but can testify only to the fact of a complaint having been made, and to the condition of the victim when making it, but defendant may bring out the details on cross-examination, and they may also be given to corroborate the prosecutrix when her testimony has been impeached. *Pefferling v. State*, 40 Tex. 486; *Holst v. State*, 23 Tex. Cr. App. 1, 3 S. W. 757, 59 Am. Rep. 770.

Where Statements Are Res Gestæ.—

Where a statement of prosecutrix in a rape case is res gestæ, it is original primary testimony and can be introduced as such, but when not res gestæ, such statement can only be used as sustaining or corroborative evidence. *Castillo v. State*, 31 Tex. Cr. App. 145, 151, 19 S. W. 892; *Price v. State*, 35 Tex. Cr. App. 501, 503, 34 S. W. 622; *Lemons v. State*, 59 Tex. Cr. App. 299, 128 S. W. 416, 421; *Wells v. State*, 43 Tex. Cr. App. 451, 67 S. W. 1020; *Caudle v. State*, 34 Tex. Cr. App. 26, 28 S. W. 810.

Evidence as to statements of prosecutrix in a trial for rape is admissible only where such statements were contemporaneous with, and illustrative of, the assault; hence, evidence of particulars of complaint made to prosecutrix's mother on the day after the assault is inadmissible. *McGee v. State*, 21 Tex. Cr. App. 670, 671, 2 S. W. 890.

Statements Made Months after Offense.—In a rape trial, prosecutrix's mother could not detail prosecutrix's conduct, statements, and exhibition of feelings made and occurring months after the alleged offense and after defendant's arrest. *Cowles v. State*, 51 Tex. Cr. App. 498, 102 S. W. 1128.

In a prosecution for rape, evidence that the girl told defendant's witness that she left home because her father had ruined her was not admissible as part of res gestæ, nor as showing defendant's motive in taking her from her home to the place where the alleged offense was committed. *Cooksey v. State* (Cr. App.), 58 S. W. 103.

Necessity for Prosecutrix Testifying as Predicate.—

On a prosecution for assault with intent to rape, it is not essential as a predicate for the introduction in evidence of the complaints of the prosecutrix which were clearly res gestæ, that the prosecutrix should have testified or should have been competent to qualify as a witness. *Croomes v. State*, 40 Tex. Cr. App. 672, 51 S. W. 924, 53 S. W. 882.

(3) Failure or Delay in Complaining and Explanation Thereof.

Delay in Complaining.—Delay by a female in making complaint against her ravisher is a fact which sometimes casts strong suspicion upon her evidence against him, but it is a fact which may be explained by the other circumstances of the case, such as her age and helplessness, or his intimidation and brutality. *Sharp v. State*, 15 Tex. Cr. App. 171; *Lawson v. State*, 17 Tex. Cr. App. 292, 303; *Rogers v. State*, 1 Tex. Cr. App. 187; *Thomas v. State* (Cr. App.), 70 S. W. 93; *Ramsey v. State* (Cr. App.), 63 S. W. 875.

On a prosecution for rape, where the alleged injured child made no complaint for several days, and testimony of the child herself is mainly relied on for conviction, the state should adduce all the evidence in its reach as to the medical examination of the child, etc., after the alleged rape. *Montresser v. State*, 19 Tex. Cr. App. 281, 293.

Explanation of Delay.—Terrorization and subjection of prosecuting witness to defendant's will by long course of threats and violence sufficiently explains her delay in disclosing the rape. *Sharp v. State*, 15 Tex. Cr. App. 171, 189.

In a prosecution for assault with intent to rape, committed while prosecutrix and her escort were going home at night in a buggy, in which accused attempted to discredit prosecutrix by showing that she did not make an outcry immediately after the assault, and by contradictory statements made by

her as to how she was injured, testimony was admissible for the state that while prosecutrix and her escort were going home after the assault the latter advised her not to tell her father thereof for the reason that she might be injured by accused, and that for that reason prosecutrix remained silent and made contradictory statements as to the offense. *Ross v. State*, 60 Tex. Cr. App. 547, 132 S. W. 793.

Threats by Accused to Kill Prosecutrix.—Though the complaining witness in a rape case delayed for about ten days to tell her mother and husband, a stepson of accused, in view of threats which she testified accused made to kill her and her husband if she told of his conduct, considered with her relation to him, testimony as to her statement that accused had assaulted her was admissible. *Pettus v. State*, 58 Tex. Cr. App. 546, 126 S. W. 868.

Fear of Being Whipped by Defendant.—On a prosecution for rape on defendant's minor daughter, it was proper to permit the state to show that prosecutrix did not make any outcry at the time of the crime because she was afraid that defendant would whip her. *Smith v. State*, 52 Tex. Cr. App. 344, 106 S. W. 1161.

Orders of Husband Not to Come Alone Across Fields to Him.—Where, in a prosecution for rape, alleged to have been committed about 10 o'clock in the morning, when prosecutrix's husband was in a field three-quarters of a mile from the scene, prosecutrix testified that she did not inform her husband until about dark of the same day, she was properly permitted to testify that she did not inform her husband sooner for the reason that he had told her not to come out into the field alone. *Salazar v. State*, 55 Tex. Cr. App. 307, 116 S. W. 819.

3. Weight and Sufficiency.

a. In General.

Where, upon an indictment for rape,

the testimony of the prosecuting witness is in many points in conflict with that contained in her written statement made at the examining trial of accused before a justice of the peace, a conviction will be set aside. *Dickey v. State*, 21 Tex. Cr. App. 430, 2 S. W. 809.

Where witnesses stated positively that the girl ravished was over fourteen years old, and others were of the opinion that she was only ten, a new trial ought to have been granted. (Paschal's Dig., art. 2189.) *Clark v. State*, 30 Tex. 448.

Evidence Should Be Direct on Question of Prosecutrix Being Wife of Accused.—In a prosecution for rape proof that prosecutrix was not the wife of defendant should be made by direct evidence. *Smith v. State*, 44 Tex. Cr. App. 137, 68 S. W. 995.

Evidence Sufficient to Show Prosecutrix Not Wife of Defendant.—In a prosecution for rape, evidence that the prosecutrix was known by her own name, that she lived with her parents, that she was about fifteen years of age, that plaintiff had carnal intercourse with her, that she went with accused and his wife to K., and that accused tried to induce her to leave the state with him and live with him as his wife, was sufficient to show that prosecutrix was not accused's wife. *Gent v. State*, 57 Tex. Cr. App. 414, 123 S. W. 594; *Munger v. State*, 57 Tex. Cr. App. 384, 122 S. W. 874.

Evidence Sufficient to Show Defendant Seventeen Years of Age.—Several witnesses testified that defendant, who committed a rape in August, 1892, was given to one S. in August, 1882, and that he then appeared to be about five or six years old. His mother testified that he was born in 1877, another witness that he was born in 1874, and another that in 1877 defendant appeared to be four years old. Held to sustain a verdict that defendant was seventeen years old when he committed the

crime. *Wilcox v. State*, 33 Tex. Cr. App. 392, 26 S. W. 989.

Instances Where Evidence Held Sufficient to Support a Conviction for Rape.—*Smith v. State* (Cr. App.), 140 S. W. 1096; *Conger v. State* (Cr. App.), 140 S. W. 1112; *Whitehead v. State*, 61 Tex. Cr. App. 558, 137 S. W. 356; *Cole v. State*, 57 Tex. Cr. App. 51, 123 S. W. 409; *Jaureque v. State*, 55 Tex. Cr. App. 221, 116 S. W. 809; *Dies v. State*, 56 Tex. Cr. App. 32, 117 S. W. 979; *Pierce v. State*, 54 Tex. Cr. App. 424, 113 S. W. 148; *Rusk v. State*, 53 Tex. Cr. App. 338, 110 S. W. 58; *Brown v. State*, 52 Tex. Cr. App. 267, 106 S. W. 368; *Cowles v. State*, 51 Tex. Cr. App. 498, 102 S. W. 1128; *Fitzgerald v. State*, 20 Tex. Cr. App. 281; *Sawyer v. State*, 39 Tex. Cr. App. 557, 47 S. W. 650; *Thomas v. State*, 47 Tex. Cr. App. 534, 84 S. W. 823; *Ricks v. State*, 48 Tex. Cr. App. 229, 87 S. W. 345; *Young v. State*, 49 Tex. Cr. App. 434, 93 S. W. 743; *Thompson v. State*, 45 Tex. Cr. App. 397, 77 S. W. 449; *Dove v. State*, 36 Tex. Cr. App. 105, 108, 35 S. W. 648; *Rodgers v. State*, 34 Tex. Cr. App. 612, 613, 31 S. W. 650; *Ledbetter v. State*, 33 Tex. Cr. App. 400, 406, 26 S. W. 725; *Nichols v. State*, 32 Tex. Cr. App. 391, 401, 23 S. W. 680; *Grate v. State*, 23 Tex. Cr. App. 458, 5 S. W. 245; *Cooper v. State*, 22 Tex. Cr. App. 419, 3 S. W. 334; *Wilson v. State*, 17 Tex. Cr. App. 525; *Cornelius v. State*, 13 Tex. Cr. App. 349; *Burk v. State*, 8 Tex. Cr. App. 336, 343.

Instances Where Evidence Held Insufficient to Support a Conviction for Rape.—The testimony of the alleged injured female was to the effect that, about a year before the particular offense alleged in the indictment, the defendant, who was her step-father, compelled her to enter a dug-out in the field, and there submit to his carnal passion, and that, during every absence of his wife, the witness' mother, and her step-brother, at church, he had compulsory carnal intercourse with

her, afflicting her with syphilis soon after commencing his enforced cohabitation with her. The defense proved that defendant's wife never left the girl at home with defendant when she went to church. Physicians testified that examination of the defendant's organ demonstrated that he had never had syphilis, and that a man could not impart that disease to a woman unless he was afflicted with it himself. Held, that the evidence was not sufficient to sustain a verdict of guilty. *Nicholas v. State*, 23 Tex. Cr. App. 317, 5 S. W. 239.

Evidence that defendant and prosecutrix were together in the room with her parents, two grown sisters, a brother, and two men on the night that the act was committed; that prosecutrix was heard to remonstrate several times, while defendant insisted; that the next morning defendant and prosecutrix were on the bed together; that about a week later she told one, not akin to her, of the affair; that she was at the time the mother of a bastard; and that the prosecutrix, her parents, and sister had made affidavits that no rape was committed—is insufficient to support a conviction of rape. *Hooker v. State*, 29 Tex. Cr. App. 327, 15 S. W. 285; *Ex parte Black*, 55 Tex. Cr. App. 121, 113 S. W. 534; *Baldrige v. State*, 45 Tex. Cr. App. 193, 74 S. W. 916; *Adkins v. State* (Cr. App.), 65 S. W. 924; *Contra*, see *Tittle v. State* (Cr. App.), 38 S. W. 202; *Ship v. State* (Cr. App.), 45 S. W. 909; *Arnett v. State*, 40 Tex. Cr. App. 617, 51 S. W. 385; *Rushing v. State* (Cr. App.), 80 S. W. 527; *Elliott v. State*, 49 Tex. Cr. App. 435, 93 S. W. 742; *Alcorn v. State* (Cr. App.), 94 S. W. 468; *Perez v. State*, 50 Tex. Cr. App. 34, 94 S. W. 1036; *Edmondson v. State* (Cr. App.), 44 S. W. 154; *Kennon v. State* (Cr. App.), 42 S. W. 376; *Parnell v. State* (Cr. App.), 42 S. W. 563; *Bozman v. State*, 34 Tex. Cr. App. 503, 507, 31 S. W. 389; *Thompson v. State*,

33 Tex. Cr. App. 472, 475, 26 S. W. 987; *West v. State* (Cr. App.), 21 S. W. 686; *Rhem v. State*, 29 Tex. Cr. App. 509, 521, 16 S. W. 338; *Baldwin v. State*, 15 Tex. Cr. App. 275; *Lawson v. State*, 17 Tex. Cr. App. 292, 305.

b. Corpus Delicti.

In a prosecution for rape, where the prosecutrix was fourteen years old, and defendant's confession was corroborated by proof that he and prosecutrix had slept together as man and wife, that they were subsequently married and that she was expecting to be confined on any day at the time of the trial, which was within four days over the period of gestation from the date of the alleged offense, the evidence is sufficient to establish the corpus delicti. *Austin v. State*, 51 Tex. Cr. App. 327, 101 S. W. 1162.

In a trial for rape, there was evidence that the prosecutrix was mentally incapable of resisting the act of carnal knowledge, that she was enceinte, that defendant had confessed to having had intercourse with her, and that he had had opportunity therefor. Held, that the corpus delicti was sufficiently shown. *Fredericson v. State*, 70 S. W. 754, 44 Tex. Cr. App. 288.

c. Carnal Knowledge.

See ante, "Carnal Knowledge," I, F.

Vague and uncertain proof of penetration will not sustain a conviction for rape. *Baldwin v. State*, 15 Tex. Cr. App. 275, 286; *Davis v. State*, 43 Tex. 189.

To warrant a conviction for rape, penetration must be proved beyond a reasonable doubt; but it may be proved by circumstantial evidence, where defendant, before committing the crime, has reduced his victim to insensibility by blows. *Word v. State*, 12 Tex. Cr. App. 174.

Where the prosecutrix testified that defendant had carnal intercourse with her and was the father of her child, a

verdict convicting defendant of rape will not be reversed on the ground that there was no evidence of penetration. *Duckworth v. State* (Cr. App.), 63 S. W. 874.

A conviction for rape will be reversed, for failure to prove penetration, where the prosecutrix subsequently denies her testimony, and stated that defendant did not have carnal intercourse with her, and there was no other evidence of penetration. *Blair v. State* (Cr. App.), 56 S. W. 622.

d. Force, Nonconsent and Resistance.

See ante, "Force," I, E; "Want of Consent of Female," I, G; "Resistance of Female," I, H.

Where accused admits carnal intercourse and that he was armed with a pistol, but claims the act was with prosecutrix's consent, and she denies such claim, and states that she submitted through fear, a conviction for rape will not be disturbed. *Myers v. State* (Cr. App.), 62 S. W. 750.

The evidence showed that defendant, who was sleeping in the same room with prosecutrix, went to the bed on which she, with her husband and two children, lay, and had intercourse with her, and she, awaking, and believing him to be her husband, made no resistance, defendant not having used any stratagem to induce her to believe that he was her husband, but that she made an outcry immediately on discovering her mistake, when he left the bed. Defendant said that he was awakened by her, and recognized her by the light of the moon, and that the act was done with her knowledge and consent. He denied prior familiarity and fear of her husband if caught. There was no moon on the night in question. Held, that the conviction would not be reversed. *Payne v. State*, 49 S. W. 604, 40 Tex. Cr. App. 202, 76 Am. St. Rep. 712.

In a rape case, evidence as to force held sufficient to go to the jury. *Cole*

v. State, 57 Tex. Cr. App. 51, 123 S. W. 409.

Fraud.—Evidence held insufficient to sustain a conviction of rape by fraud, as there was no showing of any trick, device, or stratagem practiced by defendant to induce prosecutrix to believe that he was her husband. *Huffman v. State*, 80 S. W. 625, 46 Tex. Cr. App. 428.

e. Failure to Complain or Make Outcry, and Delay in Complaining.

Where the prosecutrix in a rape case remains silent for three months after the alleged rape was committed, the circumstance is deemed to lessen the credit to be given her testimony. *Topolanck v. State*, 40 Tex. 160; *Price v. State*, 36 Tex. Cr. App. 143, 145, 35 S. W. 988; *Tittle v. State* (Cr. App.), 38 S. W. 202, 203.

In order to sustain a prosecution for rape, it is not necessary that the prosecutrix should have at once made complaint, and her failure to complain until two months after the outrage goes only to the weight of her testimony. *Hill v. State* (Cr. App.), 77 S. W. 808.

A conviction for rape on the uncorroborated testimony of the prosecutrix alone can not be sustained, where it appears that she went riding with defendant a few days after the alleged crime, and made no complaint to any one until her condition became noticeable, some seven months afterwards, the only excuse for her long silence being an alleged threat by defendant to kill her father in case she told. *Price v. State*, 36 Tex. Cr. App. 143, 35 S. W. 988.

Where the sole witness for the state is the prosecutrix, and her evidence shows that defendant drove her in his buggy through a village, meeting a number of people, before he took her to the woods, where they had intercourse; that she made no outcry on the way, although she knew his intention; and that she made no complaint

for several weeks after the event—the evidence is not sufficient to sustain a conviction. *Kennon v. State* (Cr. App.), 42 S. W. 376.

Prosecutrix testified that the act was committed in a room adjoining her mother's, and that after defendant left she went into her mother's room, and spent the rest of the night. She did not inform her mother of the outrage, nor was she corroborated as to staying in her mother's room the rest of the night. When her child was born, she told her mother that defendant was its father, but did not charge him with rape. Her explanation of her silence as to the alleged crime was that defendant threatened to kill her if she made complaint. Held, that a conviction should be set aside. *Thompson v. State*, 33 Tex. Cr. App. 472, 26 S. W. 987.

f. Incapacity to Consent.

See ante, "Incapacity to Consent," I, G, 4.

In a prosecution for a rape, when the state introduces prosecutrix as a witness, it vouches for her mental competency at the time the crime occurred. *Thompson v. State*, 33 Tex. Cr. App. 472, 26 S. W. 987.

Prosecutrix testified that she fought defendant with her hands, and that she made no outcry, because he had his hand on her throat. A physician testified that he had known her four years; that she had not the will power to oppose carnal intercourse; that, when she was "cool and quiet," she had very good sense, and, when excited, very little. Held not to show that she was so mentally diseased as to have no will to oppose the act. *Thompson v. State*, 33 Tex. Cr. App. 472, 26 S. W. 987.

Witnesses in a prosecution for rape testified that they considered the prosecutrix of weak mind, but their opinions were based on certain eccentricities. It appeared that she had charge of the other children in the family, and made contracts for their hire, and kept ac-

count of their wages; that she planned the occasion for the act, and selected a night when she would be alone at the house; and, further that she prepared herself, and went away with the defendant. Held, that such evidence did not show the prosecutrix to be insane or deprived of her will power to resist the act of carnal knowledge, so as to make defendant guilty of rape. *Lee v. State*, 64 S. W. 1047, 43 Tex. Cr. App. 285.

g. Identity of Accused.

In a rape case, wherein the prosecuting witness positively identified defendant as the person who committed the outrage on her, and her testimony is corroborated by the testimony of other witnesses, a judgment of conviction will not be disturbed. *Dove v. State*, 36 Tex. Cr. App. 105, 35 S. W. 648.

In a prosecution for rape, evidence as to the identification of defendant examined, and held to sustain a conviction. *Boyd v. State*, 94 S. W. 1053, 50 Tex. Cr. App. 138.

h. Female under Age of Consent.

An instruction, in a prosecution for rape, that, to convict, the jury must believe beyond a reasonable doubt that defendant was not the wife of appellant, and was under the age of consent, held correct. *Gonzales v. State* (Cr. App.), 62 S. W. 1060.

On a trial for rape of a female under the age of fifteen years, evidence held not to show a common-law marriage between the parties. *Wofford v. State*, 60 Tex. Cr. App. 624, 132 S. W. 929.

Evidence Held Sufficient to Support Conviction.—In a prosecution for rape on a female under the age of consent, evidence held to sustain a conviction. *Battles v. State* (Cr. App.), 140 S. W. 783; *Freeney v. State* (Cr. App.), 102 S. W. 113; *Price v. State*, 44 Tex. Cr. App. 304, 70 S. W. 966; *Henard v. State*, 47 Tex. Cr. App. 168, 82 S. W. 655; *Bartlett v. State* (Cr. App.), 51 S. W. 918.

Evidence Held Insufficient to Support Conviction.—Evidence held insufficient to sustain a conviction of statutory rape. *Donoghue v. State* (Cr. App.), 79 S. W. 309; *Kee v. State* (Cr. App.), 65 S. W. 517; *Parnell v. State* (Cr. App.), 42 S. W. 563.

Evidence Held Sufficient That Prosecutrix under Age of Consent.—Evidence, in a trial for the rape of a female under the age of consent, held sufficient to show that she was under fifteen years of age. *Blackwell v. State*, 51 Tex. Cr. App. 24, 100 S. W. 774; *Curry v. State*, 50 Tex. Cr. App. 158, 94 S. W. 1058.

Evidence Insufficient to Show Prosecutrix under Age of Consent.—Both the father and mother of prosecutrix testified that she was not twelve years old, but that they did not know what her age was, and neither of them could state the year in which she was born. One physician testified that from her appearance and development he thought she was not twelve years old, and another that in his opinion she was ten or twelve or more. Held, that the evidence did not show beyond a reasonable doubt that she was under twelve years of age. *Lawrence v. State*, 35 Tex. Cr. App. 114, 32 S. W. 539; *Duckworth v. State*, 42 Tex. Cr. App. 74, 57 S. W. 665.

Carnal Knowledge.—Medical testimony should be had in investigations of cases of rape upon a female under ten years; an examination of the injured party should be had; and every source of knowledge of the fact explored. *Davis v. State*, 42 Tex. 226.

i. Attempt or Assault with Intent to Rape.

(1) Attempt.

Defendant seized prosecutrix and took her down a river bank against her will and over her protest; and when found there, later, the girl was on her back, with her clothes up, and he lying by her side, with his pants

entirely unbuttoned. Held, that the evidence did not show an attempt to rape; the offense being either rape, or an assault with intent to rape. *Taylor v. State*, 69 S. W. 149, 44 Tex. Cr. App. 153.

Evidence that defendant, knowing that the husband of prosecutrix was absent, went to her home, and entered her bedroom, at night, and that, on her asking if it was her husband, he answered, "Yes;" that she recognized him, and told him to get out; but that he got in bed with her, and caught hold of her—will support a conviction for an attempt to rape by fraud. *Franklin v. State*, 34 Tex. Cr. App. 203, 29 S. W. 1088.

A conviction of an attempt to rape is not sustained by evidence that defendant was seen lying on a little girl several minutes, where the girl, who was defendant's sister, eight years of age, denied that there was any improper conduct by defendant, and an examination of her parts and clothing on the day of the alleged offense disclosed no evidence of an attempted rape. *Bozeman v. State*, 34 Tex. Cr. App. 503, 31 S. W. 389. See, also, *Dina v. State*, 46 Tex. Cr. App. 402, 78 S. W. 229.

Evidence held sufficient to support a conviction of an attempt to rape. *Railsback v. State*, 53 Tex. Cr. App. 542, 110 S. W. 916.

(2) Assault with Intent to Rape.

A conviction for assault with intent to rape is not supported by evidence showing an attempt to rape by fraud. *Milton v. State*, 23 Tex. Cr. App. 204, 4 S. W. 574.

A conviction of an assault with intent to commit rape is not supported by evidence showing a mere possibility of the existence of the criminal intent. *House v. State*, 9 Tex. Cr. App. 567.

Evidence Held Sufficient to Sustain a Conviction of Attempt or Assault with Intent to Rape.—*White v. State*, 60 Tex. Cr. App. 559, 132 S. W. 790; *Ross*

v. State, 60 Tex. Cr. App. 547, 132 S. W. 793; *Washington v. State*, 51 Tex. Cr. App. 542, 103 S. W. 879; *Bourland v. State*, 49 Tex. Cr. App. 197, 93 S. W. 115; *Berry v. State*, 44 Tex. Cr. App. 395, 72 S. W. 170; *Castle v. State*, 49 Tex. Cr. App. 1, 90 S. W. 32; *Perkins v. State* (Cr. App.), 80 S. W. 619; *Riddling v. State* (Cr. App.), 77 S. W. 805; *Wilson v. State* (Cr. App.), 73 S. W. 16; *Edwards v. State*, 37 Tex. Cr. App. 242, 38 S. W. 996, 39 S. W. 368; *Franklin v. State*, 34 Tex. Cr. App. 203, 213, 29 S. W. 1088; *Shepard v. State*, 34 Tex. Cr. App. 35, 28 S. W. 816; *Crew v. State* (Cr. App.), 22 S. W. 973; *Grimmett v. State*, 22 Tex. Cr. App. 36, 2 S. W. 631; *Doyle v. State*, 5 Tex. Cr. App. 442; *Dibrell v. State*, 3 Tex. Cr. App. 456; *McCleavland v. State*, 24 Tex. Cr. App. 202, 5 S. W. 664; *Outlaw v. State*, 35 Tex. 481, 482.

Evidence Held Insufficient to Sustain a Conviction of Attempt or Assault with Intent to Rape.—*Blair v. State*, 60 Tex. Cr. App. 363, 132 S. W. 358; *Eiley v. State*, 55 Tex. Cr. App. 1, 114 S. W. 793; *Collins v. State*, 52 Tex. Cr. App. 455, 107 S. W. 852; *Warren v. State*, 51 Tex. Cr. App. 598, 103 S. W. 888; *Scott v. State*, 51 Tex. Cr. App. 5, 100 S. W. 159; *Marthall v. State*, 34 Tex. Cr. App. 22, 36 S. W. 1062; *Laco v. State* (Cr. App.), 38 S. W. 176; *Clark v. State*, 39 Tex. Cr. App. 152, 45 S. W. 696; *Hancock v. State* (Cr. App.), 47 S. W. 465; *Graybill v. State*, 41 Tex. Cr. App. 286, 53 S. W. 851; *Wood v. State* (Cr. App.), 61 S. W. 308; *Sirmons v. State*, 44 Tex. Cr. App. 488, 72 S. W. 395; *Coffee v. State* (Cr. App.), 76 S. W. 761; *Caddell v. State*, 44 Tex. Cr. App. 213, 70 S. W. 91; *Draper v. State* (Cr. App.), 57 S. W. 655; *Mathews v. State*, 34 Tex. Cr. App. 479, 31 S. W. 381; *Steinke v. State*, 33 Tex. Cr. App. 65, 67, 24 S. W. 909, 25 S. W. 287; *Fields v. State* (Cr. App.), 24 S. W. 907; *Elam v. State* (Cr. App.), 20 S. W. 710; *Power v. State*, 30 Tex. Cr. App. 662, 663, 18 S. W. 552; *Rob-*

bertson *v.* State, 30 Tex. Cr. App. 498, 17 S. W. 1068; Carroll *v.* State, 24 Tex. Cr. App. 366, 368, 6 S. W. 190; Moore *v.* State, 20 Tex. Cr. App. 275; Jones *v.* State, 18 Tex. Cr. App. 485, 489; Johnson *v.* State, 17 Tex. Cr. App. 565; Sanford *v.* State, 12 Tex. Cr. App. 196; House *v.* State, 9 Tex. Cr. App. 53; Irving *v.* State, 9 Tex. Cr. App. 66.

j. Corroboration of Female.

Necessity for.—A conviction of rape may be had on the uncorroborated testimony of prosecutrix. Hill *v.* State (Cr. App.), 77 S. W. 808.

In a prosecution for rape, evidence must be sufficient to satisfy the jury of the guilt of accused, giving him the benefit of doubt as in other cases, and no more than the testimony of injured party is required, whether she be corroborated or not. Goss *v.* State, 40 Tex. 520, 522; Keith *v.* State (Cr. App.), 56 S. W. 628.

Uncorroborated Testimony Should Be Closely Scrutinized.—Where a case of rape rests solely upon the testimony of the prosecutrix, it is the duty of the jury to scrutinize and weigh her testimony very closely. Price *v.* State, 36 Tex. Cr. App. 143, 145, 35 S. W. 988.

As to the question whether or not a conviction for rape can be had on the uncorroborated testimony of the injured female, the rule laid down by Lord Hale obtains in this state, viz.: The party ravished may give evidence upon oath, and is in law a competent witness, but the credibility of her evidence, and how far she is to be believed, must be left to the jury, and is more or less credible according to the circumstances of fact that may concur in that testimony. Gazley *v.* State, 17 Tex. Cr. App. 267.

When Testimony of Suspicious or Doubtful Character.—Courts have been cautious in sustaining convictions for rape upon uncorroborated testimony of prosecutrix only where her evidence

was of a suspicious or doubtful character, which raises the question of fact and not of law. Gonzales *v.* State, 32 Tex. Cr. App. 611, 620, 25 S. W. 781.

A conviction for rape on a girl of nine will be set aside, where the girl's testimony is open to suspicion, is uncorroborated, and apparently was not satisfactory to the jury. Montresser *v.* State, 19 Tex. Cr. App. 281.

Where Prosecutrix Failed to Complain for Several Weeks.—A conviction for rape can not be sustained upon the unsupported testimony of the person injured, who did not divulge the outrage until several weeks after its perpetration. Topolanck *v.* State, 40 Tex. 160.

Sufficiency as to Female under Age of Consent.—In a prosecution for rape on a female under the age of consent, a conviction may be sustained on the victim's uncorroborated testimony. Battles *v.* State (Cr. App.), 140 S. W. 783. See, also, Wallace *v.* State, 48 Tex. Cr. App. 548, 89 S. W. 827.

Pen. Code, art. 633, whereby it is made rape to have intercourse with a female under fifteen years of age, with or without her consent, precludes any guilty participation by the female in the crime; and, though there be many acts, she was not an accomplice, so that the law of accomplice testimony would apply to her evidence. Danley *v.* State, 71 S. W. 958, 44 Tex. Cr. App. 428.

Though there may be a conviction for rape, upon the uncorroborated testimony of the injured female, notwithstanding she be a child under the age of ten years, it is in that respect a case requiring special scrutiny by the jury, and a careful weighing of the evidence, with all remote and near circumstances and probabilities. In all such cases extraordinary effort should be made to secure circumstantial evidence tending to confirm the main witness. Gazley *v.* State, 17 Tex. Cr. App. 267.

In a prosecution for statutory rape,

the prosecutrix testified to the act of intercourse, and that she was under the age of fifteen. Her testimony as to the intercourse was corroborated by the testimony of her little brother and that of defendant; and, as to her age, witnesses testified as to her appearance and size, indicating that she was under the age of fifteen. Held, that the evidence was sufficient to support a conviction. *Rodgers v. State*, 82 S. W. 1041, 47 Tex. Cr. App. 195.

C. LIMITATION OF PROSECUTIONS.

See, generally, the title LIMITATION OF PROSECUTIONS, ante, p. 421.

In Cases of Rape.—A prosecution for rape is barred unless the indictment therefor is presented within one year. *Anschicks v. State*, 6 Tex. Cr. App. 524; *Carr v. State*, 36 Tex. Cr. App. 390, 391, 37 S. W. 426; *Duncan v. State* (Cr. App.), 59 S. W. 267; *Gonzales v. State* (Cr. App.), 62 S. W. 1060.

In Cases of Attempt to Rape.—Code Crim. Proc., art. 197, requires a prosecution for rape to be brought within one year, but fixes no special limitation for the prosecution of attempts to commit rape. Section 199 requires all other felonies to be prosecuted within three years from their commission. Held, that a prosecution for attempt to commit rape comes within the three year limitations and not within the one year limitation applying to the offense of rape. *Moore v. State*, 20 Tex. Cr. App. 275.

In Cases of Assault with Intent to Rape.—One year's limitation for prosecutions for rape does not apply to an assault to rape, which falls under the general three year statute. *Moore v. State*, 20 Tex. Cr. App. 275, 280.

D. TRIAL AND REVIEW.

1. Conduct of Trial in General.

See, generally, the titles TRIAL; VENUE.

"Prosecutions for rape shall take precedence of all cases in all courts, and the courts are hereby authorized and directed to change the venue in such cases whenever it shall become necessary to secure a speedy trial." *Mischer v. State*, 41 Tex. Cr. App. 212, 53 S. W. 627; *Griffey v. State* (Cr. App.), 56 S. W. 52.

The act of June 18, 1897, providing for prosecutions for rape "in any county of the judicial district the judge of which resides nearest the county seat of the county in which the offense is committed," is not in contravention of the sixth amendment. *Mischer v. State*, 41 Tex. Cr. App. 212, 53 S. W. 627; *Bartlett v. State* (Cr. App.), 53 S. W. 629.

In a prosecution for rape, the fact that the prosecutrix held the baby, the fruit of the alleged crime, in her arms while she was on the witness stand, did not constitute reversible error, where the baby was removed from the courtroom the moment the objection was made by defendant. *Alcorn v. State* (Cr. App.), 94 S. W. 468.

2. Questions for Jury.

Corroboration of Female.—Where the testimony of the injured party on a trial for rape is unsupported by other evidence, it weakens her credit, but how far she is to be believed is left to the jury. *Goss v. State*, 40 Tex. 520.

The party ravished is competent witness in a rape case, but the credibility and weight of her testimony should be determined by the jury. *Rogers v. State*, 1 Tex. Cr. App. 187, 194; *Topolanck v. State*, 40 Tex. 160; *Cox v. State* (Cr. App.), 44 S. W. 157.

In a prosecution for rape, defendant claimed that prosecutrix was afflicted with nymphomania. The court charged that if she was laboring under a disease of the mind so as to be incapable of receiving a sound mental impression of the transaction, regarding which she testified, or if she had capacity to

receive such mental impression as would render it impossible for her to retain and impart such an impression correctly, or was laboring under such defect of reason as would render it impossible for her to understand the obligation of an oath, then she was incompetent to testify, but that if defendant had not so established, by preponderance of the testimony, that she was laboring under such disease, etc., then the jury could consider her testimony; the jury being the exclusive judge of the weight of her testimony. Held, that the instruction was correct. *Jenkins v. State*, 60 Tex. Cr. App. 236, 131 S. W. 542.

Elements of Offense.—In a prosecution for assault with intent to rape, the prosecutrix testified: That defendant "grabbed me and choked me until I could not holla," at the same time saying to his companion, "You go on, and I will be on after awhile." Then he "put his hand on my breast, and around my waist, and took hold of my skirt, and raised it a little, and said, 'Damn you! I'll get it directly.' * * * I jerked loose. * * * I stopped, and he looked at me a little while, and started off. * * * There were bruises on my neck a day or two afterwards." Held, that the testimony possibly presents sufficient evidence of defendant's intent to commit rape to authorize its submission to the jury. *Farmer v. State* (Cr. App.), 45 S. W. 701.

While it would ordinarily appear exceedingly improbable that a man should attempt to ravish a married woman in bed with her husband, such a crime is by no means impossible, and it is for the jury to decide the question upon the evidence adduced. *Stout v. State*, 22 Tex. Cr. App. 339, 3 S. W. 231.

3. Submission of Issues.

In a prosecution for rape, held that the jury should have been restricted to a consideration of the one act on which the state elected to rely. *Stone v. State*, 45 Tex. Cr. App. 91, 73 S. W. 956.

One indicted for assault with intent to commit rape and convicted of aggravated assault can not complain of the failure to require a finding as to the offense charged, where the issue of an aggravated assault was the only one submitted. *Halsell v. State*, 53 Tex. Cr. App. 510, 110 S. W. 441.

4. Instructions.

See, generally, the title INSTRUCTIONS, vol. 4, p. 385.

a. Necessity and Subject-Matter in General.

On a trial for rape, where failure on the part of the state to corroborate the prosecutrix is not in issue, a refusal of the charge based upon such theory is not error. *Lujano v. State*, 32 Tex. Cr. App. 414, 418, 24 S. W. 97.

Under the statute, which requires the charge of the court to apply to the case as made by the evidence, where the evidence shows a rape to have been committed by one or two of the several means, viz., force, threats, or fraud, but not by all three of those means, it is error to charge the jury upon all three of the said means. *Serio v. State*, 22 Tex. Cr. App. 633, 3 S. W. 784.

"The law of the case," as that term is used in Code Cr. Proc., art. 677, requiring the court to give a written charge to the jury, means the case as made by the evidence. Where the evidence disclosed a rape accomplished by threats alone, held, that a charge of the court confining the jury to a rape by threats was correct. *Cooper v. State*, 22 Tex. Cr. App. 419, 3 S. W. 334.

Where, on a prosecution for rape, the evidence raised an issue as to whether prosecutrix consented to the intercourse, the court should have charged on the question of force and resistance required to be put forth before a party can be convicted of rape. *Tyler v. State*, 79 S. W. 558, 46 Tex. Cr. App. 10.

Where, in a prosecution for rape, the contention of defendant was that he was not connected with the rape of the prosecutrix on the evening in question, but that he met her afterwards, and by her consent had intercourse with her, it was error to refuse to instruct that if the defendant took no part in the prior outrage, and used no violence on the prosecutrix, he should not be found guilty. *Segrest v. State* (Cr. App.), 57 S. W. 845.

Failure of court to charge in trial for rape that defendant should be acquitted of assault to rape, or aggravated assault, if the girl was not under ten years of age and consented to act of defendant, is error where evidence tends to establish facts. *Taylor v. State*, 24 Tex. Cr. App. 299, 305, 6 S. W. 42.

b. Form and Requisites in General.

In a prosecution for an assault with intent to rape, it is error to unite an instruction on the subject of an assault with force and without force into one instruction, as an accused is entitled to a distinct enunciation of the different phases of the law applicable to the facts of the case. *McAvoy v. State*, 51 S. W. 928, 41 Tex. Cr. App. 56.

An instruction in a prosecution for rape that defendant is on trial charged by indictment with having had carnal intercourse with a certain female under the age of fifteen years, such female not being the wife of defendant, is not erroneous, as it is a charge of the offense substantially in the language of the indictment. *Gonzales v. State* (Cr. App.), 62 S. W. 1060.

Confusing and Misleading Instructions.—An instruction that if the jury believe defendant guilty, "and do not believe from the evidence that defendant, at the time of the commission of said offense, had not arrived at the age of seventeen years," then the death penalty or confinement in the state penitentiary may be assessed, is erroneous, as confusing and misleading,

notwithstanding another instruction properly submitting the law in regard to defendant's age. *Thompson v. State*, 74 S. W. 914, 45 Tex. Cr. App. 190.

c. Weight and Sufficiency of Evidence.

In a rape trial, instructions that, if accused had carnal intercourse with prosecutrix, her consent would be presumed until the state proved beyond a reasonable doubt that she used all means to prevent it, and that prosecutrix's testimony that she did not consent would be no criterion, though some force was used, and that if she did not put forth every effort to resist, etc., accused should be acquitted, were properly refused, as being on the weight of the testimony. *Patterson v. State* (Cr. App.), 140 S. W. 1128.

In a trial for an assault with intent to rape, a requested charge that if at the time of the alleged assault, the faculties of prosecutrix were impaired from any cause and she was laboring under hallucination as to the presence of defendant or as to the assault, they should acquit, is properly refused as being on the weight of the evidence. *Johnson v. State*, 17 Tex. Cr. App. 565, 573.

Corroboration of Female.—A requested charge, that, while prosecutrix in a rape case need not be corroborated, still the jury should carefully consider her testimony, is on the weight of evidence. *Knowles v. State*, 44 Tex. Cr. App. 322, 72 S. W. 398; *Hamilton v. State*, 41 Tex. Cr. App. 599, 58 S. W. 93.

Where the act of intercourse is proved by several eyewitnesses, it is proper to refuse to instruct the jury that the testimony of the prosecutrix alone is not sufficient for conviction. *McIntyre v. State* (Cr. App.), 43 S. W. 104.

Authorizing Proof by Circumstantial Evidence Where Positive Evidence Sufficient.—Where, on a trial for rape, the penetration is proved by

positive evidence, defendant is not prejudicial by charge that proof by circumstantial evidence is competent. *Belcher v. State*, 39 Tex. Cr. App. 121, 123, 44 S. W. 1106.

Assumption of Facts.—Where, on trial for rape, evidence leaves some elements of the crime in doubt, it is error for the court in charging the jury to say that there is evidence to show that defendant raped prosecutrix at various times and places. *Owens v. State*, 39 Tex. Cr. App. 391, 397, 46 S. W. 240.

Presenting Theory of State Based on Testimony of Prosecutrix Alone.—A charge, not mentioning the testimony of any witness, and presenting the theory of the state, predicated on its testimony as to the character of force necessary, under the circumstances, to constitute rape, is not improper because it may be based on the testimony of the prosecutrix alone. *Payne v. State*, 49 S. W. 604, 40 Tex. Cr. App. 202, 76 Am. St. Rep. 712.

d. Elements of Offense in General.

On the trial of an indictment for rape, the court must instruct the jury as to what constitutes the offense. *Fulcher v. State*, 41 Tex. 233.

An instruction that penetration is necessary to complete the offense of rape, but penetration only is necessary, is erroneous, though in the words of Pen. Code, art. 532, as the statute simply states one of the rules of evidence, and other elements of the crime are necessary. *Johnson v. State*, 27 Tex. Cr. App. 163, 11 S. W. 106.

An instruction that "penetration only is necessary to be found upon a trial for rape," is misleading, the charge should add that emission need not be proven. *Serio v. State*, 22 Tex. Cr. App. 633, 638, 3 S. W. 784.

An instruction that "where a male person makes an assault upon a woman, with intent then and there, by force, to have carnal knowledge of such woman against her will, such assault

is an assault with intent to rape," sufficiently charges as to cardinal elements of rape. *Lights v. State*, 21 Tex. Cr. App. 308, 315, 17 S. W. 428.

e. Definitions of Offense.

Common-Law and Statutory Definitions.—In a prosecution for statutory rape, a charge defining rape generally as at common law, and also under the statute, was not error, where the court limited the consideration of the jury to statutory rape. *Bryant v. State*, 79 S. W. 554, 46 Tex. Cr. App. 126.

Failure to Include Want of Consent in Definition.—The jury were charged that "rape is the carnal knowledge of a woman, obtained by force or threats," and that, if defendant, at the time and place charged in the indictment, "did by force or threats have carnal knowledge of [prosecutrix], a woman, without her consent," etc., they would find defendant guilty of rape. Held, that the jury could not have been misled by the failure to include the want of consent in the definition of rape. *Pettway v. State* (Cr. App.), 37 S. W. 860.

f. Character and Condition of Parties.

Where evidence impeaching the character for chastity of the prosecutrix in a rape case is admitted, the court must charge the jury on the object for which the evidence is admitted. *Jenkins v. State*, 1 Tex. Cr. App. 346, 354.

Where the fact that prosecutrix in a prosecution for rape was not defendant's wife, was established beyond any doubt, and admitted by defendant, the court properly refused to instruct that the burden of proof was on the state to prove beyond a reasonable doubt that plaintiff was not defendant's wife. *Hardy v. State*, 37 Tex. Cr. App. 55, 38 S. W. 615.

g. Age of Female.

In a prosecution for statutory rape, in which there is a sharp conflict in the testimony as to the age of prosecutrix, the jury should be fully in-

structed that, before they can convict, the evidence must show that prosecutrix was under fifteen years of age, and that if there is a reasonable doubt as to this they should acquit. *Simpson v. State*, 81 S. W. 320, 46 Tex. Cr. App. 551.

On a prosecution for statutory rape, the court charged, requiring the jury to believe beyond a reasonable doubt the essentials constituting rape, and that prosecutrix was under fifteen years of age, and then charged "that if you believe that at the time defendant had sexual intercourse with prosecutrix, as alleged, she was of the age of fifteen years or over, then you will find defendant not guilty; or, if you have a reasonable doubt of the fact that she was under the age of fifteen years, you will give defendant the benefit of such doubt, and find him not guilty." Held, that the charge did not impose on accused the burden of proving that prosecutrix was over the age of consent. *Curry v. State*, 94 S. W. 1058, 50 Tex. Cr. App. 158.

Where the judge charges the jury on the theory that the defendant is under seventeen years of age, it is proper to charge that the burden of proving defendant to be over that age rests on the state. *McIntyre v. State* (Cr. App.), 43 S. W. 104.

h. Intent.

Where defendant is charged with an assault with intent to rape, and evidence of other acts of a like kind is admitted to show guilty intent, the jury should be instructed as to the purpose of its admission. *Cox v. State* (Cr. App.), 44 S. W. 157.

On a trial for an assault with intent to rape, no physical injury being alleged, but gravamen of the assault, consisting of an indecent proposal, coupled with defendant's taking hold of the arm of the prosecutrix, the court should properly present the question of defendant's intent to the jury.

Shields v. State, 39 Tex. Cr. App. 13, 44 S. W. 844.

A charge that the assault on the prosecutrix must be made with the specific intent to commit rape is not required on a prosecution for rape. *Thomas v. State* (Cr. App.), 70 S. W. 93.

Where, in a prosecution for assault with intent to rape, the jury might find from the evidence that the assault was made to recover a ring which defendant had given the prosecutrix, the court erred in refusing to charge that if the jury should so find, and the prosecutrix screamed only to prevent defendant getting possession of the ring, or if they should have a reasonable doubt as to such matters, it would be their duty to acquit defendant. *Freeman v. State*, 52 Tex. Cr. App. 500, 107 S. W. 1127.

A charge, in a trial for an assault with intent to rape, that to "warrant conviction, it is incumbent on the part of the state to satisfy minds of jury beyond a reasonable doubt, first, that the assault charged was committed, as charged, with the actual intent to commit the offense of rape on prosecutrix; second, that it was the defendant, and not another, who made the assault," is sufficient as to the question of intent and identity of defendant. *Johnson v. State*, 17 Tex. Cr. App. 565, 573.

i. Force.

See ante, "Force," I. E.

In a trial for rape by force, where it is incumbent on the jury to find whether the force used was of the kind and degree defined by the statute, the omission to instruct them as to the law on that point is error, whether a request for such instruction was made or not. *Jenkins v. State*, 1 Tex. Cr. App. 346; *Brown v. State*, 27 Tex. Cr. App. 330, 337, 11 S. W. 412; *Walton v. State*, 29 Tex. Cr. App. 163, 166, 15 S. W. 646; *Jones v. State*, 10 Tex. Cr. App. 552; *Shields v. State*, 32 Tex. Cr. App.

498, 23 S. W. 893; *Williams v. State* (Cr. App.), 13 S. W. 609.

An instruction in a prosecution for an assault with intent to rape that the force to be proven was such as might reasonably be supposed sufficient to overcome resistance, taking into consideration the circumstances of the case, without stating that the force intended "must be," etc., is a sufficient compliance with Pen. Code, 1895, art. 634, which defines the degree of force applicable to an assault with intent to commit rape. *Conger v. State* (Cr. App.), 140 S. W. 1112.

Where complainant's evidence indicated that her resistance might have been feigned, an instruction limiting the jury's consideration of certain picture postal cards which passed between the parties, showing men and women in loving attitudes, and a letter written by complainant to defendant, making an appointment for a meeting on the occasion of the assault, to the issue of consent, and withdrawing from them the question of force, was erroneous. *Smith v. State*, 56 Tex. Cr. App. 316, 120 S. W. 188.

Former or Accompanying Threats Together with Force at Time of Offense.—Under the Code, providing that, in considering the sufficiency of the proof of force and threats in a prosecution for rape, the circumstances may be looked to, the court should refuse to charge the jury to consider the force at the time of the offense, separate from former or accompanying threats. *Sharp v. State*, 15 Tex. Cr. App. 171.

Limiting Consideration to Offense Charged.—Where an indictment charges an assault to commit rape by force, the charge must limit the jury to the consideration of the offense as charged; i. e., by force. *Milton v. State*, 23 Tex. Cr. App. 204, 209, 4 S. W. 574.

Duty to Instruct Where Female under Age of Consent.—In a trial of rape of a child under ten years of age,

failure to instruct on "force" is not error. *Rodgers v. State*, 30 Tex. Cr. App. 510, 528, 17 S. W. 1077.

j. Carnal Knowledge.

See ante, "Carnal Knowledge," I, F.

A charge in a rape case that the jury must find that there was a penetration, beyond a reasonable doubt, is sufficient. *Massey v. State*, 31 Tex. Cr. App. 371, 380, 20 S. W. 758.

A charge in a rape case is sufficient to define rape which uses the expression "carnal knowledge," in connection with "penetration of person of female by that of male." *Burk v. State*, 8 Tex. Cr. App. 336, 342; *Lujano v. State*, 32 Tex. Cr. App. 414, 24 S. W. 97; *Wilson v. State*, 17 Tex. Cr. App. 525.

Where Evidence of Penetration Clear and Positive.—On a prosecution for rape, where the evidence of both prosecutrix and defendant shows that they had carnal intercourse, an erroneous charge defining "penetration" was not prejudicial to defendant. *Ledbetter v. State*, 33 Tex. Cr. App. 400, 26 S. W. 725. In a prosecution for rape the court should instruct the jury that if prosecutrix consented to the intercourse they should find for the defendant. *Owens v. State*, 39 Tex. Cr. App. 391, 46 S. W. 240.

k. Want of Consent of Female.

See ante, "Want of Consent of Female," I, G.

Wherein intercourse was admitted, but claimed to have been with consent of the complaining witness, whose testimony as to resistance was quite vague, the court charged that, to constitute rape, something more must be shown than the mere want of consent and use of force; that there must have been resistance on her part, dependent in amount on the circumstances surrounding her at the time; that every exertion in her power must be made by her to prevent the crime, or her consent will be presumed; that

the question of consent was the main issue, and to acquit unless defendant not only had carnal knowledge as alleged, but obtained the same without her consent by use of force reasonably sufficient to overcome her resistance; and also to acquit if the jury had a reasonable doubt as to whether the carnal knowledge was had with her consent, or was obtained by using the degree of force explained, or whether she resisted to the extent mentioned. Held erroneous, in instructing that consent was the main issue in the case, and in not distinctly and affirmatively submitting such issue of consent, and instructing that if she consented defendant should be acquitted. *Pettus v. State*, 58 Tex. Cr. App. 546, 126 S. W. 868.

On the trial of an indictment for rape, where the evidence was conflicting with regard to consent on the part of the person on whom the alleged offense was committed, and the court was asked to charge the jury "that if the defendant procured the consent, etc., by promises," the jury could not find him guilty, held, that the court should have charged the jury as requested. *Clark v. State*, 30 Tex. 448.

In a prosecution for rape alleged to have been committed by fraud, in which there was evidence of the administering of a drug to prosecutrix so as to cause in her an unnatural sexual desire, an instruction that if the jury believed defendant administered to prosecutrix some substance or drug which produced such unnatural sexual desire, "or such stupor" that her powers of resistance were weakened, by which means he obtained carnal intercourse, to find him guilty, was objectionable as without foundation in the evidence; stupor not being equivalent to unnatural excitement. *Baldrige v. State*, 74 S. W. 916, 45 Tex. Cr. App. 193.

Where, in a prosecution for rape of a female capable of giving her consent, evidence of her mental condition

was given, it was error to instruct that such evidence was only for the purpose of estimating the efficiency of any resistance which she may have made, as the evidence should have been limited to the question of her consent. *Segrest v. State* (Cr. App.), 57 S. W. 845.

On a prosecution for rape, the court charged that if defendant was not guilty of an assault with intent to commit rape, and if he made an assault upon prosecutrix without the intent to commit rape, and did assault her with intent to have sexual intercourse with her, defendant might be found guilty of an aggravated assault. All of the circumstances and facts outside of the testimony of prosecutrix tended to show that she consented to his attempting to have intercourse with her. Held, that the charge was not erroneous on the ground that it eliminated the issue of consent raised by the testimony. *Neill v. State*, 91 S. W. 791, 49 Tex. Cr. App. 219.

Where No Evidence of Threats or Fraud.—Where there was no pretense that a rape was committed by threats or fraud, the court was not required to instruct in regard thereto. *Reyna v. State* (Cr. App.), 75 S. W. 25.

Where Female under Age of Consent.—Where prosecutrix was under twelve years of age, it was proper to define rape as "carnal knowledge of a female under the age of twelve years, with or without the use of force, threats, or fraud," omitting the language "with or without consent." *Gonzales v. State* (Cr. App.), 31 S. W. 371.

1. Resistance of Female.

In a prosecution for rape, evidence showed that prosecutrix was about nineteen years of age, weighed about ninety-five pounds, and was sickly. Defendant was a strong and robust man. Prosecutrix testified that she used all resistance in her power; that she screamed until defendant threw

her down and stopped her mouth. She informed her mother as soon as she reached home. A physician, who examined her next morning, testified that copulation could not have been with consent. The court charged, defining necessary force under the statute, and that, unless such force was used, the jury should acquit, and gave defendant the benefit of reasonable doubt in that connection. Held, that under Code Cr. Proc. art. 723, providing that judgment shall not be reversed except for prejudicial error, the refusal to instruct on feigned resistance was not ground for reversal. *Leach v. State* (Cr. App.), 77 S. W. 220.

m. Elements of Assault with Intent to Rape.

See ante, "Assaults with Intent to Rape," I, J.

Assault.—An instruction that, to constitute an assault with intent to commit rape, there must be an assault, and which defines assault and battery and assault, and charges that the injury intended might be either bodily pain, constraint, or a sense of shame or other disagreeable emotions, is not objectionable as authorizing a conviction where the injury intended is merely constraint or a sense of shame. *Conger v. State* (Cr. App.), 140 S. W. 1112; *Taylor v. State*, 50 Tex. Cr. App. 362, 97 S. W. 94.

In a prosecution for assault with intent to rape, where the court in defining assault added that the injury intended might be either bodily pain, constraint, or sense of shame, or other disagreeable emotion of the mind, this was error, unless the evidence suggested aggravated assault. *Henderson v. State*, 93 S. W. 550, 49 Tex. Cr. App. 511.

Evidence in a trial for assault with intent to rape held to not sufficiently present an issue on the question of constraint and a sense of shame on prosecutrix's part as an element of as-

sault to require an instruction to acquit unless defendant's acts created such sense of shame. *Halsell v. State*, 53 Tex. Cr. App. 510, 110 S. W. 441.

Intent.—The issue whether the assault was with intent to commit rape or merely to have improper connection should be squarely submitted to the jury. *Irving v. State*, 9 Tex. Cr. App. 66, 69.

Evidence tending to show that the accused made an indecent assault upon the person of the injured female, but with no intention of penetrating her person with his male member, requires a charge to the effect that there could be no rape without penetration, and no assault with intent to rape without an intent, at the time of the assault, to penetrate the person of the assaulted female. *McGee v. State*, 21 Tex. Cr. App. 670, 2 S. W. 890.

Where, on a prosecution for an assault with intent to commit rape, the prosecutrix testified that defendant pursued her, finally overtook her, drew a loaded pistol, and, pointing it at her, demanded that she submit to his desires, and upon her refusal he left her, an instruction that defendant could not be convicted unless the jury found that he not only committed the assault, but that it was committed with the specific intention of having carnal intercourse with her by force, if necessary, regardless of any resistance made by her, should have been given. *Caddell v. State*, 70 S. W. 91, 44 Tex. Cr. App. 213.

Where, on a prosecution for assault with intent to rape, there was evidence of intimacy between the parties such as might lead defendant to believe his advances would not be objectionable, it was error to refuse an instruction that if defendant kissed and hugged prosecutrix, thinking it would not be objectionable, there was no assault. *Kearse v. State* (Cr. App.), 88 S. W. 363.

Where, on a trial for assault with

intent to rape, the evidence showed that accused caught prosecutrix, seventeen years old, and told her, on her beginning to scream, not to make a noise, and then began to beat and choke her and knocked her down twice, and that accused, on persons arriving on the scene, fled, an instruction that before the jury could convict they must believe that he entertained at the time the specific intent, and that, if he did not entertain the specific intent, the case should be tried on the question of an aggravated assault, properly submitted to the jury the question whether accused had some other intent. *Washington v. State*, 51 Tex. Cr. App. 542, 103 S. W. 879.

Defendant testified that he mistook prosecutrix for her sister, who was a lewd woman, and induced her to go to his room at night, intending to have intercourse with her by consent, and that, when he discovered his mistake, he did not further attempt to have intercourse with her. Held, that a charge forbidding the jury from looking to these facts except to determine defendant's intention in taking prosecutrix to his room was improper. *Shell v. State* (Cr. App.), 38 S. W. 207.

Omission of Word "Will."—An instruction, in a prosecution for an assault with intent to rape, that it must be shown that defendant assaulted prosecutrix, and then and there had a specific intent by actual force to have carnal knowledge of her without her consent, is not objectionable by the omission of the word "will." *Conger v. State* (Cr. App.), 140 S. W. 1112.

Presumption of Intent.—Where, in a prosecution for assault with intent to rape, the evidence showed an assault without violence, it was improper for the court to charge Pen. Code, art. 588, to the effect that, where an injury is caused by violence to the person, the intent to injure is pre-

sumed, and that it rests with the defendant to show accident or innocent intention. *Lee v. State*, 85 S. W. 798, 47 Tex. Cr. App. 612.

Assumption of Facts.—In a prosecution for assault with intent to rape, a charge that defendant would be guilty if he was frightened away from accomplishing his original evil intention was error, where there was no evidence that defendant was frightened away, but it was shown that he remained with prosecutrix, and tried to induce her to go home with him. *Suggs v. State*, 79 S. W. 307, 46 Tex. Cr. App. 151.

Defining Force and Threats Where Female under Age of Consent.—In a prosecution for rape under a statute providing that the assault can be made upon a female under fifteen years of age with or without her consent, or with or without force, where the indictment alleges an assault upon a female under fifteen years of age it is not error to define force and threats. *Fields v. State*, 46 S. W. 814, 39 Tex. Cr. App. 488.

n. Grade or Degree of Offense.

(1) In Prosecution for Rape.

Under an indictment charging rape by force, a charge on simple assault and battery is proper. *Bartlett v. State* (Cr. App.), 51 S. W. 918; *Taylor v. State*, 50 Tex. Cr. App. 362, 97 S. W. 94.

Where, on a prosecution for rape, the state's evidence showed that crime, and defendant's testimony showed an assault by consent, a charge on aggravated assault was not erroneous. *Neill v. State*, 91 S. W. 791, 49 Tex. Cr. App. 219.

On the trial of an indictment for rape, a charge, that, if defendant assaulted H., not with intent to rape her but with intent to have sexual intercourse with her, with her consent, he would be guilty of aggravated assault, is erroneous as leading the jury to believe that he would be guilty of an

assault whether she consented or not. *Isaacs v. State* (Cr. App.), 25 S. W. 1073.

Charging on Issue of Attempt Where Evidence Shows Force.—Where the prosecuting witness testified that defendant had intercourse with her, and that she was deterred from telling because of threats, while a physician testifying for the state said that the prosecutrix showed signs of injury, but that the offense of rape had not been consummated, it was error to submit to the jury the issue of an "attempt to rape," under Pen. Code, art. 640, providing that if it appear on a trial for rape that the offense, though not committed, was attempted by any of the means spoken of in arts. 634-636, which include force, threats, and fraud, but not such as to bring the offense within the definition of an "assault with intent to commit rape," defendant might be found guilty of an "attempt to rape," as the evidence showed force, threats, and an assault. *Waire v. State* (Cr. App.), 64 S. W. 1061.

Where State's Case Clearly Proven.—In a prosecution for statutory rape, where the state clearly made out its case, and defendant's testimony was that he was merely lying down by the girl, a charge on assault with intent to rape would not have been justified, and was properly refused. *Bryant v. State*, 79 S. W. 554, 46 Tex. Cr. App. 126; *Ricks v. State*, 48 Tex. Cr. App. 229, 87 S. W. 345; *Hill v. State* (Cr. App.), 77 S. W. 808.

Where, in a prosecution for rape, prosecutrix testified that defendant had complete carnal intercourse with her at the time and place stated, and there was no testimony suggesting that defendant was guilty of an assault with intent to rape, it was error for the court to charge on such offense. *Dusek v. State*, 89 S. W. 271, 48 Tex. Cr. App. 519.

Female under Age of Consent.—On

a prosecution for rape of a girl under fifteen years of age, where the testimony of prosecutrix showed the completed offense, and there was proof of her consent, and defendant denied the entire transaction, charges of attempt and assault to rape, alleged in separate counts, were eliminated from the case, and hence the failure to submit those issues was not error. *Brown v. State*, 87 S. W. 159, 48 Tex. Cr. App. 158.

Where, on a trial for rape on a female eleven years of age, the prosecutrix testified that accused raped her, and the evidence indicated that it was done with her consent, and circumstances showed a lack of penetration, it was proper to charge an assault with intent to rape. *Taylor v. State*, 50 Tex. Cr. App. 362, 97 S. W. 94.

(2) In Prosecution for Attempt to Rape.

Where, in a prosecution for attempted rape of a girl of ten years, the evidence is such that a conviction of aggravated assault would be justified, it is error not to submit that issue to the jury, who must determine the intent of the accused. *Amunsden v. State* (Cr. App.), 67 S. W. 418.

(3) In Prosecution for Assault with Intent to Rape.

In a trial for an assault with intent to commit rape, a charge of the court, besides defining rape and giving the punishment for an assault with intent to commit rape, must define assault and aggravated assault. *Hemanus v. State*, 7 Tex. Cr. App. 372, 373.

On an indictment for assault with intent to rape, where the evidence tends to show that the accused made an indecent assault upon the female, but with no intention of penetrating her person, a charge upon aggravated assault and battery is called for. *McGee v. State*, 21 Tex. Cr. App. 670, 2 S. W. 890; *Alexander v. State*, 58 Tex. Cr. App. 621, 127 S. W. 189; *McCul-*

lough v. State (Cr. App.), 47 S. W. 990; *Shields v. State*, 32 Tex. Cr. App. 498, 23 S. W. 893; *Shell v. State* (Cr. App.), 38 S. W. 207.

It was error to refuse to charge that if the jury did not believe that, under the circumstances, defendant intended to have carnal knowledge of the prosecutrix notwithstanding her resistance, they might find defendant guilty of simple assault, but not of assault to rape. *Porter v. State*, 33 Tex. Cr. App. 385, 26 S. W. 626.

Where, on a trial for assault with intent to rape a girl under fifteen years of age, the girl testified to facts making out an assault with intent to rape, and other evidence showed her *res gestæ* statement to the effect that she and accused had been fighting, it was reversible error to refuse to charge that, if there was only a fight between the girl and accused, he should be acquitted of assault with intent to rape. *Hudson v. State*, 90 S. W. 177, 49 Tex. Cr. App. 24.

Where, in a prosecution for assault with intent to rape, there was evidence of acts of illicit intercourse between defendant and the prosecutrix, tending to show that the assault was made for the purpose of having intercourse with her with her consent, and evidence showing that the assault was made only to secure from the prosecutrix a ring which defendant had previously given her, it was error to refuse to submit the issue of aggravated assault. *Freeman v. State*, 52 Tex. Cr. App. 500, 107 S. W. 1127.

On a trial for an assault with intent to rape a girl between eleven and twelve years old, the latter testified that the accused took her into a house, placed her upon a bed, removed her underclothing, laid his person upon her, and remained in that position some time, without doing anything further. Held, that the accused was entitled to have the jury instructed as to the law of aggravated assault,

which is defined to be violent and indecent familiarity by an adult male with the person of a female without her consent, and without the specific intent to rape. *Robertson v. State*, 30 Tex. Cr. App. 498, 17 S. W. 1068.

Where Evidence Shows Attempt Abandoned after Assault.—On trial of an indictment for an assault upon a stepdaughter of the accused with intent to commit rape, evidence that he placed his hand under her clothes and attempted to pull her upon the bed whereon he was lying, but upon her screaming out released her, held to render incumbent upon the presiding judge an instruction to the jury upon the law as to aggravated assault, whether asked or not. *Curry v. State*, 4 Tex. Cr. App. 574; *Cox v. State* (Cr. App.), 44 S. W. 157.

Where Accused Denies Any Attempt Whatever.—Where the testimony of prosecutrix showed that the unquestioned purpose of accused was to have carnal intercourse, while he denied that he made the attempt at all, no charge on aggravated assault was necessary. *Herbert v. State*, 90 S. W. 653, 49 Tex. Cr. App. 72.

Evidence Not Requiring Charge on Aggravated Assault.—On a trial for assault to rape, the failure to charge on aggravated assault held not erroneous under the evidence. *Holman v. State* (Cr. App.), 106 S. W. 1165; *Halsell v. State*, 53 Tex. Cr. App. 510, 110 S. W. 441; *Long v. State* (Cr. App.), 46 S. W. 640.

o. Principals and Accessories.

See ante, "Principals and Accessories," I, M.

On a trial for rape, where the evidence showed that the girl had been abducted by one other than defendant, and brought to the camp where defendant was employed, and that defendant remained in camp preparing supper while the other conducted the girl to a place some distance from the camp, it was error to charge that if

defendant was not present when the rape was committed, but, with knowledge that another intended to commit it, "kept watch" to prevent interruption, he was guilty of rape, since such charge was not warranted by the evidence. *Caruth v. State* (Cr. App.), 28 S. W. 532.

5. Verdict.

Under Code Cr. Proc. 1895, art. 751, providing that, where a prosecution is for an offense consisting of different degrees, the jury may find defendant not guilty of the higher degree, naming it, but guilty of any degree inferior to that charged in the indictment or information, where the jury on a trial for rape was instructed that it might also find assault to rape, a verdict of "Guilty as charged in the indictment" was sufficient as equivalent to one stating that the conviction was for rape. *McGee v. State*, 45 S. W. 709, 39 Tex. Cr. App. 190.

A verdict reciting, "We, the jury, find the defendant guilty of an assault with intent to rape, as charged in the indictment, and assess his punishment at four years in the penitentiary," is not vague or uncertain. *Barnes v. State* (Cr. App.), 32 S. W. 896.

Under an indictment charging (1) assault with intent to rape by force and without the female's consent, and (2) assault with intent to rape a female under the age of consent, a general verdict which fails to show on which count the conviction is based will be set aside, where a preponderance of the evidence tends to show that the female was above the age of consent. *Shell v. State* (Cr. App.), 38 S. W. 207.

6. Appeal and Error.

Insufficient Evidence.—A conviction of rape, when not supported by sufficient evidence, will be reversed. *Rhem v. State*, 29 Tex. Cr. App. 509, 16 S. W. 338; *Lawson v. State*, 17 Tex. Cr. App. 292.

On a prosecution for rape, the objection of want of proof that defendant was an adult male and prosecutrix a female can not be urged, where it was shown that defendant was an old man, and all the evidence indicated that the prosecutrix was a female, and defendant made no issue as to these facts on trial. *Hill v. State* (Cr. App.), 34 S. W. 750.

Errors Applicable to Rape on Review of Conviction for Attempt.—In reviewing a conviction of an attempt to rape, the court will not notice alleged errors applicable to the charge of rape made in the same indictment. *McAdoo v. State*, 35 Tex. Cr. App. 603, 34 S. W. 955.

Refusal to Call Person Assaulted Where Eyewitness Testifies.—Where the state called an eyewitness to an assault with intent to rape, refusal to call the person assaulted was not cause for reversal, on the ground that her testimony was the best evidence. *Blair v. State* (Cr. App.), 60 S. W. 879.

Harmless Error.—Failure to submit to the jury the issue whether defendant was under fourteen years old was not prejudicial, where the testimony of defendant's witnesses that he was under fourteen was inconsistent, where the jury found that he was seventeen years old, and where the evidence conclusively shows him to have used great physical power in committing a rape. *Wilcox v. State*, 33 Tex. Cr. App. 392, 26 S. W. 989.

Defendant requested an instruction that if the jury believed that the offense of rape was not committed, but was attempted, by force on the person of S., then the jury might find the defendant guilty of an attempt to commit rape. The court refused to so instruct, but did charge them that penetration was necessary to constitute the offense of rape, and that they must find such to have been the fact, beyond a reasonable doubt. Held, that the omission to charge as requested was

not calculated to injure defendant. *Massey v. State*, 31 Tex. Cr. App. 371, 20 S. W. 758.

An instruction that the jury might consider evidence impeaching prosecutrix's chastity on the question of her credibility in testifying to the commission of the offense by defendant is incorrect, but harmless to defendant, as such evidence is admissible only on the question of consent. *Jenkins v. State*, 1 Tex. Cr. App. 346.

Improper Admission of Evidence Having No Criminative Force.—Where it appears that evidence was admitted showing that a syringe such as is used in cases of gonorrhea was found at defendant's house, which under the circumstances had no criminative force, the error, if any, was not injurious to defendant. *Massey v. State*, 31 Tex. Cr. App. 371, 20 S. W. 758.

E. SENTENCE AND PUNISHMENT.

The penalty for rape is death by hanging, or confinement in the penitentiary for any number of years not less than five, or for life, in the discretion of the jury. *Ake v. State*, 6 Tex. Cr. App. 398.

Where Defendant under Age of Seventeen Years.—Upon conviction of a boy under seventeen years old of rape, the punishment is imprisonment for life or for not less than five years;

the maximum punishment of death provided by White's Ann. Pen. Code, art. 639, not applying where accused is under seventeen years old. *Munger v. State*, 57 Tex. Cr. App. 384, 122 S. W. 874; *Ingram v. State*, 29 Tex. Cr. App. 33, 14 S. W. 457.

Death Sentence.—In a prosecution for rape it was shown that defendant met his victim on the railroad, beat her into insensibility, perpetrated the crime, and left her in an unconscious state on the railroad track. Her injuries were of a very serious character, and her life imperiled. Held, that the jury properly inflicted the highest penalty known to the law. *Mischer v. State*, 53 S. W. 627, 41 Tex. Cr. App. 212, 96 Am. St. Rep. 780.

Where defendant was convicted of rape of a child seven years old, the evidence showing that she was frightfully lacerated and injured, the death penalty was not out of proportions to the offense proven. *Reyna v. State* (Cr. App.), 75 S. W. 25.

Where Female under Age of Consent.—Confinement in the penitentiary for 99 years is not an excessive punishment for rape on a female nine years old. *Moore v. State*, 49 Tex. Cr. App. 449, 96 S. W. 327.

Twenty years imprisonment is not excessive punishment for forcibly raping a child. *Hutcherson v. State*, 62 Tex. Cr. App. 1, 136 S. W. 53.

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Ravish.

See the title RAPE, ante, p. 702.

Reading Law to Jury.

See the title ARGUMENT AND CONDUCT OF COUNSEL, vol. 1, p. 397.

Real Evidence.

See the titles EVIDENCE, vol. 2, p. 324; HOMICIDE, vol. 3, p. 477; RAPE, ante, p. 702.

Real Property.

See the title TRESPASS.

Rearrest.

See the titles ARREST, vol. 1, p. 473; BAIL AND RECOGNIZANCE, vol. 1, p. 572.

Reasonable Cause.

See the titles CRIMINAL LAW, vol. 2, p. 168; EVIDENCE, vol. 2, p. 324; FALSE IMPRISONMENT, vol. 3, p. 231; HABEAS CORPUS, vol. 3, p. 430; HOMICIDE, vol. 3, p. 477; LIBEL AND SLANDER, ante, p. 387.

Reasonable Doubt.

See the titles CRIMINAL LAW, vol. 2, p. 168; EVIDENCE, vol. 2, p. 324; HOMICIDE, vol. 3, p. 447; INSTRUCTIONS, vol. 4, p. 385; PRESUMPTIONS AND BURDEN OF PROOF, ante, p. 669. And see the specific titles throughout this work:

Reasons for Decision.

See the title APPEAL, ERROR AND CERTIORARI, vol. 1, p. 87.

Rebellion.

See the title WAR.

Rebuttal.

See the titles CRIMINAL LAW, vol. 2, p. 168; EVIDENCE, vol. 2, p. 324; PRESUMPTIONS AND BURDEN OF PROOF, ante, p. 669; TRIAL. See, also, the title WITNESSES.

Recall of Witness.

See the title WITNESSES.

Recapture.

See the title ARREST, vol. 1, p. 473.

Receipts.

See the titles EVIDENCE, vol. 2, p. 324; FORGERY, vol. 3, p. 301; LARCENY, ante, p. 195.



